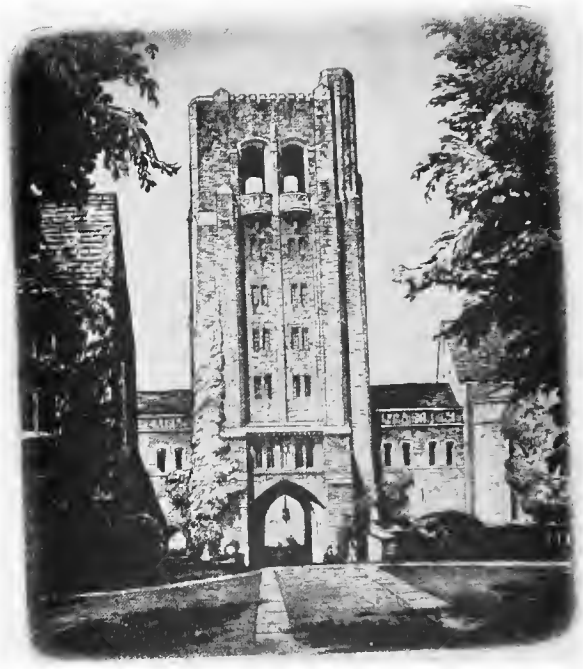

THE

LAW AND PRACTICE

UNDER

THE COMPANIES ACTS,
1862 TO 1890,

AND

THE LIFE ASSURANCE COMPANIES ACTS,
1870 TO 1872:

CONTAINING

THE STATUTES AND THE RULES, ORDERS, AND FORMS
TO REGULATE PROCEEDINGS.

BY

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PREFACE

TO

THE SIXTH EDITION.

This edition includes three new Acts of Parliament, distinctive in character, and each of importance.

The first, commercial—to meet a recognized mercantile need, giving power, within limits and subject to control, to alter that which has been unalterable, to enlarge or restrict the objects specified in the memorandum of association.

The second, administrative—intended to answer the demand for greater economy and more efficient control in winding up, defining afresh the Court which shall have jurisdiction, and providing a new machinery for the appointment of the liquidator and the control of the funds.

The third, deterrent—conceived as a terror to the prospectus-maker, and calculated to increase the income of the competent expert who has no scruples.

The judicial decisions of the last three years spread themselves over the whole field of the subject of this book. The question of dividend is still involved in difficulty, although *Lee* v. *Neuchatel Asphalte Company* (41 Ch. Div. 1) has given some principles which assist its determination. Upon a point to some extent similar, viz., whether a company may contract to issue paid-up shares against property for which it would not have agreed to give the same sum

in cash, more decision is yet wanted. Questions of underwriting, of brokerage upon the issue of shares, and some similar commercial topics, have received some, but not much, elucidation by decision.

The fifth edition of this book was exhausted early in 1890. The present edition has awaited, first, the legislation which resulted in the three Acts above referred to; and, secondly, the issue of the new Rules of Procedure under the Winding-up Act, 1890. The new Rules and Forms are included in the book, but seeing that the former Rules remain in force as regards pending liquidations, it has been found necessary to retain them also.

The preparation of the edition has been entirely the work of the Author. For the revision of the sheets in passing through the press and the correction of the Indices he is again indebted to his friend and former pupil, Mr. Robert Younger, of the Chancery Bar.

LINCOLN'S INN,
December, 1890.

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In references to the Law Reports the following notation has been adopted :—

Cases in a Court of first instance	are referred to as	Ch. D. ; Q. B. D.
Cases in the Appeal Court	are referred to as	Ch. Div. ; Q. B. Div.

THE COMPANIES ACTS.

THE COMPANIES ACT, 1862.

25 & 26 VICT. c. 89.

An Act for the incorporation, regulation, and winding up of Trading Companies and other Associations.

[7th August, 1862.]

WHEREAS it is expedient that the laws relating to the incorporation, regulation, and winding up of trading companies and other associations should be consolidated and amended: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This Act may be cited for all purposes as "The Companies Act, 1862."

Commencement of Act.

2. This Act, with the exception of such temporary enactment as is hereinafter declared to come into operation immediately (*a*), shall not come into operation until the second day of November one thousand eight hundred and sixty-two, and the time at which it so comes into operation is hereinafter referred to as the commencement of this Act.

(*a*) s. 209.

Definition of insurance company.

3. For the purposes of this Act a company that carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance company.

This section disposes of the doubts raised by *London Monetary Co.* v. *Smith* (a) and *London and Provincial Provident Society* v. *Ashton* (*b*).

Prohibition of partnerships exceeding certain number.

4. No company, association, or partnership consisting of more than ten persons shall be formed, after the commencement of this

(a) 3 H. & N. 543. (*b*) 12 C. B. (N.S.) 709, 723; 11 W. R. 152; 8 L. T. 530.

Sect. 4. Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof (*a*), unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.

(*a*) These words were introduced to exclude *Reg.* v. *Whitmarsh*, 15 Q. B. 600; *Bear* v. *Bromley*, 18 Q. B. 271; *Moore* v. *Rawlins*, 6 C. B. (N.S.) 289; *per* Lindley, L.J., *Padstow Association*, 20 Ch. Div. 149; *per* Brett, L.J., *Shaw* v. *Benson*, 11 Q. B. Div. 569.

What companies must register.

"The Act was intended . . . to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed" (*c*).

The Act broadly means that all commercial undertakings as distinguished from literary or charitable associations shall be registered (*d*). Under the expression "commercial undertakings" as here used are to be included all such companies as are formed to acquire something, or in which the individual members are to acquire something, as distinguished from companies formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain anything. An association, such as a mutual insurance society (*e*) or a loan society (*f*), which does not itself gain anything but whose individual members gain something, is within the section.

"Business."

"Business" has a more extensive signification than "trade." Farming and banking are both businesses, though neither of them is strictly a trade (*g*).

Meaning of "gain."

"Gain" means acquisition: it is not confined to pecuniary gain, still less to commercial profits: an association for securing indemnity against loss in carrying on a trade is an association for gain (*d*). Having regard to s. 21, the true meaning of the word "gain" is to be found in contrasting with the company whose object is the acquisition of gain, the company whose objects are charitable (*h*).

By the Companies Act, 1867, s. 23 (*v. infra*), an association formed for purposes not of gain may, by licence of the Board of Trade, register with limited liability, without the addition of the word "limited" to its name.

"Association."

"Company, association, or partnership." Company and association are, in

(*c*) *Per* James, L.J., *Smith* v. *Anderson*, 15 Ch. Div. 273.

(*d*) *Arthur Average Association, E. p. Hargrove & Co.*, 10 Ch. 545; *Padstow Association*, 20 Ch. Div. 137, 145, 148, 149.

(*e*) *E. p. Hargrove & Co.*, 10 Ch. 545; *Padstow Association*, 20 Ch. Div. 137. In the last-mentioned case Brett, L.J., withdrew the opinion he had expressed to the contrary in *Smith* v. *Anderson*, 15 Ch. Div. 247, 278, 280.

(*f*) *Shaw* v. *Benson*, 11 Q. B. Div. 563.

(*g*) 15 Ch. Div. 258, 259.

(*h*) *Arthur Average Association, E. p. Hargrove & Co.* (Jessel, M.R.), 10 Ch. 545, approved by James, L.J., Ibid. 554.

the opinion of James, L.J., synonymous, and intend, as distinguished from partnership, a combination in which the partners can change from time to time without the necessity either of consent as between the partners or of novation as regards the creditors (*i*). But perhaps (per Brett, L.J.) (*k*) an association (*l*) which is neither a company nor a partnership is a possibility, and Cotton, L.J., suggests that a combination of persons or of firms to carry out a particular adventure is what is intended (*m*).

It will be observed that the title and preamble of the Act speak of "trading companies and other associations."

Public company.

The Apportionment Act, 1870, s. 5 (3), uses the expression "trading or other public company." What a "public company" is has not been defined, but one test is whether the members have a right to transfer their shares (*n*).

Joint relation. Business. Gain.

But whatever the "company, association, or partnership" is, it is not within the section unless there is a joint relation for carrying on a business, that is to say, for doing a succession of acts, having the acquisition of gain for their object (*k*). And if a substantial part of the objects of the association is not the carrying on of such a business, a mere subsidiary provision will not bring it within the section (*o*).

Investment trust companies.

It has therefore been ultimately held in *Smith* v. *Anderson* (*p*), overruling *Sykes* v. *Beadon* (*q*), that a combination of persons for forming a common fund for investment by trustees in certain securities is not an association within the section, and further, that neither the subscribers nor the trustees in such a case carry on a "business," and that even if they do, such business is carried on not by the association or its members but by the trustees, and if the trustees are less than twenty in number the section is not infringed. "Persons who have no mutual rights and obligations do not . . . constitute an association because they happen to have a common interest or several interests in something which is to be divided between them" (*r*).

Land societies.

So a land society, being an association of persons formed to purchase an estate, subdivide it into allotments, make roads, and divide the allotments among the members, does not carry on a business that has for its object the acquisition of gain, and does not require to be registered (*s*). And where the rules of a land society provided that on conveyance to a member of his allotment, the right to the minerals should remain vested in the trustees (in whom the land was vested), and that the trustees might work the minerals, and the profits should be divided amongst the members, it was held that the trustees no doubt were carrying on a mining business, but as principals not as agents, and that the association was not carrying on a business and did not require to be registered (*t*).

Loan societies.

But a loan society whose objects are to form a fund from which money may be advanced at interest to enable members to build or buy a house, or may be advanced to members on personal security, does carry on a business having for its object the acquisition of gain by the company "or by the individual members thereof," for the lending member at any rate

(*i*) *Smith* v. *Anderson*, 15 Ch. Div. 247, 273.

(*k*) *Smith* v. *Anderson*, 15 Ch. Div. 247, 277.

(*l*) See also *St. James' Club*, 2 D. M. & G. 383.

(*m*) 15 Ch. Div. 282.

(*n*) *Carr* v. *Griffith*, 12 Ch. D. 655.

(*o*) *Smith* v. *Anderson*, 15 Ch. Div. 247, 279 (referring to *Reg.* v. *Whitmarsh*, 15 Q. B. 600); *Crowther* v. *Thorley*, 32 W. R. 330; 50 L. T. 43; and see *Bear* v. *Bromley*, 18 Q. B. 271; *Moore* v. *Rawlins*, 6 C. B. (N.S.) 289.

(*p*) 15 Ch. Div. 247.

(*q*) 11 Ch. D. 170.

(*r*) *Per* James, L.J., *Smith* v. *Anderson*, 15 Ch. Div. 247, 275.

(*s*) *Wigfield* v. *Potter*, 45 L. T. 612; *Re Siddall*, 29 Ch. Div. 1.

(*t*) *Crowther* v. *Thorley*, 32 W. R. 330; 50 L. T. 43; followed in *Re Siddall*, 29 Ch. Div. 1.

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gains (*u*), and the fact that the operations of the society are conducted by a committee, less than twenty in number, does not bring the case within *Smith* v. *Anderson* (*x*) and *Crowther* v. *Thorley* (*y*), if the committee act in fact as agents and not as principals (*z*).

"Shall be formed."

An association consisting at first of less than twenty persons becomes illegal within the section so soon as it comes to consist of more than twenty persons (a). But an association consisting of more than twenty persons existing before 1862, whose members vary from year to year by some persons ceasing to be and others becoming members, is not "formed" on each change of membership, and such a society does not require to be registered (*b*).

Foreign corporations.

A foreign company cannot be registered as an existing company under the Companies Acts (*c*), and cannot (if it have no office in this country) have a winding-up order in this country (*d*). A limited company incorporated under the laws of another country may, it is conceived, trade in this country without being incorporated according to the laws of this country (*e*). Suppose, therefore, a company consisting of more than twenty persons were formed in (say) France according to the law of France, with a view to trading, and which did after its formation trade here, *quære* would such a company be illegal? Does not "formed" in this section mean "formed in this country"?

Trade union.

A trade union cannot register under the Act (*f*).

Farming company.

An association formed for the purpose of farming and grazing is within this section, and unless registered is illegal. Farming, although not a "trade," is a "business," and has for its object the acquisition of gain (*g*).

Consequences of non-registration.

An association formed after the Act which ought to be and is not registered, is an illegal association, and it has been much discussed whether to an association whose very existence is thus a defiance to the Act, the winding-up provisions of the Act can be applied. In *E. p. Hargrove & Co.* (*h*), Jessel, M.R. (without in any way deciding the point), stated it to be his impression that the Court ought not to wind up an illegal association; and in *Re Padstow Association* (*i*) a winding-up order was discharged on the ground that the association was, for want of registration, illegal. That was a case of a mutual marine insurance society, and the petitioner was an assignee of the claim of a member whose vessel had been lost. He stood, therefore, in the shoes of a person necessarily affected with notice of the illegality. Both Jessel, M.R., and Brett, L.J., however, treat the case generally and discharge the order, on the ground that by reason of the illegality there never existed in law any association at all, and consequently it could not be wound up. Lindley, L.J., however, treats it as possible that if A. has traded with an association consisting (so far as he knows) of less than twenty, he might have a winding-up order, notwithstanding that the respondents shewed that in fact thirty or forty more persons had been illegally associated with them. No doubt it is not competent to members *participes criminis*, or to creditors cognizant of the illegality, to pray the exercise of the jurisdiction in their

Winding-up of illegal associations.

(*u*) *Shaw* v. *Benson*, 11 Q. B. Div. 563; *Re Thomas*, 14 Q. B. D. 379.
(*x*) 15 Ch. Div. 247.
(*y*) 32 W. R. 330; 50 L. T. 43.
(*z*) *Re Thomas*, 14 Q. B. D. 379.
(a) Ibid.
(*b*) *Shaw* v. *Simmons*, 12 Q. B. D. 117.
(*c*) *Bulkeley* v. *Schutz*, L. R. 3 P. C. 764.
(*d*) *Lloyd Generale Italiano*, 29 Ch. D. 219.
(*e*) See *Bateman* v. *Service*, 6 App. Cas. 386.
(*f*) 34 & 35 Vict. c. 31, s. 5 (amended by 39 & 40 Vict. c. 22); see *Reg.* v. *Registrar of Friendly Societies*, L. R. 7 Q. B. 741, as to registration under that Act.
(*g*) *Harris* v. *Amery*, L. R. 1 C. P. 148.
(*h*) 10 Ch. 542, 548.
(*i*) 20 Ch. Div. 137.

favour. But it cannot lie in the company's mouth to allege its own illegality as a defence (*k*), and it has been said that the very fact of the illegality of its existence may supply a strong reason for winding it up, so that possibly such an association might be wound up upon the petition of a *bonâ fide* creditor, and even in some cases upon that of a contributory (*l*).

If an order to wind up an illegal association has been made, it was said in *South Wales Atlantic Steamship Co.* (*m*) that the winding-up would deal only with existing assets and existing liabilities, and could not be used to enforce contribution from the members who had not paid for the re-imbursement of those who had: for that as between the members of an illegal association no right of contribution exists. Jessel, M.R., however, has dissented from this, and expressed an opinion that if a winding-up order can be made all the ordinary consequences of the order must follow (*n*).

De facto winding-up of unregistered illegal companies.

There are several instances in which before the decision in *Padstow Association* (*o*), unregistered mutual insurance companies were wound up under the Act (*p*). Where an order has been made it cannot be questioned in proceedings consequent upon the order (*q*). If, therefore, debts have been proved and not expunged within due time, a call will be made to pay them (*r*), and the contributories are liable to calls for the costs of the winding-up (*s*).

Action by illegal association.

An association which is illegal for want of registration cannot recover debts due to it (*t*). But where an association illegal for want of registration has made an advance, and then having registered and become legal sues for the debt, it may sustain the claim if it can be shewn that the debtor has recognised and adopted the incorporated association as his creditor (*u*).

Effect of non-registration in case of companies formed before the Act.

Companies formed after the commencement of the Act, and required to register under this section, are, in default of registration, illegal; companies formed *before* the commencement of the Act, and required by sect. 209 to register under it, are not, in default of registration, illegal, but, until registration, are subject to the penalties imposed by sect. 210.

As to the application of the Act to companies existing at the time of its commencement, and as to the registration of such companies under it, see Parts VI. and VII. of the Act, and sect. 209.

As to the liability of a banking company in respect of its issue of notes, see sect. 182.

As to banking partnerships, see Sch. III. Pt. 2.

A savings bank company is not necessarily a banking company within the statute (*x*).

Division of Act.

5. This Act is divided into Nine Parts, relating to the following subject-matters:

The First Part,—to the Constitution and Incorporation of Companies and Associations under this Act:

(*k*) *Cf. Doolan* v. *Midland Railway Co.*, 2 App. Cas. 792, 806.

(*l*) *South Wales Atlantic Steamship Co.*, 2 Ch. Div. 763. No debt was here established in the case of the outside creditor, and the point was therefore not decided.

(*m*) 2 Ch. Div. 763.

(*n*) *Padstow Association*, 20 Ch. Div. 140.

(*o*) 20 Ch. Div. 137.

(*p*) See the cases cited *infra*, s. 199.

(*q*) *London Marine Association*, 8 Eq. 176; *Arthur Average Association*, 10 Ch. 542, 549; 3 Ch. D. 522; and see *Padstow Association*, 20 Ch. Div. 145; *Strick* v. *Swansea Tin Plate Co.*, 36 Ch. D. 558.

(*r*) *Arthur Average Association*, 3 Ch. D. 522.

(*s*) *Arthur Average Association*, 3 Ch. D. 522; *Queen's Average Association*, *E. p. Lynes*, 38 L. T. 90; 26 W. R. 432.

(*t*) *Jennings* v. *Hammond*, 9 Q. B. D. 225; *E. p. Day*, 1 Ch. D. 699; *Shaw* v. *Benson*, 11 Q. B. Div. 563; *cf. Strick* v. *Swansea Co.*, 36 Ch. D. 558; *Phillips* v. *Davies*, 5 Times L. R. 98.

(*u*) *Re Thomas*, 14 Q. B. D. 379.

(*x*) *District Savings Bank*, 10 W. R. 138; 31 L. J. (Ch.) 319; 5 L. T. 566.

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The Second Part,—to the Distribution of the Capital and Liability of Members of Companies and Associations under this Act:

The Third Part,—to the Management and Administration of Companies and Associations under this Act:

The Fourth Part,—to the Winding-up of Companies and Associations under this Act:

The Fifth Part,—to the Registration Office:

The Sixth Part,—to Application of this Act to Companies registered under the Joint Stock Companies Acts:

The Seventh Part,—to Companies authorized to register under this Act:

The Eighth Part,—to Application of this Act to unregistered Companies:

The Ninth Part,—to Repeal of Acts, and temporary provisions.

PART I.

Constitution and Incorporation of Companies and Associations under this Act.

Memorandum of Association.

Mode of forming company.

6. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association (*a*), and otherwise complying with the requisitions of this Act in respect of registration (*β*), form an incorporated company with or without limited liability.

(*a*) See forms in Sch. II. (*β*) ss. 17, 18.

Signature by an agent.

Signature by an agent verbally authorized is sufficient. The memorandum of association is not a deed, although by s. 11 it has for certain purposes the effect of a deed (*y*).

Not of gain.

A company formed for purposes not of gain may clearly register and obtain limited liability (*z*). But a trade union cannot register (a).

Infant subscriber.

If the memorandum be in fact signed by seven persons, and a certificate of incorporation (s. 18) be given, the certificate of the registrar is conclusive (*b*) that the parties have become an incorporated body. The incorporation is not rendered invalid by the fact that one of the subscribers was an infant (*c*).

Where, however, a company, after a short existence, had passed into voluntary liquidation, which was continued under supervision, and then

(*y*) *Whitley Partners, Limited*, 32 Ch. Div. 337.

(*z*) And under Companies Act, 1867, s. 23, without the addition of "limited" to its name.

(a) 34 & 35 Vict. c. 31, s. 5.

(*b*) *Cf. Glover* v. *Giles*, 18 Ch. D. 173.

(*c*) *Nassau Phosphate Co.*, 2 Ch. D. 610.

a subscriber of the memorandum was struck off the list of contributories on the ground that he was an infant, a compulsory winding-up order was made (*d*). But this case did not necessarily decide that the registration was invalid. It is enough to say that inasmuch as the supervision order would have been bad if the registration was invalid, it was preferable to make a compulsory order which would be good in either event.

Person.

The word "person" includes a body corporate. A limited company may become a shareholder in another limited company, if authorized by its own memorandum and articles of association to do so (*e*).

And if a limited company be by its memorandum and articles of association authorized to hold shares in an unlimited company and the memorandum and articles of the unlimited company do not forbid it, it is conceived that there is no legal impediment to its doing so. For while in *Muir* v. *Glasgow Bk.* (*f*) it was established that trustees cannot become shareholders "as trustees," so as to limit their liability to the trust estate, the opinions of the Lords proceeded upon the footing that if it could have been shewn that in Scotch law the trustees were a corporation, the result would have been different. The ground of *Muir* v. *Glasgow Bk.* (*f*) is that there is no power in law to limit the liability of a shareholder, except under the statute, so that a man cannot be shareholder except upon the terms that he is personally liable to the full extent of his means. But if a corporation be shareholder it is none the less liable to the full extent of its means by reason of its being a limited company, than an individual by reason of his means being limited to that which he possesses (*g*).

Whether the word "person" in a statute can be treated as including a corporation, must depend on a consideration of the object of the statute and of the enactments passed with a view to carry that object into effect (*h*).

Under the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 15 (7), it has been held that a corporation cannot be treasurer to a friendly society, and that consequently where an incorporated bank purported to have been appointed treasurer, the provisions of that Act as to priority of payment were not applicable in the winding-up (*i*).

Foreign shareholders.

Foreign business.

To be capable of being registered under the Act the company must be one which, at the outset, contemplates some description of management and of carrying on business in this country. But if this be so, the fact that the scene of its operations is to be in other countries is no objection to its being constituted here under the Act (*k*).

Neither will it constitute any objection that the subscribers of the memorandum of association are foreigners and resident abroad. Any persons who contemplate a company which, according to the articles of association, may be managed and carried on here, and may have a directorship here, may lawfully sign the memorandum, and may lawfully go through those forms which are necessary for incorporation. The mere circumstance that the persons who sign do not live in this country does not, of itself, necessarily prevent

(*d*) *Hertfordshire Brewery Co.*, W. N. 1874, 38; 22 W. R. 359; 43 L. J. (Ch.) 358.

(*e*) *Barned's Banking Co., E. p. Contract Corporation*, 3 Ch. 105; *Royal Bank of India's Case*, 7 Eq. 91; Ibid. 4 Ch. 252; and see s. 23. *Cf. Re Jeffcock*, W. N. 1882, 49; 51 L. J. (Ch.) 507.

(*f*) 4 App. Cas. 337.

(*g*) Consider *Muir* v. *Glasgow Bank*, 4 App. Cas. 337, 381.

(*h*) *Pharmaceutical Society* v. *London Supply Association*, 5 App. Cas. 857; 4 Q. B. D. 313; 5 Q. B. Div. 310; *Union Steamship Co.* v. *Melbourne Harbour Commissioners*, 9 App. Cas. 365.

(*i*) *West of England Bank, E. p. Swansea Friendly Society*, 11 Ch. D. 768.

(*k*) *General Co. for the Promotion of Land Credit*, 5 Ch. 363; L. R. 5 H. L. 176; and see *Madrid and Valencia Railway Co.*, 3 De G. & Sm. 127; 2 Mac. & G. 169; and s. 79, *sub* tit. "Foreign Company."

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the operations of the company from being carried on in England; and if in other respects foreigners comply with the requirements of the Act, they can have the benefit of the Act, just as they can benefit by the laws of this country by trading in this country (*l*).

Whether or not a company can be registered in this country which conducts no business whatever, and never intends to conduct any business in this country, *quære*; see *Union Bank of Calcutta* (*m*) and the observations of Hatherley, L.C., in *Princess of Reuss* v. *Bos* (*n*). If such a company have been registered it can be wound up under the Act (*o*).

A foreign partnership or company complete and existing in a foreign country cannot be registered as an existing company under the Act (*p*), and it is conceived that such a partnership or company although consisting of more than twenty persons may trade here without being registered here (*q*).

Foreign shareholders. British ship.

An English corporation may be the owner of a British ship notwithstanding that some or, *semble*, that even all the shareholders in the corporation are foreigners (*r*).

Friendly and Industrial Societies.

Friendly Societies (*s*) and Industrial and Provident Societies (*t*) may by special resolution under the Acts referred to determine to convert themselves into companies under the Companies Acts.

Mode of limiting liability of members.

7. The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid (*a*) on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.

(*a*) *Almada Co.*, 38 Ch. Div. 415, 424, 425.

The provision of this section that the liability of the members is to be defined by the *memorandum* is one which is to be strictly adhered to. For the enactments by which limited liability has been permitted have been passed in favour of the shareholders, and the means prescribed must therefore be strictly followed. This section expressly says that it must be done by the memorandum, and any provisions, therefore, in the articles by which the liability is sought to be limited to the prejudice of creditors in a way inconsistent with the memorandum are simply void (*u*).

But in matters which are not thus of the essence of the memorandum it is possible that the memorandum may be controlled by the contemporaneous articles (*x*). Thus the articles may extend the liability of the shareholders beyond the limit fixed by the memorandum in order to provide for the payment of a particular debt (*y*).

(*l*) *General Co. for the Promotion of Land Credit*, 5 Ch. 363; L. R. 5 H. L. 176.

(*m*) 3 De G. & Sm. 253; 19 L. J. (Ch.) 388.

(*n*) L. R. 5 H. L. 176, 194.

(*o*) *Infra*, s. 79.

(*p*) *Bulkeley* v. *Schutz*, L. R. 3 P. C. 764.

(*q*) *Bateman* v. *Service*, 6 App. Cas. 386; and see note to s. 4, *ante*.

(*r*) *Reg.* v. *Arnaud*, 9 Q. B. 806.

(*s*) Friendly Societies Act, 1875, 38 & 39 Vict. c. 60, s. 24 (4) (7).

(*t*) Industrial and Provident Societies Act, 1876, 39 & 40 Vict. c. 45, s. 16 (4) (7).

(*u*) *Dent's Case*, 15 Eq. 407; Ibid. 8 Ch. 768, 775. From the cases collected, *infra*, s. 23, it will be seen that subscribers of the memorandum are most strictly treated.

(*x*) *Phœnix Bessemer Steel Co.*, 32 L. T. 854; 44 L. J. (Ch.) 683; *Harrison* v. *Mexican Railway Co.*, 19 Eq. 358; *South Durham Brewery Co.*, 31 Ch. Div. 261.

(*y*) *Maxwell's Case*, 20 Eq. 585; *McKewan's Case*, 6 Ch. Div. 447.

By the Companies Act, 1867, ss. 4–8 (*v. infra*), the liability of the directors of a limited company may be unlimited.

Directors.

Memorandum of association of a company limited by shares.

8. Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association (*a*) shall contain the following things: (that is to say,)

(1.) The name of the proposed company, with the addition of the word "Limited" as the last word in such name:

(2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate:

(3.) The objects for which the proposed company is to be established:

(4.) A declaration that the liability of the members is limited:

(5.) The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount:

Subject to the following regulations:

(1.) That no subscriber shall take less than one share:

(2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

(*a*) Sch. II., Form A.

"Limited."

A company formed for purposes not of gain may under the Companies Act, 1867, s. 23 (*v. infra*), register with limited liability without the addition of the word "Limited" to its name.

The members of a limited company may by agreement among themselves extend their liability so as to make themselves responsible for the discharge of a particular debt by contributions in excess of the limit of liability (*z*), and may extend their liability beyond that which they are liable to pay for satisfaction of the debts and liabilities of the corporation to an amount which they are to pay (*e.g.* as mutual insurers) for satisfaction of claims of members to which they have contracted to contribute (a).

Memorandum of association of a company limited by guarantee.

9. Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association (*a*) shall contain the following things: (that is to say,)

(1.) The name of the proposed company, with the addition of the word "Limited" as the last word in such name:

(*z*) *Maxwell's Case*, 20 Eq. 585; *McKewan's Case*, 6 Ch. Div. 447.

(a) *Lion Insurance Co.* v. *Tucker*, 12 Q. B. Div. 176.

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(2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate:

(3.) The objects for which the proposed company is to be established:

(4.) A declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding-up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount.

(*a*) Sch. II., Forms B, C.

It is remarkable that the memorandum of association of a company limited by guarantee has not to contain head (4) of s. 8, viz., "A declaration that the liability of the members is limited."

A company limited by guarantee may or may not have a capital divided into shares (ss. 14, 90, 134). The regulations at the end of sect. 8 are therefore omitted in this section as being inapplicable to one class of companies limited by guarantee, viz., those in which there is not a capital divided into shares. These regulations are subsequently enacted by sect. 14 in the case of a company limited by guarantee and having a capital divided into shares. The same remark applies to sect. 10 with respect to an unlimited company. It will be observed that sect. 14 enacts that each subscriber shall write opposite to his name *in the memorandum of association* the number of shares he takes. In the forms, however, in Sch. II. (*b*), this is put in the *articles of association*. It may be a question whether "memorandum" has not been inadvertently inserted in sect. 14 for "articles," a view which receives confirmation from the fact that the provisions as to capital in the case of companies other than such as are limited by shares are placed in the articles of association, not in the memorandum, and the number of shares for which a member subscribes would naturally be placed in the same document. By sect. 176 in the case of an unlimited company registered under previous Acts the company may alter the regulations relating to its capital notwithstanding such regulations are contained in the memorandum of association.

Companies limited by guarantee.

Limitation by guarantee may conveniently be used by mutual insurance societies, for the contract of contribution for mutual insurance may be enforced although it is *ultra* the contribution prescribed in the memorandum under clause (4) of this section (*c*). And limitation by guarantee with a capital divided into shares may conveniently be used by other commercial companies. But limitation by guarantee without a capital *ultra* the guarantee seems properly applicable only to companies which require no trading capital. For in respect of capital properly so called such companies can never receive a sixpence from their members until the company is in liquida-

(*b*) See Forms C. and D.

(*c*) *Lion Insurance Co.* v. *Tucker*, 12 Q. B. Div. 176.

tion. And even in winding-up the liability is not of much value to the creditor, for the guarantee is not so much per share but so much per member, and fluctuates therefore with the number of members. If therefore a year before winding-up commenced (see s. 38, (1) (6)) the members reduce themselves to seven in number, the creditors will find that seven times £1 or £5, or whatever may be the figure, is all they have to look to. An adroit use of limitation by guarantee would lend readily to fraud.

It has been not uncommon to register a certain class of companies (principally insurance companies) with liability limited by guarantee and to include in the articles of association provisions for the formation of a "Guarantee Fund." The guarantee properly so called contained in the memorandum may be £1 per member; the "Guarantee Fund," despite the similarity of name, is something quite distinct, and is, say, £250,000. The provisions as to the "Guarantee Fund" are to the effect that every member shall guarantee, say £100 or some multiple of £100, and that to the extent of his guarantee he shall be liable to be called upon to make advances from time to time to the company as the company may require, receiving, say, 10 per cent. on what he pays up in respect of his guarantee, and 2½ per cent. on the difference between the amount he has guaranteed and the amount he has paid up. The result is to provide the company with working capital, and inasmuch as it has been held (*d*) that the agreement to advance is determined by the winding-up of the company, the effect upon the creditors in the event of liquidation is this—they find that the company had no assets beyond the few pounds comprised in the guarantee in the memorandum, and that the "Guarantee Fund," whose substantial figures were probably put prominently forward in the company's prospectus and policies, not only is not a fund available to satisfy their claims, but that so much of it as has been called constitutes a debt of the company ranking *pari passu* with the creditors' claims against the assets (if any) of the company.

Memorandum of association of an unlimited company.

10. Where a company is formed on the principle of having no limit placed on the liability of its members, hereinafter referred to as an unlimited company, the memorandum of association (*a*) shall contain the following things: (that is to say,)

(1.) The name of the proposed company:

(2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate:

(3.) The objects for which the proposed company is to be established.

(*a*) Sch. II., Form D.

See note to sect. 9.

Stamp, signature, and effect of memorandum of association.

11. The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and that attestation shall be a sufficient attestation in Scotland as well as in England and Ireland: It shall, when registered, bind the company and the members thereof to the same extent as if each

(*d*) *Indemnity Fire Office* v. *Cousins*, W. N. 1882, 16.

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Effect of section.

This section and the 16th section make the memorandum and articles of association, when registered, binding "on the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto." A member is defined by sect. 23, and that section therefore explains and qualifies the 11th and 16th sections.

If a person has actually subscribed and sealed the memorandum and articles he cannot allege want of notice of their contents, but the statute does not authorize any one to sign or seal those instruments till after he has become a *member*; and therefore the cases (*e*) in which persons have on account of variation between the prospectus and memorandum been relieved of their shares are not at variance with this section, for the decisions in those cases rest upon the ground that the persons relieved never become members; or, more strictly speaking, that the contract into which they had entered was *ab initio* voidable at their option.

Any one who has without fraud taken shares cannot allege ignorance of anything contained in the memorandum or articles, merely because he has not signed or sealed them; but if he never actually signed or sealed them, nor had notice of what they contained, the statute cannot be taken to impute to him knowledge of their contents, so as to protect those who by fraud have induced him to that which, in the absence of fraud, would have precluded him from saying he was ignorant of their contents (*f*).

Power of certain companies to alter memorandum of association.

12. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned (*a*), as to increase its capital (β) by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock (γ), but, save as aforesaid, and save as is hereinafter provided in the case of a change of name (δ), no alteration shall be made by any company in the conditions contained in its memorandum of association (ϵ).

(*a*) ss. 50, 51.
(β) s. 34. Sch. I. Table A. (26)—(28).
(γ) ss. 28, 29. Sch. I. Table A. (23)—(25).
(δ) ss. 13, 20.
(ϵ) See ss. 50, 176, 196, as to alterations in the articles.

Company limited by shares.

This section is confined to the case of companies limited by shares, as the provisions as to capital are, in the case of other companies, contained in the articles of association, and are therefore capable of alteration in the same manner as other regulations in those articles (*g*). That the word "regula-

(*e*) *v.* s. 35.
(*f*) *Directors, &c., of Central Railway Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99, 123; *Downes* v. *Ship*, L. R. 3 H. L. 343.
(*g*) See s. 50.

tions" in sect. 50 is not confined to regulations in matters of detail but extends to matters so important as regulations about capital may be inferred from the fact that sect. 176 provides that in case of unlimited companies formed under the Act of 1856, and whose regulations as to capital and shares are contained in the memorandum of association, the powers of sect. 50 shall extend to altering such regulations as to capital and shares, thus implying that in the case of unlimited companies formed under the Act of 1862 (whose regulations as to capital are therefore contained in the articles), such power of alteration already existed. It is to be observed that the operation of this section (sect. 12) is limited to alterations in respect of capital, the object being, it is conceived, to put companies limited by shares on a level with other companies in this respect, so far as regards the particular matters specified in this section, and that with this exception any alteration by *any* company is forbidden.

The further alterations allowed by Companies Act, 1862, s. 176, and Companies Act, 1867, ss. 8, 9, 21, will be found to be equally within the principle of this observation.

Articles cannot extend objects as defined in memorandum.

The memorandum of association of the company is its charter, and defines the limitation of its powers (*h*) and the destination of its capital (*i*). A statutory corporation created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined by that Act. . . . The memorandum of association is under this Act, the fundamental and (except in certain specified particulars) the unalterable law of companies incorporated by virtue of it (*k*).

But the doctrine that any act *ultra vires* the memorandum is incompetent to the company and void is to be applied reasonably, and anything which is fairly incidental to the company's objects as defined is not (unless expressly prohibited) to be held as *ultra vires* (*l*).

When you have a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done, and against which no express prohibition is found, may and ought *primâ facie* to follow from the authority for effectuating the main purpose by proper and general means. You must ascertain first what the main purpose is, then what are the general powers, then what are the special powers, and then, supposing the act is not within the natural meaning either of the general or the special powers, whether it can be brought in as incidental to the main purpose and a thing reasonably to be done for effectuating it. This language, which was used by Earl Selborne (*m*) in considering whether an act done by the directors of a building society was *ultra vires* or not, may be usefully applied to the case of incorporated companies.

In *Riche* v. *Ashbury Railway Carriage Co.* (*n*) there was an article providing that "An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." Such a provision in the articles is wholly nugatory, and void. It is an attempt to do the very thing which the Act prohibits—to arrogate to the company a power under the guise of internal regulation to go beyond the objects expressed or im-

(*h*) *Per* Cairns, L.C., *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 668.

(*i*) *Guinness* v. *Land Corp. of Ireland*, 22 Ch. Div. 349.

(*k*) *Per* Lord Selborne, L. R. 7 H. L. 693.

(*l*) *A. G.* v. *Great Eastern Railway*, 11 Ch. Div. 449, 480; 5 App. Cas. 473; *L. & N. W. Railway Co.* v. *Price*, 11 Q. B. D. 485.

(*m*) *Small* v. *Smith*, 10 App. Cas. 119, 129.

(*n*) L. R. 9 Ex. 224; 7 H. L. 653.

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plied in the memorandum (*o*). "The memorandum cannot be so qualified by the articles as to reserve powers to extend or change the business or objects of the company by means of a special resolution" (*p*).

Contracts *ultra vires* the memorandum are void:—

The concurrence or assent of every individual member of the corporation will not make valid as against the corporation a contract which is *ultra vires* the corporation (*q*).

and cannot be ratified.

A contract made by the directors upon a matter not included in the memorandum is *ultra vires* of the directors and of the company, and is not binding on the company, and cannot be rendered binding even by the assent of every individual shareholder (*r*).

The statute contemplates the protection not only of the shareholders for the time being in the company, but also of those who may hereafter become shareholders; and further of the outside public, and in particular those who are or may be the company's creditors (*s*). And every Court, whether of law or equity, is bound to treat a contract which is *ultra vires* the memorandum as wholly null and void, and to hold that being wholly void it cannot be ratified (*t*).

Secus as to acts *ultra vires* the articles.

But it is otherwise with acts which are within the memorandum but *ultra vires* the articles, or which, though being *intra vires* the articles, have not been done in the manner directed by the articles. To either of the latter cases the principle of the *Agriculturist Co.'s Cases* (*u*), of *Phosphate of Lime Co.* v. *Green* (*x*), and of *Campbell's Case* (*y*), may apply (*z*), for the acts are in such a case, either by alteration of the articles, or by following the directions of the articles, within the power of the company, if they take the proper steps to compass them (a). This is wholly different from an act *ultra vires* the memorandum which cannot, by any lawful course of action, or even by the assent of every individual member, be brought within the power of the company.

Common Law powers of corporations.

The ground of the judgments of those learned judges who in *Riche* v. *Ashbury Co.* (*b*) took the view which was not eventually taken by the House of Lords, seems to have been that the statute does not expressly take away that power of contracting which at common law would be incident to a body corporate; that a company would, therefore, have power to enter into contracts *ultra vires* the memorandum, and that such a contract is therefore capable of ratification. The House of Lords, however, held (*c*), that the company was not by registration under the Act created a corporation with inherent common law rights, and the House has held the same as regards a company incorporated by special Act (*d*). In such a case, "the objects which the corporation may legitimately pursue must be ascertained from the Act itself," and "the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred, or derived by reasonable implication from its provisions" (*d*).

The law as laid down in *Ashbury Co.* v. *Riche* (*e*) applies to all companies created by any statute for a particular purpose (*f*).

(*o*) *Per* Cairns, L.C., L. R. 7 H. L. 671.
(*p*) *Per* Archibald, J., S. C., L. R. 9 Ex. 288. And *cf. Dent's Case*, 15 Eq. 407; Ibid. 8 Ch. 768.
(*q*) *Wenlock* v. *River Dee Co.*, 36 Ch. Div. 674, 681, n., 686, n.; *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 672.
(*r*) *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653; *Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675, n.
(*s*) *Ashbury Co.* v. *Riche*, L. R. 7 H.L. 667.
(*t*) Ibid. 673.
(*u*) See note to Table A., art. 19.
(*x*) L. R. 7 C. P. 43.
(*y*) 9 Ch. 1.
(*z*) See also *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366.
(*a*) See L. R. 7 H. L. 674.
(*b*) L. R. 9 Ex. 224.
(*c*) L. R. 7 H. L. 653.
(*d*) *Wenlock* v. *River Dee Co.*, 10 App. Cas. 354, 362.
(*e*) L. R. 7 H. L. 653.
(*f*) *Wenlock* v. *River Dee Co.*, 10 App. Cas. 354, 360.

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Distinction between companies incorporated by charter and by statute.

At common law a corporation created by charter can by its common seal bind itself to anything to which a natural person could bind himself, and can deal with its property as a natural person might deal with his own (*g*). So that not only can the chartered company bind itself by acts as to which no power is affirmatively given by the charter, but even if the charter by express negative words forbid any particular act, the corporation can nevertheless at common law do the act, and if it does it, is bound thereby, and the result is only that ground is given for a proceeding by *scire facias*, in the name of the Crown repealing the charter (*g*).

But a corporation created by statute stands in a wholly different position. The statute does not create a corporation at common law. It creates a statutory creature, which cannot go beyond its statute for the reason that to the statute it owes its whole existence (*h*). A statutory corporation created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined by that Act (*i*).

And as regards companies incorporated under the Companies Acts the intention that the company shall not go beyond its objects is not merely implied but actually expressed (*k*) by this section. And the incorporation is not of a body with inherent common law rights, but an incorporation with reference to a memorandum of association (*l*). In such companies, therefore, to ascertain whether an act is *ultra vires* or not, you have to inquire whether the Act is within the objects defined by the memorandum of association, including the "incidental or conducive" clause.

Section cannot be evaded.

Indeed, both on principle (*m*) and authority (*n*), it seems clear that even by the introduction of apt words into the memorandum itself, the provisions of this section could not be enlarged or evaded.

Thus, *semble*, it would not under the Act of 1862 be competent, even by unambiguous words in the memorandum, to obtain the power of reducing the nominal amounts of the shares (*o*).

Articles may explain memorandum:—

But while the articles cannot modify or alter any condition expressed or implied in the memorandum (*p*), yet, for purposes of construction upon points which the statute does not require to be contained in the memorandum as the dominant instrument (*q*), the memorandum and articles as contemporaneous documents (*r*), are to be read together, and the articles may serve to explain that which is ambiguous in the memorandum (*s*), or to supplement it as to that upon which it is silent (*t*). Thus a power to mortgage future calls (*u*), or to issue preference shares (*t*), contained in the articles alone may be effectual; and (subject to Companies Act, 1867,

(*g*) *Sutton's Hospital Case*, 10 Coke 1; *Riche* v. *Ashbury Co.*, L. R. 9 Ex. 224, 262; *Wenlock* v. *River Dee Co.*, 36 Ch. Div. 674, 685.

(*h*) *Wenlock* v. *River Dee Co.*, 36 Ch. Div. 674, 685, n.

(*i*) *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653, 693; referring to *Hawkes* v. *Eastern Counties Co.*, 5 H. L. C. 331.

(*k*) *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 673.

(*l*) Ibid. 668.

(*m*) See the judgment of Archibald, J., in *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 224, 291, *et seq.*; and the speeches of all the Lords in *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653.

(*n*) *Feiling & Rimington's Case, Holmes' Case, Re Financial Corporation*, 2 Ch. 714, 733.

(*o*) *Financial Corporation, Holmes' Case*, 2 Ch. 714, 733; and see *Droitwich Salt Co.* v. *Curzon*, L. R. 3 Ex. 35; and s. 196, and see further, Comp. Act, 1867, s. 21, note.

(*p*) See the cases in the note to s. 50.

(*q*) *Guinness* v. *Land Corp. of Ireland*, 22 Ch. Div. 349, 377, 381.

(*r*) *Anderson's Case*, 7 Ch. Div. 75, 98, 106.

(*s*) *Phœnix Bessemer Co.*, 32 L. T. 854; 44 L. J. (Ch.) 683; *London Financial Association* v. *Kelk*, 26 Ch. D. 107, 133, 135.

(*t*) *Harrison* v. *Mexican Railway Co.*, 19 Eq. 358; *South Durham Brewery Co.*, 31 Ch. Div. 261.

(*u*) See note (*m*).

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s. 25) the articles alone may properly explain how particular shares are to be paid for (*x*).

may extend liability fixed by memorandum,

So the articles may extend the shareholders' liability beyond that fixed by the memorandum, in order to provide for payment of a particular debt (*y*) or debts of a particular class, *e.g.* contributions for mutual insurance (*z*).

And a provision in the articles that, if increased funds should be required, the same to an extent not exceeding £200 per share shall be contributed by shareholders, in proportion to the number of their shares, to be treated as a debt from the company to be repaid with interest, has been held not illegal as an evasion of the provisions of this section. Persons who advance money to the company at interest are not holders of share capital within the meaning of the section (a).

but cannot add to Co's. objects.

But the articles cannot authorize an application of the company's capital to objects other than those defined in the memorandum (*b*).

Shares of subscriber of memorandum.

A provision in the articles that "the shares written in the memorandum of association opposite the name of each subscriber, shall be allotted to him as fully paid up," is an attempt to alter the memorandum in one of its most essential points, viz., the definition of the liability of the members, and is void under this section (*c*). But the articles may explain how shares are to be paid for (*d*).

Matters not properly within memorandum.

The word "conditions" in this section is general. It is not restricted to conditions required by the statute to be inserted in the memorandum. If conditions not required by the statute to be inserted, and being, not details with regard to the management of the company, but conditions in the sense of forming a part of the constitution of the company, are inserted in the memorandum, they are by virtue of this section unalterable (*e*).

Thus conditions as to the relative rights of different classes of shares in respect of dividend, if inserted in the memorandum of association, are unalterable (*e*).

But if the memorandum appoints A. a director, not saying that he is to hold a qualification, no doubt the company may afterwards impose a share qualification (*f*), and if A. signs the memorandum for fifty B shares, he may satisfy his contract by taking 25 A shares and 25 B shares (*g*).

Power how to be exercised.

The powers given by this section are well exercised whenever the things authorized are in substance done by those who are by the statute made competent to do them.

And, therefore, it was held by the full Court of Appeal in Chancery, differing in opinion from the Exchequer Chamber (*h*), that it was not necessarily essential that the articles should first be varied at two meetings, and then an issue of new shares authorized by two other meetings; but that where a resolution had been passed and confirmed "that the capital of the company be increased by the creation of" new shares to be issued "upon the terms stated in the before-mentioned agreement," being an agreement for amalgamation with and purchase of the business of another company

(*x*) *Anderson's Case*, 7 Ch. Div. 75, 98, 106.

(*y*) *Maxwell's Case*, 20 Eq. 585; *McKewan's Case*, 6 Ch. Div. 447.

(*z*) *Lion Insurance Co.* v. *Tucker*, 12 Q. B. Div. 176.

(a) *Peninsular Co.* v. *Fleming*, 27 L. T. 93.

(*b*) *Guinness* v. *Land Corp. of Ireland*, 22 Ch. Div. 349. See further, Comp. Act, 1867, s. 9, note.

(*c*) *Dent's Case*, 15 Eq. 407; Ibid. 8 Ch. 768, 775; *et v. supra*, s. 7.

(*d*) *Anderson's Case*, 7 Ch. Div. 75.

(*e*) *Ashbury* v. *Watson*, 28 Ch. D. 56; 30 Ch. Div. 376.

(*f*) *Lord Claud Hamilton's Case*, 8 Ch. 548.

(*g*) *Duke's Case*, 1 Ch. D. 620; *cf. Winstone's Case*, 12 Ch. D. 239, 251.

(*h*) *Bank of Hindustan* v. *Alison*, L. R. 6 C. P. 222.

by means of such new shares, which agreement was at the same meetings approved by the shareholders; new shares by virtue of such resolutions issued by the directors were well created under this section, there being in the articles a power for the directors to amalgamate with or purchase and pay in shares for the business or property of another company (*i*).

And so in a case arising upon articles of association, where the articles provided that the directors should not purchase the shares of the company, a resolution that, "notwithstanding anything contained in the articles," the directors should take a surrender of certain vendors' shares and pay a certain sum per share was effectual [assuming it to be legal], and it was unnecessary first to repeal the veto and then give the authority (*k*).

But where the company has no power to do an act until its regulations authorize the act, you must first give the power and then exercise it. Thus where articles contain no power to reduce capital, you must first by special resolution take the power, and then by special resolution exercise it (*l*).

Comp. Acts, 1867 to 1890.

The Companies Act, 1867 to 1880, and the Companies (Memorandum of Association) Act, 1890 (*v. infra*), provide further that the conditions of the memorandum of association may, in the manner pointed out by the Acts, be modified so as:—

To make the liability of directors unlimited—Comp. Act, 1867, sect. 8.

To reduce the capital and shares—Comp. Act, 1867, sect. 9; Comp. Act, 1877, ss. 3, 5.

To divide the shares into shares of smaller amount—Comp. Act, 1867, sect. 21.

To create reserve liability—Comp. Act, 1879, s. 4.

To return undivided profits in reduction of paid-up capital—Comp. Act, 1880, s. 3.

To alter the provisions of the memorandum of association with respect to the objects of the company, or to substitute a memorandum and articles of association for a deed of settlement—Comp. (Memorandum of Association) Act, 1890, s. 1.

Mortgage Debenture Act.

Under the Mortgage Debenture Act, 1865 (*m*), any company constituted under this Act for the purpose of making advances on real securities, and whose memorandum of association includes but is not limited to the objects in the 3rd section of that Act specified (viz., the making advances on certain real securities there named) may by special resolution alter its memorandum for the purpose of limiting, and so as to limit, its objects to those so specified, for the purpose of acquiring the powers given by that Act.

Power of companies to change name.

13. Any company under this Act, with the sanction of a special resolution of the company passed in manner hereinafter mentioned (*α*), and with the approval of the Board of Trade testified in writing under the hand of one of its secretaries or assistant secretaries, may change its name (*β*), and upon such change being made the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations

(*i*) *Campbell's Case*, 9 Ch. 1.
(*k*) *Taylor* v. *Pilsen Joel Co.*, 27 Ch. D. 268.
(*l*) *Patent Invert Sugar Co.*, 31 Ch. Div. 166; *West India Steamship Co.*, 9 Ch. 11, n.
(*m*) 28 & 29 Vict. c. 78, s. 3, amended by 33 & 34 Vict. c. 20.

Sect. 14. of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.

(α) s. 51. (β) See also s. 20.

Change of name, when complete.

The change of name is not complete until it has been made upon the register, and a certificate of incorporation altered to meet the circumstances of the case has been issued by the registrar. Until that certificate has been obtained the corporation does not exist by its new name, but is considered as still existing under its original name. The 18th section enacts that "a certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with;" and until a certificate of incorporation under the 13th section has been altered and certified, the original certificate remains, and is conclusive evidence of the company's incorporation (*n*).

As to a change of name when a company has, through inadvertence or otherwise, been registered in the name of a subsisting company, see sect. 20.

Articles of Association (α).

Regulations to be prescribed by articles of association.

14. The memorandum of association may, in the case of a company limited by shares, and shall in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient: The articles shall be expressed in separate paragraphs, numbered arithmetically: They may adopt all or any of the provisions contained in the table marked A in the first schedule hereto: They shall in the case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered (β); and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members (γ) with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration (δ): In a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes (ε).

(α) s. 50.
(β) Sch. II., Forms C, D.
(γ) As to increase of number of members see s. 34.
(δ) Sch. II., Form B.
(ε) See s. 8, *ad fin.*, and note to s. 9.

(*n*) *Shackleford, Ford, & Co.* v. *Dangerfield*, L. R. 3 C. P. 407.

If the regulations contained in the articles are altered under sect. 50, a copy of the special resolution passed for that purpose is to be annexed to the articles (*v.* sect. 54).

Application of Table A.

15. In the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations contained in the table marked A. in the first schedule hereto, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company in the same manner and to the same extent as if they had been inserted in articles of association, and the articles had been duly registered.

As to the alteration of Table A. by the Board of Trade, see sect. 71.

Table A. does not, unless adopted by special resolution, apply to any company registering under the Act in pursuance of the 7th part thereof (*o*).

Stamp, signature, and effect of articles of association.

16. The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber, in the presence of, and be attested by, one witness at the least, and such attestation shall be a sufficient attestation in Scotland as well as in England and Ireland: When registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles subject to the provisions of this Act (*α*); and all moneys (*β*) payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt (*γ*).

(*α*) See note to s. 11.

(*β*) Not calls only, *Peninsular Co.* v. *Fleming*, 27 L. T. 93; *Lion Insurance Co.* v. *Tucker*, 12 Q. B. Div. 176; contrast 32 & 33 Vict. c. 19, s. 13.

(*γ*) See s. 75. Sch. I., Table A. (4)—(7).

This section was introduced in order to get over the difficulty which in *Robinson's Executor's Case* (*p*) occasioned so much trouble (*q*).

General Provisions.

Registration of memorandum of association and articles of association, with fees as in Table B.

17. The memorandum of association and the articles of association, if any, shall be delivered to the registrar of joint stock companies hereinafter mentioned (*a*), who shall retain and register the same: There shall be paid to the registrar by a company

(*o*) s. 196 (1).

(*p*) 3 Sm. & Giff. 272; 6 D. M. & G. 572.

(*q*) *Per* Bacon, V.C., *Buck* v. *Robson*, 10 Eq. 629, 631.

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having a capital divided into shares, in respect of the several matters mentioned in the table marked B. in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct (β); and by a company not having a capital divided into shares, in respect of the several matters mentioned in the table marked C. in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct (β): All fees paid to the said registrar in pursuance of this Act shall be paid into the receipt of Her Majesty's Exchequer, and be carried to the account of the Consolidated Fund of the United Kingdom of Great Britain and Ireland.

(α) s. 174. (β) s. 71.

By the Stannaries Act, 1887, s. 31, companies engaged in or formed for working mines in the Stannaries are to have a duplicate registration both at the office of Joint Stock Companies in London and at the office of the assistant registrar at Truro.

Effect of registration.

18. Upon the registration of the memorandum of association, and of the articles of association in cases where articles of association are required by this Act or by the desire of the parties to be registered, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited: The subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company (α), shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands (β), but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned (γ). A certificate of the incorporation of any company, given by the registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with (δ).

(α) s. 23.
(β) Unrestricted, except as to the companies mentioned in s. 21.
(γ) s. 38.
(δ) *Cf.* s. 192.

Corporation is distiact legal entity.

The legal entity created by registration is a corporate body distinct from the persons composing it. Thus where a partnership firm transfers its assets to a company incorporated but consisting wholly and exclusively of the partners themselves, the corporation is nevertheless for the purposes, *e.g.*, of income tax to be treated as a new and different body (r).

(r) *Ryhope Coal Co.* v. *Fryer*, 7 Q. B. D. 485, 498; *cf. Wenlock* v. *River Dee Co.*, 36 Ch. Div. 676, n., 680, n., 682, n.

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Similarly a sale by a mortgagee with power of sale to himself and others is of course no sale at all, and irrespective of any question of undervalue cannot stand. But a sale by a mortgagee with power of sale to a corporation of which he is a member is neither in form nor in substance a sale to himself, and cannot be impeached on that ground (*s*).

So in this connection it may be mentioned that a sale made by the corporation under a resolution of the company in general meeting to one of its members is not impeachable by reason only that the resolution was carried by the vote of that member at the general meeting (*t*).

Forgery under company's seal.

If the seal of a corporation be affixed by a person without authority, the act is not that of the corporation, and the corporation is not bound unless it become bound by estoppel. And upon the authority of *Bank of Ireland* v. *Trustees of Evans' Charities* (*u*) any negligence in the corporation which is relied upon to work an estoppel must be negligence which is the proximate cause of the loss—negligence in or immediately connected with the act by which the loss arises (*x*).

Effect of certificate of incorporation.

The certificate of incorporation given by the registrar is not merely a *primâ facie* answer, but a conclusive answer to any objection in respect of the registration. It prevents all recurrence to prior matters essential to registration, and is conclusive that all previous requisites have been complied with (*y*). When once the memorandum has been registered, and the company is held out to the world as ready to undertake business, to receive shareholders, and to contract engagements, it would be of most disastrous consequence if any person was allowed to go back and enter into an examination of the circumstances attending the original registration (*z*).

The registrar objected to the memorandum of association of a company when brought to him for registration, as going beyond the prospectus, whereupon the bearer then and there, without any communication with the persons who had signed it, made alterations to remove the registrar's objections, and he at once registered it in the altered form. The company was held to be duly constituted, the certificate of registration being, under this section, conclusive evidence that the requisitions of the Act had been complied with (a).

Again, where one of seven subscribers of the memorandum was an infant at the time of registration the company was nevertheless held to be effectually incorporated (*b*).

So where it was alleged that the meeting which resolved upon the registration of a building society under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), was irregularly convened, it was held in an action claiming a declaration that the certificate of incorporation was void, that the Court had no power to make such a declaration (*c*).

So under sect. 192 it has been held in Ireland that where a railway company had registered under the Act the certificate was conclusive that it was a company authorized to be registered (*d*).

A curious question as to the effect of a certificate has arisen under the

(*s*) *Farrar* v. *Farrars Limited*, 40 Ch. Div. 395.

(*t*) *North West Transportation Co.* v. *Beatty*, 12 App. Cas. 589.

(*u*) 5 H. L. C. 389.

(*x*) *Staple of England* v. *Bank of England*, 21 Q. B. Div. 160; *cf. Vagliano* v. *Bank of England*, 22 Q. B. D. 103; 23 Q. B. Div. 243.

(*y*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 354; *Nassau Co.*, 2 Ch. D. 610; *Glover* v. *Giles*, 18 Ch. D. 173.

(*z*) *Peel's Case*, 2 Ch. 674, 682.

(a) *Barned's Banking Co., Peel's Case*, 2 Ch. 674.

(*b*) *Nassau Co.*, 2 Ch. D. 610.

(*c*) *Glover* v. *Giles*, 18 Ch. D. 173.

(*d*) *Ennis and West Clare Railway Co.*, 3 L. R. Irish, 94.

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Building Societies Acts. The certifying barrister, before giving his certificate on the original rules, struck out a particular rule. The Society nevertheless printed and circulated its rules with this particular rule as if it had been certified, and acted on the rule. Some years afterwards the Society amended the rule, and the barrister certified the amendment. It was held that the effect of this last certificate was to make valid the whole rule as amended (*e*).

Whether conclusive that company is one capable of being registered under the Act.

Whether the certificate under the Companies Acts is conclusive on the question whether or not the provisions of the Act are applicable to the company at all, *quære*.

By the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 115 (see also sect. 13), "The certificate of incorporation given to any existing company in pursuance of this Act shall be conclusive evidence that all the requisitions herein contained in respect of registration under this Act have been complied with." Upon which section Turner, L.J., said in *Re Northumberland and Durham District Banking Co.* (*f*), "If a company is not authorized to be registered, it is quite clear that the certificate of incorporation can be of no avail" (*g*).

The Act 16 & 17 Vict. ch. cliv. s. 53 provided that the execution by the Inclosure Commissioners "of any charge on lands in pursuance of this Act shall be both at law and in equity conclusive evidence to all intents and purposes of the contract to which such charge relates having been duly entered into by the proper parties . . . and of such charge having been duly made and executed and being a valid charge under this Act . . ." (*h*): It was held that the certificate did not validate a charge given by a corporation whose borrowing power was exhausted (*i*). The certificate would be conclusive as to all matters of machinery (*k*), but not as to the capacity to enter into a contract (*i*).

The registrar's certificate under the Building Societies Act, 1874, s. 20, is conclusive as to the validity of proceedings taken by a society in passing a new rule, although it may not be conclusive as to the validity of the rule (*k*).

In the case of a company which had been registered after the presentation of a winding-up petition, Malins, V.C., expressed an opinion that the registration was a mere nullity (*l*).

Sect. 192, which applies to the registration of existing companies under Part VII. of the Act, goes on to provide that the certificate shall be conclusive that the company is authorized to be registered under the Act.

Business may be commenced before capital fully subscribed:—

It is competent to a company to commence business before the whole amount of the nominal capital has been subscribed and all the shares allotted. The Act contemplates a company doing business under such circumstances, as *e.g.*, where provision is made by sect. 56 (2) for the appointment of inspectors on the application of members holding not less than one-fifth part of the shares *for the time being issued* (*m*).

It is, therefore, no defence to an action for a call that the capital is not fully subscribed (*n*), and under such circumstances the Court has, in several cases, refused to interfere to prevent business from being commenced (*o*), or

(*e*) *Guardian Soc.*, 23 Ch. Div. 441; *Murray* v. *Scott*, 9 App. Cas. 519.

(*f*) 2 De G. & J. 357, 371.

(*g*) See also *Princess of Reuss* v. *Bos*, L. R. 5 H. L. 176; *Wenlock* v. *River Dee Co.*, 36 Ch. D. 674; 38 Ch. Div. 534.

(*h*) The section is given at 36 Ch. Div. 679, n.

(*i*) *Wenlock* v. *River Dee Co.*, 36 Ch. D. 674, 692; 38 Ch. Div. 534, 545.

(*k*) *Rosenberg* v. *Northumberland Building Soc.*, 22 Q. B. Div. 373; *Dewhurst* v. *Clarkson*, 3 E. & B. 194.

(*l*) *Hercules Insurance Co.*, 11 Eq. 321; and see s. 153.

(*m*) *McDougall* v. *Jersey Imperial Hotel Co.*, 2 H. & M. 528; 12 W. R. 1142.

(*n*) See note to Table A., art. (4)

(*o*) *McDougall* v. *Jersey Imperial Hotel Co.*, 2 H. & M. 528; 12 W. R. 1142.

to relieve an allottee of shares from his allotment (*p*). Unless there is a stipulation that there shall be no allotment until a particular number of shares is applied for, an allottee cannot escape on that ground (*q*).

It has been said that a company is not entitled to commence business with a capital wholly inadequate; and where only 900 out of 25,000 shares had been allotted—the first issue being fixed at 12,500 shares—an allottee of 200 shares was held entitled to the return of his deposit, and the removal of his name from the register (*r*).

But the jurisdiction in such a case must, it is conceived, rest upon fraud and misrepresentation. Two subsequent cases before the same learned Judge (Malins, V.C.) went to the Appeal Court, but in each case the plaintiff was defeated on the ground of laches and acquiescence (*s*).

unless articles otherwise provide.

It is perfectly competent to intending shareholders to protect themselves by a provision in the articles that until subscription of a certain amount of capital business shall not be commenced, and as between the shareholders themselves there can be no doubt that such a provision is effectual (*t*).

It has, moreover, been held that such a provision is also good as against third parties, and that no action will in such a case lie on a contract made by the directors before the subscription of such an amount of capital as is prescribed by the articles (*u*).

In the case last referred to the articles provided that so soon as 3000 shares should have been subscribed for and allotted, the members for the time being should be associated, &c., and it was said that, until the 3000 shares were subscribed, there existed no such incorporated company as the plaintiff could contract with. It is conceived, however, that under this section the company, despite the articles, was incorporated, although its powers were in suspense. No doubt the principle of *Royal British Bank* v. *Turquand* (*x*) cannot in such a case apply in favour of a third party dealing with the company (*y*).

Copies of memorandum and articles to be given to members.

19. A copy of the memorandum of association, having annexed thereto the articles of association, if any, shall be forwarded to every member, at his request, on payment of the sum of one shilling, or such less sum as may be prescribed by the company for each copy; and if any company makes default in forwarding a copy of the memorandum of association and articles of association, if any, to a member, in pursuance of this section, the company so making default shall for each offence incur a penalty not exceeding one pound (*a*).

(*a*) Recovery of penalties, s. 65.

Prohibition against identity of names in companies.

20. No company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive,

(*p*) *Lyon's Case*, 35 Beav. 646; *Hawkins' Case*, 2 K. & J. 253; 25 L. J. (Ch.) 221.

(*q*) *Scottish Petroleum Co.*, 23 Ch. Div. 413, 422.

(*r*) *Elder* v. *New Zealand Land Co.*, 30 L. T. 285; W. N. 1874, 85; *cf. Imperial Steam Coal Co.*, 37 L. J. (Ch.) 517, 519.

(*s*) *Rooper* v. *East Norfolk Tramway Co.*, W. N. 1874, 172, 178; *Sharpley* v. *Louth Railway Co.*, 2 Ch. Div. 663.

(*t*) *North Stafford Steel Co.* v. *Ward*, L. R. 3 Ex. 172.

(*u*) *Pierce* v. *Jersey Waterworks Co.*, L. R. 5 Ex. 209.

(*x*) 5 E. & B. 248; 6 E. & B. 327.

(*y*) *Cf. Cartmell's Case*, 9 Ch. 691.

Sect. 20. except in a case where such subsisting company is in the course of being dissolved, and testifies its consent in such manner as the registrar requires; and if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name (*a*), and upon such change being made the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.

(*a*) And see s. 13.

Upon this section it is to be observed (1) that it applies only to the case of taking the name of a subsisting company already registered, and not to a case like *Hendriks* v. *Montagu* (*z*), where a new company proposes to register in the name of or in a name closely resembling the name of an old established company which is not registered; (2) that so soon as the new company is registered the section has ceased to be applicable, so that the old registered company cannot found upon the section any claim for an injunction to restrain the newly registered company from trading in the name; (3) that the Act forbids registration in the same or a similar name irrespective of the fact whether the business to be carried on under the name is the same or not.

But if the Court is satisfied that a company which is about to register is intended to carry on the same business as the plaintiff company and to bear a name so similar to the plaintiff company's name as to be calculated to deceive, there is jurisdiction, not under the section but under the general law, to restrain the registration, and none the less that the plaintiff company is not a registered company (a).

And *e converso* the fact that the registrar has accepted a name and registered a new company under it will not prevent the old company from obtaining an injunction restraining the new company from carrying on under that name a business of the same kind as that of the old company, where it is shown that the name is calculated to deceive (*b*).

The jurisdiction in these cases rests either upon fraud or upon property; not that there is property in the name, but that the use of a name in which another carries on business will deceive and will divert customers to the

(*z*) 17 Ch. Div. 638.

(a) *Hendriks* v. *Montagu*, 17 Ch. Div. 638; *Madame Tussaud & Sons, Lim.* v. *Tussaud*, 44 Ch. D. 678; *cf. Hoby* v. *Grosvenor Library Co., Lim.*, 28 W. R. 386.

(*b*) *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank*, 9 Ch. D. 560; *Guardian Fire and Life Ass. Co.* v. *Guardian and General Ins. Co.*, 50 L. J. (Ch.) 253; *Accident Insurance Co.* v. *Accident Disease and General Insurance Corporation*, 54 L. J. (Ch.) 104; 51 L. T. 597.

person taking the name. Where this is not the case there is no jurisdiction (*c*).

In *The London Insurance* v. *The London and Westminster Insurance Corporation, Limited* (*d*), *Colonial Life Assurance Co.* v. *Home and Colonial Assurance Co.* (*e*), *London and County Bank* v. *Capital and Counties Bank* (*f*), *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank* (*g*), and *Australian Mortgage Land and Finance Co.* v. *Australian and New Zealand Mortgage Co.* (*h*), injunctions to restrain the defendants from using the name they had adopted on account of its similarity to that of the plaintiffs were refused.

In *Hendriks* v. *Montagu* (*i*), at the instance of an unregistered company, *The Universal Life Assurance Society*, an injunction was granted to restrain a proposed company from registering under the name of *The Universe Life Assurance Association*.

In *Madame Tussaud and Sons, Limited* v. *Tussaud* (*k*) a similar injunction was granted to restrain the registration of a company under the name of *Louis Tussaud, Limited*. In this case the defendant, Louis J. K. Tussaud, had never carried on a business such as the proposed company was to carry on, so that assuming that if he had assigned to the company an existing business theretofore carried on by him under the name of Louis Tussaud, the company might have styled themselves *Louis Tussaud, Limited*, this was not that case, and Louis Tussaud, although he might use his own name, could not give to the corporation the right to use his name where it did not represent that they succeeded him in a business identified by that style.

But if the name be not a fancy name (although in the case of a corporation its name may in most cases be a fancy name and not the statement of a fact (*l*)), but be the correct statement of a fact, the putting forth of such a statement does not become actionable by the fact that some persons may misapprehend it. So when John Turton took his two sons into partnership and styled his firm "John Turton and Sons," a corporation whose name was "Thos. Turton and Sons, Limited," failed in holding on appeal (*m*) an injunction which had been granted according to *Hendriks* v. *Montagu* (*i*).

In *Hoby* v. *Grosvenor Library Co., Limited* (*n*), at the instance of an individual who had for ten years carried on business under the style of "The Grosvenor Library," an injunction was granted to restrain carrying on or advertising a similar business under that name.

Before the Act, an injunction was refused in *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Co.* (*o*).

Where each of two opposing sections of a trade union applied to register it under the Trade Union Act, 1871, by the name which the society had always used, the registrar was held entitled to refuse registration until the legal status of the applicants had been ascertained (*p*).

Prohibition against certain companies holding land.

21. No company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving

(*c*) *Street* v. *Union Bank of Spain*, 30 Ch. D. 156; *Day* v. *Brownrigg*, 10 Ch. Div. 294.

(*d*) 9 Jur. (N.S.) 843; 32 L. J. (Ch.) 664.

(*e*) 33 Beav. 548; 33 L. J. (Ch.) 741.

(*f*) Before Jessel, M.R., 1878.

(*g*) 9 Ch. D. 560.

(*h*) W. N. 1880, 6.

(*i*) 17 Ch. Div. 638.

(*k*) 44 Ch. D. 678; *cf. Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. Div. 748.

(*l*) See *Turton* v. *Turton*, 42 Ch. Div. 128, 148.

(*m*) 42 Ch. Div. 128.

(*n*) 28 W. R. 386.

(*o*) 17 L. J. (Ch.) 36.

(*p*) *Reg.* v. *Registrar of Friendly Societies*, L. R. 7 Q. B. 741.

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the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land; but the Board of Trade may, by licence (*a*) under the hand of one of their principal secretaries or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit.

(*a*) Sch. II., Form F.

Companies other than those named in this section are unrestricted in the matter of holding lands (*q*).

PART II.

Distribution of Capital and Liability of Members of Companies and Associations under this Act.

Distribution of Capital.

Nature of interest in company.

22. The shares or other interest of any member in a company under this Act shall be personal estate (*a*) capable of being transferred in manner provided by the regulations of the company (β), and shall not be of the nature of real estate, and each share shall, in the case of a company having a capital divided into shares, be distinguished by its appropriate number (γ).

(*a*) Shares in a partnership owning land, as distinguished from a company corporate or unincorporate (*Myers* v. *Perigall*, 2 D. M. & G. 599), are an interest in land within the Mortmain Act: *Ashworth* v. *Munn*, 15 Ch. Div. 363.

(β) Sch. I. Table A. (8)—(16). See Stannaries Act, 1869 (32 & 33 Vict. c. 19), ss. 14, 15, as to mining companies in the Stannaries not registered under this Act. *Infra*, s. 178, as to certain other companies.

(γ) *East Gloucestershire Railway Co.* v. *Bartholomew*, L. R. 3 Ex. 15; Table A., art. 8, note.

As to the manner in which shares may be made transferable, whether by deed, instrument in writing, or delivery, see the note to Table A., art. 8, *infra*.

Shareholder's right to transfer.

By this section the ordinary incidents of partnership in respect of the introduction of new members are excluded, and the shares rendered freely transferable, subject only to any restrictions imposed by the articles.

In the absence of any such restrictions the shareholders have the right of going into the market and disposing of and transferring their shares without the consent of directors, or shareholders, or anybody, provided only it is a *bonâ fide* transaction, as an out-and-out disposal of the property, without retaining any interest in them. If it is desired that such unlimited power of assignment shall not exist, then a clause must be inserted in the articles whereby the directors shall have the power of rejecting proposed members (*r*).

(*q*) s. 18.

(*r*) As to the effect and exercise of such a power, *v. infra*, p. 36. The strong observations by Lord Westbury in *Walton Williams' Case* (Eur. Arb.), L. T. 125; 18 Sol. J. 84; and *J. Murgatroyd's Case* (Eur. Arb.), L. T. 146; 18 Sol. J. 28; must, it is conceived, be read in connection with the provisions of the deed of settlement of the company in which those cases arose. (*v. Read's Case* (Eur. Arb.), L. T. 10.)

In the absence of any such provision the directors have no discretionary power of refusing to register a transfer which has been *bonâ fide* made (*s*).

Thus a shareholder may make transfers of his shares to nominees in such a way as to secure himself, under the regulations of the company, a maximum of voting power at a pending meeting, and the directors cannot refuse to register the transfers (*t*).

The only obligation, in fact, on the transferor is to find a transferee legally competent to take the shares (*u*).

Where the shareholder is also a director.

Moreover, in the matter of dealing with his shares, a director is in general as free as any other shareholder. He is not a trustee for the general body of the shareholders, so as to be unable to deal with his shares in a manner prejudicial to the interests of his *cestuis que trust*, but in a vast variety of circumstances is just as free to deal with his shares—except, perhaps, his qualification (*x*), which he cannot deal with without giving up his directorship—as any other person (*y*).

So also a director may surrender his shares under a power in the articles authorizing surrenders by shareholders (*z*).

But, since it is in his power and is also his duty to see that all formalities in respect of transfers are duly observed, any irregularities will be construed strictly against him (a).

But notwithstanding what was said in *E. p. Brown* (*b*), knowledge of all the entries in a company's books will not be imputed to a director (*c*).

And if the formalities required for transfer have been substantially complied with, and the director's transferee have been accepted as a shareholder, not only by the directors, but practically also by the shareholders in having accepted the transferee as a director, then after a lapse of time the validity of the transfer cannot be impeached (*d*).

Cases conflicting.

On the question of the shareholder's right to transfer a large number of cases have come before the Court, and the decisions having in some instances turned on distinctions somewhat subtle and refined, are not at first sight easy to reconcile.

There may, however, be drawn from the cases certain broad rules of considerable value for practical guidance, which may, perhaps, be shortly stated thus :—

General rules as to shareholder's right to transfer.

I. A shareholder may, although the company is in difficulty, or even *in extremis*, effect a transfer of his shares, and such a transfer will be valid although made avowedly for the purpose of avoiding liability, although made to a man of straw, although made for a nominal consideration, or although a valuable consideration be expressed but be not in fact paid, or even although the consideration be in fact paid *to*, not *by*, the transferee, provided the transaction be *bonâ fide* an absolute out-and-out disposal of the property, without any trust or reservation for the benefit of the transferor (*e*).

(*s*) *Smith, Knight, & Co., Weston's Case*, 6 Eq. 238, 4 Ch. 20; *Gilbert's Case*, 5 Ch. 559, 565; *Cawley & Co.*, 42 Ch. Div. 209; *Pinkett* v. *Wright*, 2 Hare, 120, 130; *Poole* v. *Middleton*, 29 Beav. 646, 650; and see the cases cited *infra*.

(*t*) *Stranton Iron Co.*, 16 Eq. 559; *Moffatt* v. *Farquhar*, 7 Ch. D. 591.

(*u*) *Lumsden's Case*, 4 Ch. 31, 34.

(*x*) *Infra*, note to s. 23.

(*y*) *Gilbert's Case*, 5 Ch. 559; *South London Fishmarket Co.*, 39 Ch. Div. 324; *Cawley & Co.*, 42 Ch. Div. 209; and see *Jessopp's Case*, 2 De G. & J. 638; *Libri's Case*, 30 L. T. (1857) 185, cited *infra*.

(*z*) *Snell's Case*, 5 Ch. 22.

(a) *E. p. Brown*, 19 Beav. 97; *E. p. Henderson*, Ibid. 107; and see *Eyre's Case*, 31 Beav. 177; *cf. E. p. Munster*, 14 L. T. 723; 14 W. R. 957.

(*b*) 19 Beav. 97.

(*c*) *Hallmark's Case*, 9 Ch. Div. 329.

(*d*) *Bush's Case*, 6 Ch. 246; *Murray* v. *Bush*, L. R. 6 H. L. 37; *Taurine Co.*, 25 Ch. Div. 118.

(*e*) *De Pass's Case*, 4 De G. & J. 544,

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II. But if the transaction be colourable and fictitious, and the transfer be merely nominal, and there be any trust or reservation of benefit in favour of the transferor, the transaction is then invalid and the transferor remains liable (*f*).

III. If, further, the transfer be not open and *bonâ fide*, but be made with colour indicating an attempt to escape liability in a manner tainted with fraud, or be made upon an opportunity fraudulently obtained, it cannot be supported (*g*).

And as a special head of this last rule in the case of companies to whose directors is, by the articles, given a discretion as to the acceptance of any proposed transferee, must be added the following, viz., that:—

IV. If, in the case of such a company, the facts have been wilfully misstated to the directors, and if the facts were such that, in the opinion of the Court, the directors, if they had known them, would have, or ought to have, in the execution of their duty, refused to register the transfer; or if—according to the decisions in the European Arbitration (*h*)—the transferor, without having made any misrepresentation, knew in fact that his proposed transferee was not a proper and solvent person (*i*), then the transfer will be set aside, and the transferor rendered liable (*k*).

I. TRANSFER VALID.

I. As establishing the first rule the following cases may be cited:

De Pass's Case (*l*), where P., being aware that the company was in difficulties, handed over to his clerk for a nominal consideration shares, transferable by delivery. It was admitted that the transfer was made to escape liability, but the Court, being satisfied that it was an absolute and *bonâ fide* transfer out-and-out without any trust or reservation, held that P. was not a contributory.

Consideration mis-stated.

Slater's Case (*m*), in which the consideration was stated to be £25 paid for the shares, when in fact £30 was paid to the transferee as a consideration for his taking the transfer. The company was wound up about a year afterwards, and there being no evidence of fraud, the transfer was held valid.

Incorrect address.

Weston's Case (*n*), in which a shareholder executed a transfer to a transferee who gave an address at which he was only an occasional visitor. The directors had not by the articles any discretion as to accepting a proposed transferee, but they refused to register the transfer on the ground that the transferee's

and cases cited *infra*; but as to mining companies in the Stannaries, see 32 & 33 Vict. c. 19, s. 35, cited *post*. Lord Westbury in the European Arbitration held that a transferor who under such circumstances had not completed the transaction by a legal transfer before the commencement of the winding-up, had no right to relief, *Read's Case* (Eur. Arb.), Reil. 19; L. T. 10; *Lloyd's Case* (Eur. Arb.), Reil. 35; L. T. 25; 17 Sol. J. 46; and see *E. p. Parker*, 2 Ch. 685. But this principle was not recognised in *Weston's Case*, 6 Eq. 238; 4 Ch. 20. Such completion of course may be unimportant where there is no such objection to the transferee, *Bentinck's Case* (Eur. Arb.), L. T. 99; 17 Sol. J. 807, *et infra*.

(*f*) *Hyam's Case*, 1 D. F. & J. 75, and cases cited *infra*; and see s. 30.

(*g*) *Costello's Case*, 2 D. F. and J. 302, which Turner, L.J., said lay between *De Pass's Case* and *Hyam's Case*; *E. p. Parker*, 2 Ch. 685; *South London Fishmarket Co.*, 39 Ch. D. 324, *et infra*.

(*h*) *v. infra*, p. 34.

(*i*) *Quære*, the requisition in *Joshua Murgatroyd's Case* ((Eur. Arb.), L. T. 146; 18 Sol. J. 28) that the transferor should swear affirmatively that he knew the transferee to be a man of substance cannot surely be maintained.

(*k*) *E. p. Kintrea*, 5 Ch. 95, *et infra*.

(*l*) 4 De G. & J. 544. This case is said to have been compromised in the House of Lords. As other early cases, see *Jessopp's Case*, 2 De G. & J. 638; *Libri's Case*, 30 L. T. (1857) 185; in the former the transferor was a director, in the latter the chairman of the company; *Carstin's Case*, 10 W. R. 457; 6 L. T. 374.

(*m*) 35 Beav. 391; 14 W. R. 446; 14 L. T. 95; 12 Jur. (N.S.) 242; 35 L. J. (Ch.) 304.

(*n*) 6 Eq. 238; 4 Ch. 20.

address was incorrectly given. It was admitted, on the one hand, that the transferor intended to part with the entire interest in his shares, and on the other, that he executed the transfer with the intention of escaping liability. It was held that the directors were bound to register the transfer, and the Court in the winding-up took the name of the transferor off the register.

Description "gentleman."

Bishop's Case (*o*), in which a number of minute circumstances were brought forward in order to attempt to shew a trust or reservation of benefit to the transferor. There was no evidence that the company was in a failing state at the time of the transfer, and in the opinion of the Court no trust for the transferor was established. A description of a man of small or no means, living in a house worth only £3 a year, as a "gentleman," is not, under such circumstances, material as a misdescription. The transfer was held valid.

Transferee clerk of transferor.

Hakim's Case (*o*), in which the transferee was a clerk of the transferor's firm. There was a stipulation that the transferee should not part with the shares for six months. After the transfer the certificates were given back to the custody of the transferor or of his firm, but this was held perfectly consistent with the restriction placed upon the transfer, and the transaction was held valid.

Description, address, and consideration falsely stated.

Battie's Case (*p*), in which the transfer was to a man of straw, by a transfer giving a false description and address of the transferee, and purporting to be for valuable consideration, whereas no consideration was in fact paid. But seeing that the directors had not by the articles any power to disallow transfers, and that the transferor and transferee deposed that no trust or benefit was reserved for the transferor, it was held that the transfer was valid.

Transfer with guarantee as to calls.

Harrison's Case (*q*), in which H., to escape liability, transferred his shares for a nominal consideration to his clerk. The directors, having by the articles power to refuse to register a transfer, declined to register the transfer unless H. would enter into a certain guarantee (the precise terms of which were disputed) as to payment of a call or calls. H. accordingly gave the guarantee, and the transfer was registered. It was held that the bargain with the directors was good, and the transfer valid; and that whatever might be H.'s liability on his guarantee, he was not liable as a contributory.

Transfer with directors' sanction.

Chappell's Case (*r*), where the directors had no power to reject a transfer unless they found a substituted transferee, and they sanctioned a transfer of a large number of shares for a nominal consideration, such transfer being, on the evidence, an absolute disposal of the property; it was held that the sanction on the part of the directors was not a breach of trust, and that the transfer was or, but for other circumstances in that case immaterial to be here mentioned, would have been valid and effectual.

Description "gentleman." Transferee son-in-law of transferor.

Masters' Case (*s*), in which twelve days before a banking company stopped payment, a shareholder transferred for a nominal consideration 280 shares to his son-in-law, a journeyman butcher, describing him as "gentleman" and giving a London address. By the articles, transfers might be refused registration unless the transferee was approved by the board of directors. The transfer was duly registered. On an application nearly five years afterwards to substitute the transferor for the transferee on the list of contributories, it was held that the transfer was a *bonâ fide* gift to the son-in-law, and that the misdescription of the transferee was not material.

Companies in the Stannaries.

With respect, however, to mining companies subject to the jurisdiction of

(*o*) 7 Ch. 296, n.
(*p*) 39 L. J. (Ch.) 391. Contrast *Lund's Case*, 27 Beav. 465.
(*q*) 6 Ch. 286.
(*r*) 6 Ch. 902; *cf. Bush's Case*, 6 Ch. 246; *Murray* v. *Bush* L. R. 6 H. L. 37.
(*s*) 7 Ch. 292.

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the Stannaries Court, the Stannaries Act, 1869 (32 & 33 Vict. c. 19), enacts by s. 35:

"*Fraudulent Transfers of Shares.*] A transfer of shares made for the purpose of getting rid of the further liability of a shareholder, as such, for a nominal or no consideration, or to a person without any apparent pecuniary ability to pay the reasonable expenses of working a mine, or to a person in the menial or domestic service of the transferor, shall be presumed to be a fraudulent transfer, and need not be recognised by the company, or by the Court on the winding-up of the company, whether the company be a registered or unregistered company."

But if a transfer, fraudulent by virtue of this section, is recognised by the company, and they sue the transferee for calls and ultimately forfeit the shares for non-payment, the Court cannot, subsequently in the winding-up, set aside the transfer and make the transferor a contributory (*t*).

II. TRANSFER FICTITIOUS AND INVALID.

II. As examples of cases in which a transfer has been set aside as colourable and fictitious, the following may be cited:—

Hyam's Case (*u*), where, a few days before the winding-up of a mining company, H. transferred shares in it to P., a clerk in his employ, and the payment for the mining shares was made by handing to the broker certain bank shares standing in P.'s name, but which, in fact, belonged to H. It was sought to be maintained that the purchase by P. of the mining shares with H.'s money constituted P. a trustee for H., and that, as between the company, the trustee, and the *cestui que trust*, the trustee only was liable (*x*). It was held that the transfer of the mining shares to P. was merely colourable, and that H. was liable as a contributory (*y*).

Budd's Case (*z*), in which a solicitor transferred his shares to his farm-bailiff, a man without property. The transferee stated that he had never looked upon himself as owner of the shares, and had always understood that he should be indemnified. In the winding-up of the company the transferor, as solicitor of the transferee, but without any communication with him, made the company an offer of a certain sum, which he admitted was to have come out of his own pocket, to escape all further liability. The transfer was held to be colourable. The relative position of master and servant, and the particular relations between the parties, were held to be important in ascertaining the genuine nature of the transaction.

Consideration not paid: benefit reserved.

Chinnock's Case (a), in which a transfer of 500 shares was made to the transferor's clerk in consideration of £500, which was not, in fact, paid. A dividend was paid by cheque to the transferee, and he paid over the cheque to the cashier of the transferor, who entered the amount in the transferor's private cash-book as interest upon shares. Upon this, and the evidence of the transferee, the Court was of opinion that the transferor reserved an interest in the shares, and he was, therefore, put upon the list of contributories.

Alexander's Case (*b*), in which A. transferred 130 shares to a solicitor's clerk, in receipt of a salary of £1 a week, in consideration of £97 10s., which was not, in fact, paid. The certificates of the shares were retained by A. A. was held liable as a contributory.

(*t*) *Chynoweth's Case*, 15 Ch. Div. 13.

(*u*) 1 D. F. & J. 75.

(*x*) See s. 30.

(*y*) The distinction to which attention was drawn in *E. p. Bugg*, 2 Dr. & Sm. 452, between the case of a purchase of shares in the name of a *bonâ fide* trustee, and the transfer of shares in a failing company to a transferee with a reservation of benefit in favour of the transferor, should be clearly borne in mind. In the former case the company can look only to the trustee as contributory (*v.* s. 30); in the latter the transfer is a fraud upon the company, and as such will be set aside.

(*z*) 3 D. F. & J. 297; 30 Beav. 143.

(*a*) Joh. 714.

(*b*) 9 W. R. 410; 3 L. T. 883.

Lund's Case (*c*), in which the transfer was to an old servant of the transferor, and the consideration nominal. In this case the transferor and transferee agreed in stating that the transfer was out-and-out, and it does not appear that the Court was of opinion that there was any reservation of benefit to the vendor, and *quære* whether the case can stand with some of the later decisions (*d*).

Transfer to old servant, consideration nominal.

E. p. Hatton (*e*), in which the transfer was made in order to avoid payment of a call, and there was an agreement to indemnify the transferee. The directors had refused to register the transfer until the call had been paid, and at the time of the winding-up of the company a year afterwards the name of the transferor was still on the register.

Transfer with guarantee of indemnity against call.

III. The third rule is one which, from its nature, hardly admits of so accurate a definition as the two preceding rules, and the cases falling under it are also of a more varied description.

III. TRANSFER TAINTED WITH FRAUD.

In *Costello's Case* (*f*), a shareholder sold to his father, who was a man of no means, and was supported by his sons, shares in a company for a consideration merely nominal, and taken seemingly at haphazard, and which he was variously represented as having paid with the proceeds of a wager, or with money received from his other sons. The transferor was a broker, but another broker was employed "to make the transaction more regular." Of this case Turner, L.J., said that it seemed to him to lie between *De Pass's Case* (*g*) and *Hyam's Case* (*h*). It was held that the transaction was a mere false and hollow contrivance, and that the transferor remained liable.

Son transferring to father who was dependent on him.

In this case the relation between the parties is, perhaps, the strongest point, as tending to shew *indirectly* a reservation of benefit to the son through the medium of the father, who was dependent on him. But the case is certainly not free from difficulty, for the Lords Justices do not seem to have concluded that there was directly any trust or reservation; and, without any such, the decision can hardly avoid coming in conflict with some of the decisions mentioned above.

The case is, perhaps, open to the remark that, had the parties enjoyed the benefit of the knowledge of the subsequent decisions of the Court on the shareholder's right to transfer, the transaction might have been effected with less earnest endeavour to insure validity, and might then have proved successful.

Lund's Case (*i*) mentioned above as offering some difficulty under rule II., is to some extent a parallel case to *Costello's Case*.

Voluntary transfers by directors of their qualification shares in order to escape liability have been held by Kay, J., void for fraud: but on appeal the Court found it unnecessary to decide the point (*k*).

In *Eyre's Case* (*l*) a shareholder had presented a winding-up petition, and the directors, in order to stifle inquiry, bought him off by taking a transfer of his shares to a nominee of their own. The company being wound up within two years, it was held that the transfer was not *bonâ fide*, and that the transferor was a contributory.

Transfer taken to put an end to winding-up petition:—

(*c*) 27 Beav. 465; contrast *Battie's Case*, 39 L. J. (Ch.) 391.
(*d*) But see *infra*, under III.
(*e*) 8 Jur. (N.S.) 380; 31 L. J. (Ch.) 340; *cf. Orpen's Case*, 9 Jur. (N.S.) 615.
(*f*) 2 D. F. & J. 302.
(*g*) 4 De G. and J. 544.
(*h*) 1 D. F. & J. 75.
(*i*) 27 Beav. 465; 7 W. R. 333.
(*k*) *South London Fishmarket Co.*, 39 Ch. D. 324.
(*l*) 31 Beav. 177; and see *Benham's Case*, 13 W. R. 483; 12 L. T. 224; 11 Jur. (N.S.) 381; *cf. Gower's Case*, 6 Eq. 77, where a forfeiture of shares to stop the mouth of a shareholder was held invalid.

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So, in *Lankester's Case* (*m*), certain shareholders having presented a winding-up petition, containing serious charges against certain persons, and an agreement having been come to between the persons attacked and the petitioners that the petition should be withdrawn and the petitioners' shares transferred to a nominee of the directors, and the shares having been transferred accordingly, the transferors were, nevertheless, held liable as contributories.

to quiet dissentient shareholder.

So where shareholders threatened proceedings, and thereupon the directors agreed that they should be allowed to transfer their shares on payment to the company of a sum, out of which a claim of one of the directors against the company should be satisfied, transfers thus effected were held invalid (*n*).

But, in another case, where a transfer by the chairman of the board of directors was said to have been made upon some bargain which was not proper as regards the company, it was said that this might be the foundation of some application in respect of a loss sustained through breach of trust, but could not make a man a shareholder who had by transfer ceased to be a shareholder (*o*).

Transfer after call proposed.

In *Parker's Case* (*p*) the articles provided that on proof of title and execution of transfer the company should register the transferee, but that no transfer of shares should be made or registered after a call on such shares had been made until payment thereof. A shareholder, who was present at a meeting of the directors on the 17th of April, when the propriety of making a call was discussed, induced them to postpone the consideration of the matter, and then, without informing them of his intention, transferred his shares to a pauper, in order to escape all further liability, and sent in the transfer for registration. The declaration of the call was made on the 23rd of April. The directors refused to register the transfer, and the Court refused to rectify the register by substituting the transferee for the transferor.

So in *Gilbert's Case* (*q*), in the same company, one of the directors transferred some of his shares to his clerk on the 18th of April, under circumstances which shewed that he did so to escape liability. The transfer was registered on the 20th, the other directors being cognisant of the transaction. In the winding-up the transferor was made contributory in respect of the shares.

In the former of these, viz., *Parker's Case* (*p*), the equity must have been that the shareholder represented to the directors, or led them to believe that if they would postpone the call he would not transfer; in the latter, viz., *Gilbert's Case* (*q*), that the call was postponed for a purpose which was not honest. In the absence of an equity against him, the director no less than any other shareholder is entitled to transfer his shares out-and-out to escape liability (*r*).

Transfer colourable

How's Case (*s*) must also, it is conceived, be placed under this head. H. applied for 150 shares, and in order to enable him to pay the application and allotment moneys, a loan of £300 was made to him out of the funds of the company, as security for which he gave a promissory note, and deposited the shares with the company. By a transfer in November, 1867, expressed to be in consideration of £10, which was never paid, H. transferred the 150 shares to R., a man without means, it being part of the arrangement that the company should accept R.'s promissory note in lieu of that of H. H.'s

(*m*) 6 Ch. 905, n., and see p. 910; *cf.* *Chappell's Case*, 6 Ch. 902. *Allin's Case*, 16 Eq. 449.
(*n*) *Bennett's Case*, 18 Beav. 339; 5 D. M. & G. 284.
(*o*) *E. p. Littledale*, 9 Ch. 257.
(*p*) 2 Ch. 685.
(*q*) 5 Ch. 559.
(*r*) *Cawley & Co.*, 42 Ch. Div. 209.
(*s*) W. N. 1872, pp. 136, 162.

note was, however, allowed to remain with the company, and a verdict against him for £300 was subsequently obtained in an action upon it by the company. The transfer to R. was accepted by the directors, and his name put upon the register, where it remained for more than a year before the winding-up. It was held that the transfer was fraudulent and void, that H. remained a shareholder, and that the lapse of time did not prevent the setting aside the transaction.

IV. WILFUL MISREPRESENTATION.

IV. The cases under this head, and the principle on which they are decided, are so plain that no comment is required. In all these cases it is to be understood that the directors had power to refuse to register the transfer if they did not approve of the proposed transferee.

In *Williams' Case* (*t*) the transfer was nominally made in consideration of £45 (which was the market value of the shares) to W., "of Blenheim Terrace, in the city of Bristol, public accountant." W. was a clerk in the transferor's employ at 23*s.* a week, and no consideration was paid for the transfer. The transaction was set aside in the winding-up.

In *E. p. Kintrea* (*u*) K. transferred 145 shares nominally in consideration of £195 (which was about the market value) to L., "of 30, Lower Lion Street, Southampton," giving no description of him. The transfer was registered. L. was a ship's steward; his wages were £1 a week, and he had no other means. No consideration was in fact paid. The company was wound up a few weeks afterwards—the transaction was set aside. (The Court came to the conclusion further that it was not K.'s intention to part with his interest in the shares.)

In *Payne's Case* (*x*), P., on the 10th of May, 1866, the day before the stoppage of the company, in consideration of £17 transferred sixty-eight shares to L., "of 10, China Walk, Lambeth Road, gentleman," and the transfer was registered. A voluntary winding-up of the company commenced in June, 1866, and was continued under supervision. In 1869, L. became bankrupt, and in the course of an examination in the bankruptcy, held in October, 1869, statements were made which led to the discovery of the facts being that in May, 1866, L. was a messenger at a salary of 25*s.* a week, that P. knew of his position, and that the real consideration was not £17 paid by L. to P., but £5 which P. paid to L. to execute the transfer. P. stated that the transfer was out-and-out to escape liability, and that S. acted as his broker, and he believed S. filled up the transfer. It was held that the mis-statement, which was intended to mislead and did mislead the directors, avoided the transaction; that it could make no difference whether the falsehood came from P. or from the broker; and that P. was liable as a contributory.

In *Snow's Case* (*y*) a transfer was made to a person described as "of Cadogan Terrace, gentleman," in consideration of £1326, expressed to be paid, and the directors registered the transfer. The transferee was employed in a warehouse at a salary of less than £100 a year, and the consideration was paid only by a promissory note (*z*), which was not given at the time the transfer was executed, and which was worth, perhaps not two shillings in the pound, and probably nothing. Assuming that an out-and-out sale was intended, it was held that the misdescription of the transferee and mis-statement of the consideration were fatal, and that the transferor must be put upon the list.

(*t*) 9 Eq. 225, n.; and see *Wilkinson's Case*, W. N. 1869, p. 211.
(*u*) 5 Ch. 95.
(*x*) 9 Eq. 223.
(*y*) 19 W. R. 1057; *sub nom. Rogers' Case*, 25 L. T. 406.
(*z*) But as to payment by promissory note see *R. Williams' Case* (Eur. Arb.), L. T. 84, cited *infra*.

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Description "gentleman."

It must not, however, be inferred from the above cases that the mere fact that a person in a humble station in life has been described by the vague title of "gentleman," necessarily constitutes such a fraudulent misrepresentation as to allow of the transaction being avoided (a). The principle on which such transactions are set aside is that a person cannot profit by his own fraud—that having been guilty of misrepresentation he cannot complain that his representation was believed, and insist that it was the duty of the company to make inquiry. The whole point, therefore, is that the representation was intended to mislead; but if the Court finds that there was no intention to mislead, the mere fact of there having been in the transfer some misdescription is unimportant.

Thus, in *Masters' Case* (*b*), twelve days before a company stopped payment, a shareholder transferred 280 shares to his son-in-law, a journeyman butcher, describing him as "of 141, Blackfriars Road, London, gentleman." The consideration was stated to be 5*s*. On an application nearly five years afterwards to make the transferor the contributory, it was held that the transfer was good as a *bonâ fide* gift to the son-in-law, and that the misdescription was immaterial. There was no evidence of fraud, and no immediate anticipation at the time of the transfer of any failure of the company.

If the transferee be honestly described by his correct address, and the directors do not think proper to send and make inquiries, they have only themselves to blame (*c*).

European Arbitration.

This fourth rule received copious illustration in the European Arbitration. The European Assurance Society was a society not registered under this Act, but governed by a deed of settlement containing provisions under which a shareholder might submit for the directors' approval the name of a proposed transferee, describing his "full name and profession or calling and place of abode," and if he should be approved, or if the directors should not within fourteen days propose some other transferee to take the shares at the market price, then the shareholder might transfer to the person "so proposed and approved." And it was provided that no share should be transferred to any person who had "not been first approved of, or considered as approved of, as aforesaid," and any transfer made to a person not so first approved was to be void (*d*).

These provisions Lord Westbury held to be something more than a description of certain regulations and checks upon a transfer. "It is a provision that contains within itself in reality a contract between all the shareholders, that one of the bases of their partnership shall be that no shares shall be transferred, except in conformity with the spirit of that power" (*e*).

Accordingly his Lordship went far beyond the decisions in Chancery, and professing himself wholly indifferent whether there had been misrepresentation or not, applied as the test of the validity of the transfer the answer to this question—Did the transferor know that his proposed transferee was not a proper person to be introduced into the partnership? If he knew of the impropriety, then that knowledge was held a personal bar to an effectual transfer, and the proceeding was set aside as a fraud upon the directors.

The stringency with which these principles were applied increased as the arbitration went on, from the point at which, in *Read's Case* (*f*), and *Lloyd's*

(*a*) *W. W. Williams' Case*, 1 Ch. D. 576.
(*b*) 7 Ch. 292.
(*c*) *W. W. Williams' Case*, 1 Ch. D. 576.
(*d*) See the clauses set out in *Read's Case* (Eur. Arb.), L. T. 10.
(*e*) *Joshua Murgatroyd's Case* (Eur. Arb.), L. T. 146; 18 Sol. J. 28; *Walton Williams' Case* (Eur. Arb.), L. T. 125; 18 Sol. J. 84.
(*f*) Eur. Arb. L. T. 10; Reil. 19.

Case (*g*), the principle of out-and-out disposal (*supra*, Rule I.) appears to have been recognised, to the culminating decision in *Joshua Murgatroyd's Case* (*h*), where the transferor was called upon to swear affirmatively as to his transferees that he "personally knew they were men of substance."

In *Read's Case* (*i*) the transfer was expressed to be by "J. R., of 74, Lord Street, Liverpool, in consideration of 5*s*., to W. A., of 74, Lord Street, aforesaid, bookkeeper," and was, therefore, on the face of it, a transfer by a master to his servant for a nominal consideration. This case was decided against the transferor on the ground that a legal transfer had not been completed, and the transferor had no equity to help him.

Lloyd's Case (*g*) was a similar case, and the directors having refused to approve a person, described as "wine merchant," who had been a clerk in a wine company which was in liquidation, it was held that the transferor had acquired no right of transfer by reason of the directors having proposed no other transferee in his stead.

In *Simpson's Case* (*k*), the description as "gardener" and "sheep-farmer," of labouring men in Scotland, earning respectively 15*s*. and 18*s*. a week, and in *Paterson's Case* (*l*) the description as "superintendent," of a colliery labourer, were held to invalidate transfers made to persons who, under those descriptions, had been approved by the directors.

Richard Williams' Case (*m*) is the one instance of this kind in which the transferor escaped. The transfer there was to Lewis Jones, "merchant," in consideration of £450. The transferee was in fact a working miller, who had till within six months of the transfer been in the transferor's employment at 10*s*. a week and his food, and the consideration was paid not in cash, but by a promissory note. This case appears to fall strictly within the decisions in Chancery. The transfer was upheld on the ground of out-and-out disposal and no misrepresentation. But, *quære*, whether the transferor would have passed the ordeal imposed in *Joshua Murgatroyd's Case* (*h*), of swearing that he knew the transferee was a fit and proper person to be substituted for himself.

Walton Williams' Case (*n*) was decided on the ground of improper concealment and knowledge on the part of the transferor that the transferee was not a proper person to be introduced into the society.

Joshua Murgatroyd's Case (*h*) was the last case of this kind which came before Lord Westbury, and there his Lordship required from the transferor "an affidavit fully detailed to prove" that at the time he sent in the names of the transferees "he personally knew they were men of substance." It should be observed that in this requisition his Lordship went beyond that which, in stating the general case, he had laid down a few lines before; for the proposition is there put, not in the affirmative, but in the negative, and the guilty knowledge is defined as a knowledge that the intended transferee was not a proper person. However, the case subsequently, after Lord Westbury's death, coming on the further evidence before Lord Romilly, his Lordship evidently felt himself bound to require the affirmative evidence, and in default the transfer was set aside.

Mushet's Case (*o*), *Dymock's Case* (*p*), and *Phillips' Case* (*q*), are subsequent decisions of Lord Romilly, in all of which the transfers were set aside. These cases go further to shew that the onus is on the transferor to shew

(*g*) Eur. Arb. L. T. 25; 17 Sol. J. 46.
(*h*) Eur. Arb. L. T. 146; 18 Sol. J. 28.
(*i*) Eur. Arb. L. T. 10; Reil. 19.
(*k*) Eur. Arb. L. T. 77; 17 Sol. J. 648.
(*l*) Eur. Arb. L. T. 79.
(*m*) Eur. Arb. L. T. 84.
(*n*) Eur. Arb. L. T. 125; 18 Sol. J. 84.
(*o*) Eur. Arb. L. T. 139, 141; 18 Sol. J. 202.
(*p*) Eur. Arb. L. T. 144.
(*q*) Eur. Arb. L. T. 148; 18 Sol. J. 380.

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that the material facts have been brought to the directors' attention, and that where the transfer is brought about through the agency of two brokers, the knowledge of the transferee's broker may be the guilty knowledge of the transferor. It was also broadly stated in *Mushet's Case* (*r*) that in such cases the transaction cannot stand unless the transferor shews that the whole consideration paid for accepting the shares reached the hands of the transferee.

Lapse of time.

If a long time have elapsed since the transaction which it is sought to invalidate, the official liquidator must shew what grounds he has for taking proceedings. Thus, where the transfer was made in 1848, and the winding-up order in 1851, the Court in 1863 refused to allow the official liquidator to contest the validity of the transaction until he had laid a sufficient ground for it by stating to the Court what information he had received on the subject and when he first received it (*s*).

Exercise of discretionary power of rejecting proposed transferees.

Where a power of rejecting proposed transferees is reserved to the directors, they must exercise it reasonably (*t*), and in its exercise will be controlled by a Court of Equity.

Thus, where the deed of settlement of a bank contained the following article: "No person not being a lawful claimant of a share shall be entitled to become a transferee of a share, unless and until he be approved by the Court" (*i.e.* of directors); to a bill praying that the bank might be decreed to approve of A. B. or some other person to be nominated by A. B., as a transferee, a demurrer for want of equity was overruled (*u*). The directors were there, in fact, refusing to allow a transfer to anybody (*x*). Whether it is a reasonable ground of objection that the proposed transferee is the nominee of a rival bank with which the shares have been deposited as security—*quære* (*u*).

In *Shepherd's Case* (*y*) the articles provided that the company might decline to register any transfer in any case where the directors considered that the transfer was made for purposes not conducive to the interests of the company. The directors passed a resolution that no transfers then in the office should be registered without their express sanction; and Romilly, M.R., held, that they had the power, if they exercised it *bonâ fide*, and considered it to be for the benefit of the company, to refuse to register any transfer or any number of transfers which (as his Lordship subsequently, in *Nation's Case* (*z*), explained his meaning to be) they had not, before the passing of the resolution, been bound to register, according to the ordinary course of business, without any improper delay.

On appeal (a) the decision of the Master of the Rolls in *Shepherd's Case* (*y*) was affirmed, on the ground that there had not been, within sect. 35, any "unnecessary delay" in registering the transfer. The Lords Justices gave no opinion as to the effect of the discretionary clause in the articles, except that Cairns, L.J., said that the resolution amounted only to this, that the directors reserved to themselves the right of looking into the circumstances of every transfer before it was registered—a thing which they had a perfect right to do, provided they did not take an unreasonable length of time in doing it.

But although the Court will not interfere with the discretion given to the directors, if reasonably exercised, yet if before the commencement of a

(*r*) Eur. Arb. L. T. 139, 141; 18 Sol. J. 202.

(*s*) *Cameron Coalbrook Co., Hunt's Case*, 32 Beav. 387.

(*t*) *Poole* v. *Middleton*, 29 Beav. 646, 651; *Slee* v. *International Bank*, 17 L. T. 425; *London, Birmingham, &c., Bank*, 34 Beav. 332, 12 L. T. 45; and cases next cited.

(*u*) *Robinson* v. *Chartered Bank*, 1 Eq. 32.

(*x*) See *E. p. Penney*, 8 Ch. 446, 452.

(*y*) 2 Eq. 564; 2 Ch. 16.

(*z*) 3 Eq. 77.

(a) 2 Ch. 16.

winding-up a transfer has been duly executed and left for registration, and the directors have neglected to exercise their discretion either by approving or disapproving the transferee, and have left the transfer unregistered, then, there being "unnecessary delay" within the meaning of sect. 35, the Court will, if there is no reason why the transfer should have been disapproved, put the parties in the same position as if it had been approved (*b*).

And, in the absence of evidence of any objection to the transferee, it will be presumed that the directors would have registered the transfer (*c*).

Power is fiduciary.

A power of this kind is a fiduciary power to be exercised for the benefit of the company, and if wrested to a purpose foreign to its object, as, *e.g.*, to allow on terms dissentient shareholders to escape from the company, the transfer may be invalid (*d*).

A director may be competent to approve a transfer of shares to himself (*e*).

Evidence of approval.

Where no form of approval or consent is prescribed, anything from which it may fairly and reasonably be inferred that consent must have been given will be sufficient (*f*).

Objection need not be stated.

A power of this kind is given to directors for the benefit of the shareholders, and it is most important that they should be unfettered in the exercise of it. To compel them to give the reason why they rejected a particular individual would be to deprive the power of half its efficacy; the decision might be challenged, or the reason taken as an imputation on character and solvency, and the result would be an impossibility of free exercise of discretion by the terror of litigation.

Directors, therefore, are not bound to disclose their reasons for rejecting a proposed transferee, provided they have fairly considered the question at a meeting of the board. In the absence of evidence to the contrary, the Court will assume that they have acted reasonably and *bonâ fide*. To induce the interference of the Court evidence must be given that the power has been exercised capriciously or unfairly (*g*).

Discretionary clause, how to be construed.

In putting a construction upon a clause giving to directors a discretionary power of rejecting a proposed transferee it is necessary to bear in mind, on the one hand, that, apart from such a clause, the right of transfer is unlimited (*h*), and, on the other, that the object of such a clause is the protection of the shareholders (*i*). While, therefore, the power cannot be extended to authorize the refusal of a transfer in a case not provided for by the clause (*k*), the Court will not be slow to adopt such a construction as shall effectuate the desired object of protection (*l*).

Thus, where an absolute power of alienation is given, subject only to approval of the transferee, approval cannot be refused for the purpose of previously obtaining payment of a debt due to the company from the transferor (*m*).

So where the power was to decline registration of a transfer by a member indebted, or in the case of shares not fully paid up, to a transferee not approved by the directors, a transfer made for the purpose of acquiring a

(*b*) See *Nation's Case*, 3 Eq. 77, and other cases cited under s. 35.

(*c*) *Evans* v. *Wood*, 5 Eq. 9; and see *Paine* v. *Hutchinson*, 3 Ch. 388, 393.

(*d*) *Bennett's Case*, 5 D. M. & G. 284.

(*e*) *Bush's Case*, 6 Ch. 246, 262; L. R. 6 H. L. 37, 68.

(*f*) *Nicol's Case*, 3 De G. & J. 387, 434, 445.

(*g*) *E. p. Penney*, 8 Ch. 446. In *Reg.* v. *Liverpool, &c., Railway Co.*, 16 Jur. 949, a mandamus to compel registration of a transfer was refused on the ground that the transferee was not proceeding *bonâ fide* to enforce his rights as a shareholder.

(*h*) *Supra*, p. 26.

(*i*) *Nicol's Case*, 3 De G. & J. 387, 433.

(*k*) *Pinkett* v. *Wright*, 2 Hare, 120; *Stranton Iron Co.*, 16 Eq. 559.

(*l*) *Allin's Case*, 16 Eq. 449, *et infra*.

(*m*) *Pinkett* v. *Wright*, 2 Hare, 120, 130, 133.

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maximum of voting power could not on that account be refused registration (*n*).

But, on the other hand, where it was provided that the transferor should propose his transferee, and that the directors should consider the proposal and accept or reject him, and if he should be rejected and the directors should not within fourteen days procure another person to take the shares at the market price, the proposed transferee should be considered as approved, and be entitled to take a transfer, although it was in *Chappell's Case* (*o*) held by Mellish, L.J., that the directors' power of rejection was not absolute, but conditional only on their providing a substitute; yet in *Allin's Case* (*p*) Lord Selborne, sitting for the Master of the Rolls, held that the qualification of the power of rejection was to be construed strictly against the shareholder, that the words "at the market price" were not merely directory, and that the scope of the clause was such as to render invalid a transfer for the purpose of escaping liability which had not been approved.

So, in the European Arbitration, the construction placed by Lord Westbury upon the transfer clauses of the deed of settlement (*q*) was that the right to transfer arose only in the event of approval, or of silence on the part of the directors (*r*), and that in case of their expressing their disapproval within the fourteen days, no right to transfer arose (*s*).

In *Taft* v. *Harrison* (*t*) the deed of settlement providing that, in case the board should refuse to consent to a transfer, they should at the request of the holder be obliged to purchase the shares out of the funds of the company at a price to be determined by arbitration, it was held on motion that a *bonâ fide* refusal to purchase at a time when the company was in difficulties and had no funds for the purpose was sustainable, and that it did not follow that the holder was consequently at liberty to transfer to his proposed transferee.

Specific performance.

Specific performance of a contract for purchase of shares will not be decreed where the directors (having the power to do so) refuse to assent to the transfer, so that the transferee's name cannot be put on the register; unless it is a case in which the Court can and will compel their assent (*u*).

If the shareholder's contract is that he will not sell his shares without previously obtaining a certain assent, then the remedy of a person who, in ignorance of such restriction, has entered into a contract with him is only in damages, he cannot have specific performance (*x*).

But where the provision was that "no shareholder should be at liberty to transfer . . . except in such manner as a board . . . should approve" specific performance was decreed (*x*).

The transferee may call on the transferor to comply with the rules of the company, *e.g.*, to leave his certificate for inspection, so as to get the transfer registered, and if he decline, *semble*, the Court would compel him to do so in a suit for specific performance (*y*).

The contract of the seller of shares upon the Stock Exchange is that upon payment of the price he will deliver genuine transfers and certificates with the interest and rights which they convey. If the right which the transfer

(*n*) *Stranton Iron Co.*, 16 Eq. 559. *Cf. Moffatt* v. *Farquhar*, 7 Ch. D. 591; and see note to Table A., art. 44.

(*o*) 6 Ch. 902.

(*p*) 16 Eq. 449, 456.

(*q*) See these, *supra*, p. 34.

(*r*) *Bentinck's Case* (Eur. Arb.), L. T. 99; 17 Sol. J. 807; and see *Joshua Murgatroyd's Case* (Eur. Arb.), L. T. 115, 146, 17 Sol. J. 483; 18 Sol. J. 28.

(*s*) *Lloyd's Case* (Eur. Arb.), L. T. 25; 17 Sol. J. 46.

(*t*) 10 Hare, 489.

(*u*) *Bermingham* v. *Sheridan*, 33 Beav. 660.

(*x*) *Poole* v. *Middleton*, 29 Beav. 646.

(*y*) *East Wheal Martha Mining Co.*, 33 Beav. 119, 121.

conveys is under the articles not an absolute right to registration, but a right to registration if the directors approve, the purchaser cannot recover the price from the seller upon the ground that the directors refuse approval. There is no condition subsequent imposing on the seller the onus of procuring the consent of the directors to the transfer (*z*).

Where transferor resident abroad sells shares to transferee resident here the latter may sue for specific performance here, for the transferor must not only execute but deliver the transfer to the transferee, and as delivery will be here the contract is one "to be performed within the jurisdiction" (a).

Notice of refusal to register.

A company is under no obligation to send notice to a transferor of its refusal to accept a transfer. It is for the transferor to see that everything is complete; and the fact that a considerable time has elapsed since the transfer was sent in for registration does not affect the company, but leaves its rights exactly the same (*b*).

TRANSFER INEFFECTUAL.

If a shareholder dispose of his shares by an invalid transfer, or by any means which are ineffectual legally to relieve him of them, he will remain liable in respect of the shares, and this although he be entirely innocent in the matter. For if a person be once a shareholder he will remain a shareholder until he can show that he has in some lawful way got rid of his liability (*c*).

"Every one who has at any time become a shareholder, and is unable to shew that at the date of the order he had ceased to belong to the company, either by the forfeiture or transfer of his shares, or in some other authorized manner, must be placed upon the list" (*d*).

"A man who executes a transfer of shares remains liable unless and until there is on the list a transferee who is legally liable to the company, and you take, for the purpose of ascertaining whether the transferor has or has not provided such a transferee, the date of the winding-up" (*e*).

There may be exceptional cases in which a member may cease to be liable as a member without any one becoming liable in his place. Thus where by the articles of association participating policy holders of an Insurance Society are members and contributories, the assignor of a policy may cease to be a member, although under the provisions of the articles the assignee has not become a member in his stead (*f*). Whether the assignee has become a member or not depends upon whether the provisions of the articles for his admittance as a member have been complied with (*g*).

To the rule that transferor remains liable until transferee becomes liable ought to be added, on the one hand, the qualification, that if it is through the default or unnecessary delay of the company that there is not such a transferee on the list, the transferor will nevertheless be relieved (*h*); and on the other, that if the substitution of the transferee have been obtained by fraud to enable the transferor to escape liability, in that case, although there may be on the list a transferee legally liable, the transferor will nevertheless be made a contributory (*i*).

(*z*) *Stray* v. *Russell*, 1 E. & E. 888, 917; *London Founders' Association* v. *Clarke*, 20 Q. B. Div. 576.

(a) *Reynolds* v. *Coleman*, W. N. 1887, 166.

(*b*) *Gustard's Case*, 8 Eq. 438; and see *Shipman's Case*, 5 Eq. 219; and s. 35.

(*c*) *Addison's Case*, 5 Ch. 294, 297; *Bell's Case*, 4 App. Cas. 563.

(*d*) *Per* Lord Chelmsford, *Spackman* v. *Evans*, L. R. 3 H. L. 171, 238. And of course, if made contributory, it is quite immaterial that the debts were incurred after he supposed he had ceased to be a member. *Ibid.*

(*e*) *Per* Giffard, L.J., *Symons' Case*, 5 Ch. 298, 300; and see *Curtis' Case*, 6 Eq. 455, 459; *England's Case*, W. N. 1884, 174.

(*f*) *Albion Society*, *Brown's Case*, 18 Ch. D. 639.

(*g*) *Albion Society*, *Sanders' Case*, 20 Ch. D. 403.

(*h*) s. 35.

(*i*) *v.* cases *ante*, under this section.

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It follows from the above that, even although a transfer have been approved and registered by the company, yet, if it be not a valid transfer, the transferor remains liable.

These principles may be illustrated by the following cases:—

Transfer not accepted by transferee.

If a shareholder transfer shares into the name of a person without his authority, and the transferee never accepts them, the transferor remains liable (*k*), although his name has been taken off the register (*l*).

Acceptance of other shares, &c., on amalgamation.

Where a shareholder in the A. Company accepted, upon an amalgamation with the B. Company, shares in the B. Company in exchange for his shares in the A. Company, but never parted with his A. shares by transfer or in any effectual manner, he was made a contributory of the A. Company (*m*).

So, where for his A. shares he received partly B. shares and partly cash (*n*).

So, where the amount paid on his A. shares had been paid back to him by the B. Company and his share certificates delivered to that company, and the payment purported under the amalgamation agreement to be by way of satisfaction and in extinction of his shares, he was nevertheless, since his name remained on the A. register, liable on his A. shares, although he might possibly be a trustee for the B. Company so as to be entitled to an indemnity from that company (*o*).

So, where he sold his A. shares to the B. Company, and received the consideration money, and delivered to the B. Company his share certificates with a deed of transfer, but no alteration was made in the register, his executors were put on the list (*p*).

Where, upon a scheme for reconstruction, a shareholder accepted, in lieu of shares partly paid up, shares in the new company fully paid up and debentures partly paid up, he was not allowed, as against creditors of the old company who had not consented to the arrangement, to treat the instalments paid upon his debentures as being in reduction of his liability upon his shares in the old company (*q*).

Apart from questions of novation (*r*), the creditors of a company cannot be prejudiced by any proceedings whereby the company purports to merge itself into another company; and, as respects amalgamations carried out under powers in the deed of settlement or articles, creditors cannot have imputed to them knowledge of the details of an arrangement which may possibly come within such powers. The mere acceptance, therefore, of shares in the new company in exchange for those in the old company cannot, as against the creditors of the old company, discharge the shareholders' liability in respect of their old shares (*s*).

If, however, the creditors are not creditors of the company, but creditors upon a particular fund which fund is by the constitution of the company liable to be handed over to another company, then apart from novation alto-

(*k*) *Henessey's Executors' Case*, 3 De G. & Sm. 191; 2 Mac. & G. 201; and see *Durham and Northumberland, &c., Association's Case* (Alb. Arb.), 16 Sol. J. 630. So if the transfer has never been completed, *Gammon's Case* (Eur. Arb.), L. T. 117.

(*l*) *Heritage's Case*, 9 Eq. 5; *Curtmell's Case*, 9 Ch. 691.

(*m*) *E. p. Nash*, 16 L. T. 689; *cf. Woodhams* v. *Anglo-Australian Co.*, 2 D. J. & S. 162. Under such circumstances the shareholder will be liable on both the A. and the B. shares, *West's Case* (Eur. Arb.), L. T. 71, and see *infra*, s. 23, "Amalgamation."

(*n*) *Part's Case*, 10 Eq. 622.

(*o*) *Lee's Case* (Alb. Arb.), Reil. 1; 15 Sol. J. 636.

(*p*) *Nichols' Case* (Alb. Arb.), Reil. 40.

(*q*) *E. p. Jeaffreson*, 11 Eq. 109.

(*r*) *v. infra*, s. 158, n.

(*s*) *Pownall's Case* (Eur. Arb.), L. T. 8, Reil. 8; *Lancey's Case* (Eur. Arb.), L. T. 15, Reil. 12; 17 Sol. J. 8; *West's Case* (Eur. Arb.), L. T. 71; *Part's Case*, 10 Eq. 622; see also note to s. 143, *infra*.

gether the creditor may whether he wishes it or not be obliged to follow the fund and may lose any claim against the first company (*t*).

Transfer on amalgamation.

If on a transfer of the business which is not *ultra vires*, a shareholder have transferred his shares to a trustee for the new company, and they have power to buy, the transferor's liability is at an end (*u*).

Again, where company A. agreed to purchase the business of company B. and to make payment in part in shares of company A., and H., the solicitor of company A., who disapproved of the purchase, transferred his A. shares to members of company B. as part of the shares to be given for the purchase; it being afterwards sought to invalidate the transfer on the ground that the transaction was only a device to enable H. to rid himself of valueless shares, and also that its effect was to diminish the "area of the proprietary," because if H.'s shares had not been transferred, unallotted shares would have been issued, it was held upon the evidence, and after the lapse of time, that the transfer was good (*x*).

Where a transfer was effected to the nominee of another company as part of a scheme for the amalgamation of the two companies, the second company having no power to buy shares, and the transfer was not registered, the transferor was held liable (*y*).

Transfer of its own shares to nominee of a company.

A purchase by a company of its own shares being illegal (*z*), a transfer to a nominee of the company leaves the transferor liable (a).

But it does not follow that the transferee is not liable. Thus in *Cree* v. *Somervail* (*b*) the directors applied moneys of the company in buying shares, and they were transferred into the names of three directors "in trust for the company." The liquidator applied to remove their names and to substitute the names of the transferors. The House of Lords refused the application, holding that whether the transaction was right or not, and whether the directors as trustees for the company were entitled to be indemnified by the company or not, their names had with their authority been registered as shareholders, and after winding-up commenced they could not be released.

If the transferor had no knowledge that the transferee was the nominee of the company (*c*), or if, though the transaction be suspicious, there is nothing to shew that he was such nominee (*d*), the transfer is valid.

If, however, the Court come to the conclusion on the evidence that the transfer was made with the knowledge of the transferor to the directors on behalf of the company, the transfer will be invalid, and the transferor will consequently remain liable (*e*).

Transfer which is in fact a surrender.

So any transfer which in fact amounts to a surrender will, even where there is a power of accepting surrenders or buying up shares, be ineffectual, if not within the principle (*f*) which requires surrenders to be taken only *bonâ fide* for the benefit of the company (*g*).

(*t*) *Hort's Case*, 1 Ch. Div. 307; *Grain's Case*, 1bid.; *Cocker's Case*, 3 Ch. Div. 1; *Dowse's Case*, 3 Ch. Div. 384.

(*u*) *Rivington's Case* (Eur. Arb.), L. T. 57; 17 Sol. J. 403; 3 Ch. Div. 10; *Doman's Case* (Eur. Arb.), L. T. 133, 159; 17 Sol. J. 785; 18 Sol. J. 798; 3 Ch. Div. 21.

(*x*) *Horn's Case*, 12 W. R. 904.

(*y*) *Clack's Case*, 14 W. R. 986.

(*z*) See note to s. 23, *ad fin.*; and to Table A. art. (17)—(19).

(a) *Addison's Case*, 5 Ch. 294.

(*b*) 4 App. Cas. 648.

(*c*) *Nicol's Case*, 3 De G. & J. 387, where he was the solicitor of the company; *Grady's Case*, 1 De G. J. & S. 488, where he was managing director; but there was in this case power to buy shares with the consent of a general meeting, and such consent was assumed.

(*d*) *Jessopp's Case*, 2 De G. & J. 638.

(*e*) *Cross' Case*, 38 L. J. (Ch.) 583; 17 W. R. 1006.

(*f*) See *infra*, Table A. art. (17)—(19), note.

(*g*) *Morgan's Case*, 1 De G. & Sm. 750; 1 Mac. & G. 225; 1 H. & T. 320; *Lawes' Case*, 1 D. M. & G. 421; *Bennett's Case*, 5 D. M. & G. 284; and *cf. Daniell's Case*, 22 Beav. 43; (see also 3 Jur. (N.S.) 803;) *Munt's Case*, 22 Beav. 55.

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However, in *Singer's Case* (*h*), in a company whose articles contained a clause in large terms empowering the directors to act as they should deem expedient, a shareholder who, being dissentient to a certain proceeding of the company, was allowed to transfer some of his shares to a nominee for the company, was held not to be a contributory in respect of the shares transferred. This was equivalent to a forfeiture.

Where there was given to directors a power to purchase shares in the company, it was held (assuming the power to be legal) that it was a special power not within the scope of the duties of, nor capable of being delegated to, the general manager; and the shares having been purchased and transferred to the directors without a due exercise of the power, the principle of *Royal British Bank* v. *Turquand* (*i*) did not apply in favour of the transferor (*k*).

Transferor indebted to the company.

In a company, whose articles provided that a transfer might be refused in a case where the transferor was indebted to the company (*l*), a transfer by a holder who had not paid his calls was duly passed and registered; after thirty-four days the secretary, finding that the registration had been allowed by mistake, cancelled the transfer without the authority of the directors. The company being subsequently wound up, it was held that the transfer, having been passed under a mistake, was invalid, and the transferor was placed on the list of contributories (*m*).

In another company, whose articles contained a similar provision, A. executed a transfer of his shares, and sent it to B. to be left with the secretary for registration, together with £320, being the amount due for calls. B. appropriated the £320, and tendered to the company in payment of A.'s calls certain overdue coupons, on some of which equities were attaching as between himself and the company. It was held that this was not a payment, or anything equivalent to a payment, of the amount due from A. for calls, that consequently the company were not bound to register the transfer, and that A. remained liable for the shares (*n*).

Transfer of shares as fully paid up.

Many cases have arisen in which shares registered as fully paid up have, under the Companies Act, 1867, sect. 25, proved to leave their holders liable for calls. If the original holder of such shares transfer them as fully paid up, a suggestion was thrown out by Mellish, L.J., in *Spargo's Case* (*o*), whether in the hands of the transferee they are not to be treated as fully paid, and whether the liability on the shares does not remain in the transferor (*o*). It is now clearly settled that in such a case the shares must, in the hands of a transferee who has purchased without notice of the circumstances under which they were issued, be treated as paid (*p*).

Infant transferee.

If the transfer be to an infant, who remains an infant at the time of the winding-up, the transferor remains liable, although he was not aware of the infancy of the transferee, and although the transfer has been accepted and registered by the company. And the infant will not lose his right to be taken off the list by some delay in making application for that purpose (*q*).

(*h*) W. N. 1869, 206.
(*i*) 5 E. & B. 248; 6 E. & B. 327.
(*k*) *Cartmell's Case*, 9 Ch. 691.
(*l*) 32 & 33 Vict. c. 19, s. 14, as to companies in the Stannaries.
(*m*) *Anderson's Case*, 8 Eq. 509.
(*n*) *Henry Holden's Case*, 8 Eq. 444.
(*o*) 8 Ch. 407, 410.
(*p*) *British Farmers Co., Nicolls' Case*, 7 Ch. Div. 533; *Burkinshaw v. Nicolls*, 3 App. Cas. 1004; and see note to Comp. Act, 1867, s. 25.
(*q*) *Litchfield's Case*, 3 De G. & Sm. 141; *Reid's Case*, 24 Beav. 318; *Mann's Case*, 3 Ch. 459, n.; *Capper's Case*, 3 Ch. 458; *Delmar's Case*, *Hart's Case*, 38 L. J. (Ch.) 85; 17 W. R. 21; 19 L. T. 304; *Sassoon's Case*, 20 L. T. 161, 424; *Edwards' Case*, W. N. 1869, p. 211, where the infant was a female, and had since married; *W. H. Bentinck's Case* (Eur. Arb.), L. T. 143; 18 Sol. J. 224; where the infant was

So, where a father, being the holder of certificates of a company, the shares in which passed by delivery of the certificates, gave them to his son, an infant, and on the company being registered under the Companies Act, 1862, the son sent in the certificates and exchanged them for shares, and the father bought other shares in the name of his son, and they were so registered, the father was, in the winding-up, held liable as a contributory in respect of the shares (*r*).

So, where a father purchased shares in the name of his infant son, and took the receipt for the purchase money and the transfer in his son's name, he was treated as acting under an *alias* and made personally liable as contributory (*s*).

And although the infant have, since the transfer to him and before the winding-up, sold and transferred some of the shares, this will not relieve the shareholder who transferred to the infant from liability in respect of the shares standing in the infant's name at the time of the winding-up (*t*).

A transfer to an infant is, however, not void, but voidable (*u*), and apart from the effect, whatever it may be, of the Infants Relief Act, 1874 (*x*), the infant may confirm the transaction on attaining his majority if no winding-up order has been made before that time.

Thus confirmation may be made by acquiescence; as where an infant transferee, having become adult nearly two years before the commencement of the winding-up, and having during that time taken no steps to repudiate the shares, though proceedings had been taken to enforce calls, was held to be a contributory (*y*).

And if a winding-up order has been made before he comes of age, he may still confirm the contract, provided the official liquidator accept him as a shareholder; but some distinct act must be shewn to make him liable. The mere appearance of solicitors for him, together with others, at Chambers, in opposition to a call, does not amount to confirmation or acquiescence (*z*).

Again, where the infant transferee paid, while still an infant, a call in the winding-up, and after attaining his majority entered into some negotiations for a compromise of his liability, the transferor was nevertheless, on the application of the liquidators, made contributory (a).

And if the infant transferee be still an infant at the date of the winding-up, the official liquidator may refuse to accept him as a shareholder, although after coming of age the infant be willing to confirm the transfer (*b*).

If, however, the company, having become aware of the infancy of the transferee, do not, as in *Capper's Case* (*c*), give the transferor notice that the transferee is an infant, and that they hold him liable, but conceal the fact from the transferor, and then after a length of time (as, *e.g.*, three and a half years) come upon the transferor to make him liable, they will be precluded by laches from so doing (*d*).

If the infant transferee attain his majority before the winding-up order, and do not repudiate the shares, but do anything amounting to confirmation of the contract, the transfer cannot afterwards be objected to on the part of the official liquidator.

made to repay dividends received while the company was a going concern.

(*r*) *Weston's Case*, 5 Ch. 614.

(*s*) *Richardson's Case*, 19 Eq. 588. Contrast *London, Bombay, &c., Bank*, 18 Ch. D. 581.

(*t*) *Curtis' Case*, 6 Eq. 455.

(*u*) *Lumsden's Case*, 4 Ch. 31; see this well illustrated in *Gooch's Case*, 14 Eq. 454; 8 Ch. 266.

(*x*) 37 & 38 Vict. c. 62.

(*y*) *Mitchell's Case*, 9 Eq. 363.

(*z*) *Wilson's Case*, 8 Eq. 240.

(a) *Cheetham's Case*, W. N. 1869, 201.

(*b*) *Castello's Case*, 8 Eq. 504; *Symons' Case*, 5 Ch. 298.

(*c*) 3 Ch. 458.

(*d*) *Parson's Case*, 8 Eq. 656.

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Thus, where L. transferred fifty shares to H., an infant, who was also the transferee of a large number of other shares in the same company, and H., attaining his majority more than five months before the winding-up order, in the interval transferred some of the other shares, but neither repudiated nor disposed of the fifty shares, the application of the official liquidator to substitute L.'s name for that of H. on the list was refused (*e*).

If an infant transferee have, on attaining his majority, repudiated the shares, and his repudiation have been accepted by the company, any subsequent act by which he appears to acknowledge his liability must be very strong indeed in order to act as a repudiation of that repudiation (*f*).

Vendor's right to indemnity:

As to the vendor's right to indemnity from a transferee who has neglected or been unable to complete and register the transfer, see sect. 35, *infra*.

in case of transferee being an infant.

A person who purchases shares and has them transferred into the name of an infant may be made liable to indemnify the transferor.

Thus, where A. sold shares to B., and B. had them transferred into the name of his son, who was a boy at school, upon bill filed by A., praying that it might be declared that the son was a trustee for his father, or that the father purchased the shares on his own account, and not as agent for the infant, and for indemnity, a decree was made as prayed (*g*).

If in such a case it appear by the evidence that the father has placed the shares in his son's name, not as trustee for himself, but for the son as beneficial owner, on an application to rectify the register, the vendor's name, and not that of the father, must be put on the list; but this cannot, of course, in any way prejudice the right of the vendor to an indemnity from the father in respect of the liability on the shares (*h*).

See further sect. 35, *infra*, "Indemnity."

Mode of transfer.

As to the way in which transfers may be made, and the effect of a transfer invalid as a deed, or informal, or irregular, see *infra*, the notes to Table A., art. (8).

Payment into Court.

When stock in a public company is paid into Court, the transfer should be expressed to be to the account of, and not to, the Paymaster-General. Stock or shares on which there is any liability cannot be transferred to or to the account of the Paymaster-General (*i*).

Definition of "member."

23. The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned (*α*); and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members (*β*), shall be deemed to be a member of the company.

(*α*) s. 25.

(*β*) See *Portal* v. *Emmens*, 1 C. P. D. 201, 1 C. P. Div. 664; *Tufnell's Case*, 29 Ch. Div. 421.

Register not conclusive.

Although it is, as a matter of policy, of very great importance to make the register as conclusive as possible, yet it certainly is not and cannot be

(*e*) *Lumsden's Case*, 4 Ch. 31; and see *Mitchell's Case*, 9 Eq. 363; as to an infant allottee, see *Ebbett's Case*, 5 Ch. 302, and s. 23.

(*f*) *Baker's Case*, 7 Ch. 115.

(*g*) *Nickalls* v. *Furneaux*, W. N. 1869, p. 118; and see *Weston's Case*, 5 Ch. 614.

(*h*) *Maitland's Case*, 38 L. J. (Ch.) 554; *Edwards' Case*, W. N. 1869, 211. See, however, *Richardson's Case*, 19 Eq. 588.

(*i*) *Re Stephens*, 8 Ch. 465; see *Povah* v. *Walker*, 15 Eq. 316.

absolutely conclusive on the question of who are the parties responsible to the creditors of the company (*k*). The subscribers of the memorandum of association are liable, whether they have been entered on the register of members or not (*l*). As regards other persons, the statute makes it a condition precedent to membership that their names shall have been entered on the register (*l*). But it does not follow that a person who has agreed to become a member can escape liability because his name has not been entered on the register. For the Act supplies as well before (s. 35) as after (s. 98) winding-up the means of rectifying the register, and if a person ought to be, but is not on the register, he cannot escape liability on that ground, for he may be put on by rectification (*m*). Again, the register may, under sect. 35, be purged of a number of persons whose names appear upon it if it be shewn that their names have been placed there without any authority or agreement on their parts, or in case of default or delay on the part of the directors, and this notwithstanding a winding-up order has been made (*n*); and, on the other hand, the names of other persons may be substituted for them (*o*).

In *Portal* v. *Emmens* (*p*), the Court of Common Pleas, in a judgment delivered by Lindley, J., said of the Companies Clauses Act:—"The true view of the Act we take to be as follows:—1. If a proper register is kept that register is *primâ facie* evidence that a person whose name is on it is a shareholder, see sect. 28 (*q*). 2. If in addition it be proved that such person has become by subscribing to the prescribed sum or otherwise entitled to a share in the company, the evidence that he is a shareholder is conclusive. 3. If there be no register, or if the register is so defective as to be inadmissible in evidence, other evidence must be adduced to prove that a person is a shareholder (*r*)." It is conceived that this is equally true of this Act.

Different classes of members.

There is nothing in the Act of Parliament to prevent there being different classes of members, *e.g.*, in a mutual assurance society, members who are shareholders and primarily liable for the debts, and participating policy-holders not holding shares and only secondarily liable (*s*), or not liable at all (*t*); or again in a life and fire insurance society, members who hold life shares and are liable only on life policies, and members who hold fire shares and are liable only on fire policies (*u*). Before the Act a partnership might have been formed upon any such terms, and inasmuch as sect. 4 now renders illegal partnerships of more than twenty members unless registered, then if the Act did not allow of such a company, it would have indirectly prohibited the future formation of a species of partnership which was perfectly legitimate before (*x*).

Who are members.

The members of the company are defined by this section, and are either (1) subscribers of the memorandum of association; or (2) persons who have agreed to become members.

(*k*) See s. 37.

(*l*) *Tufnell's Case*, 29 Ch. Div. 421; *Nanney* v. *Morgan*, 35 Ch. D. 598.

(*m*) See *e.g. Winstone's Case*, 12 Ch. D. 239, 249.

(*n*) s. 98.

(*o*) *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 77, 80; and see *e.g. Whittet's Case*, 2 De G. & J. 577; *E. p. White*, 16 L. T. 276; *Lyster's Case*, 4 Eq. 233; *Heritage's Case*, 9 Eq. 5; *Palmer's Case*, I. R. 2 Eq. 573; *E. p. Fox*, 11 W. R. 577; 8 L. T. 223; 2 N. R. 1; *Beck's Case*, 9 Ch. 392, 394; and cases cited under this section and under s. 35.

(*p*) 1 C. P. D. 201, affirmed 1 C. P. Div. 664.

(*q*) *Cf.* Comp. Act, 1862, s. 37.

(*r*) See 1 C. P. D. 212.

(*s*) *Winstone's Case*, 12 Ch. D. 239.

(*t*) *Gt. Britain Mutual Soc.*, 16 Ch. Div. 246, where however there was only the one class of policy-holders not liable. See s. 38, note.

(*u*) *Bath's Case*, 8 Ch. Div. 334; and see s. 38, note.

(*x*) *Winstone's Case*, 12 Ch. D. 239, 252.

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SUBSCRIBER OF THE MEMORANDUM.

A person who signs a memorandum of association for any number of shares thereby contracts to become a shareholder in respect of that number of shares, and becomes absolutely bound to take those shares from the company and pay a proper consideration for them; and so long as there are shares that can be allotted to him (*y*) he must fulfil that obligation.

If no allotment has been made to him, and all the shares have been allotted to other persons, the subscriber is no longer liable; and the fact that by subsequent forfeiture the company has afterwards become possessed of shares which might have been allotted to the subscriber makes no difference (*z*). The principle here is clear: the subscriber is liable only by virtue of the contract, which under this section arises immediately upon his signature. By allotting all the shares elsewhere the company has put it out of its power to perform the contract on its part, and can therefore no longer enforce it.

Similarly where persons applied for a large number of shares and allotments were made to them, but their names were not put on the register and they never received any certificates nor made any payment, and subsequently under altered arrangements all the shares were allotted to other persons, the original allottees were not liable as contributories (a).

If the subscriber omits to write opposite his name the number of shares he takes, *semble* he will be a subscriber for one share (*b*).

The fact that no shares have ever in fact been allotted to a subscriber of the memorandum, and that his name has never been put on the register, will not relieve him (*c*).

Under Table A. (*d*), where applicable, the subscribers of the memorandum are to be deemed to be directors until directors are appointed, and special articles often adopt a similar provision. Where this is the case it is the subscriber's duty to enter his own name on the register (*e*); but whether he have acted as a director (*f*) or not (*g*), the fact that his name has not been entered does not relieve him from the liability to take shares.

The subsequent allotment of a larger number of shares than that for which he subscribed the memorandum will cover the number for which he subscribed, and satisfy the contract (*h*); and where he subscribed the memorandum for fifty and subsequently made written application for a hundred, and a hundred were allotted to him, he was not liable for a further fifty (*i*). But the shares so allotted must not be nominally paid-up shares (*k*), but shares in respect of which the subscriber's contract, viz., to take and *pay for* the shares, is to be carried out by payment either "in meal or malt" (*l*).

The contract is to take the shares *from the company*, and the obligation is not satisfied by taking them from some one else (*m*). If the subscriber take

(*y*) *Tyddyn Sheffrey Slate Quarries Co.*, 20 L. T. 105; see *Drummond's Case*, 4 Ch. 772, 776, 780; *Evans' Case*, 2 Ch. 427.

(*z*) *Mackley's Case*, 1 Ch. D. 247; *Kipling* v. *Todd*, 3 C. P. Div. 350.

(a) *Tufnell's Case*, 29 Ch. Div. 421.

(*b*) s. 8.

(*c*) *Evans' Case*, 2 Ch. 427; *London Coal Co.*, 5 Ch. D. 525. *Cf. Portal* v. *Emmens*, 1 C. P. D. 201, 219.

(*d*) See Table A. art. (53), *infra*.

(*e*) *Hall's Case*, 5 Ch. 707; *Forbes' Case*, 19 Eq. 353.

(*f*) *Evans' Case*, 2 Ch. 427; *Tooth's Case*, W. N. 1868, 270; 19 L. T. 599.

(*g*) *Levick's Case*, 40 L. J. (Ch.) 180; 23 L. T. 838; *Sidney's Case*, 13 Eq. 228.

(*h*) *Freen & Co.*, 15 W. R. 166; 15 L. T. 406; *Drummond's Case*, 4 Ch. 772.

(*i*) *Gilman's Case*, 31 Ch. D. 420.

(*k*) *Migotti's Case*, 4 Eq. 238; and other cases, *infra*.

(*l*) *v. infra*, "Payment in money's worth."

(*m*) *Migotti's Case*, 4 Eq. 238; *Bennet's Case*, 15 W. R. 1058; 16 L. T. 475; *Tooth's Case*, 19 L. T. 599; W. N. 1868, 270; *Forbes and Judd's Case*, 5 Ch. 270; *Dent's Case*, 15 Eq. 407; 8 Ch. 768; *Fraser's Case*, 28 L. T. 158; 21 W. R. 642; 42 L. J. (Ch.) 358.

the shares in the names of other persons, the register may be rectified by putting his name on for the whole number of shares (*n*).

No lapse of time will relieve the subscriber from his liability (*o*); the only way of getting rid of it is to take the shares, and then make a valid transfer (*p*), unless indeed the contract has been put an end to by the allotment of all the shares to others (*q*).

Where the subscriber signed, as he said, conditionally in the belief, founded on the statement of the solicitor of the company, that unless two-thirds of the capital were subscribed he would be entitled to withdraw, and two-thirds not having been subscribed, he did withdraw with the consent of the directors, and was never afterwards treated as a member, nor was his name ever placed on the register; he was, nevertheless, four years afterwards, made a contributory in the winding up (*p*).

If the directors have power to accept a surrender of shares, and do accept a surrender from a subscriber to the memorandum, this will be valid, and will relieve him from his liability, although his name has never in fact been entered on the register (*r*); but if the transaction be not a surrender and forfeiture, but a dealing in shares which is *ultra vires* the directors, the subscriber will, of course, remain liable (*s*).

Thus where before any allotment disputes having arisen between the subscribers, it was resolved that the shares subscribed for should not be allotted to certain of the subscribers, those subscribers were nevertheless liable. For the directors had no power to cancel the contract to take the shares (*t*). The articles contained no power to accept surrenders.

The contract to which the subscriber is irrevocably bound by subscription is to contribute a certain amount of capital, but he is not irrevocably bound as to other matters which are not by the Act required to be stated in the memorandum. Thus if he sign the memorandum for a certain number of preference shares, and by subsequent agreement with the company he takes ordinary shares instead, his obligation is satisfied (*u*).

Payment in money's worth (*x*).

The contract on the part of the subscriber is, to take the shares and pay a proper consideration for them, but (apart from Companies Act, 1867, s. 25) it is not necessary that the payment should be in money, it is sufficient that he gives money's worth (*y*).

That is to say, the payment for shares may be made by the present transfer of property from the shareholder to the company, or the consideration may be a debt due from the company to the shareholder.

Consideration, a debt due from the company.

If the consideration be a debt from the company to the subscriber, it will make no difference at what time the debt was contracted; but the only question is, whether there is, at the time when the shares are to be paid for, a valid debt due from the company to the subscriber and immediately payable, so that the demands can be set off against each other (*z*).

(*n*) *Nokes' Case*, 16 W. R. 413, 1135; 37 L. J. (Ch.) 470, 624.

(*o*) *Levick's Case*, 40 L. J. (Ch.) 180; 23 L. T. 838; where twenty months had elapsed; *Sidney's Case*, 13 Eq. 228, five years; *Tooth's Case*, W. N. 1868, 270; 19 L. T. 599, seven and a half years.

(*p*) *Sidney's Case*, 13 Eq. 228, referring to *Levick's Case* and *Migotti's Case*, *v. supra*.

(*q*) See notes (*z*), (a), p. 46.

(*r*) *Snell's Case*, 5 Ch. 22.

(*s*) *Hall's Case*, 5 Ch. 707, where a deed of release and indemnity was held ineffectual.

(*t*) *London Coal Co.*, 5 Ch. D. 525.

(*u*) *Duke's Case*, 1 Ch. D. 620.

(*x*) See also note to Table A. art. (4).

(*y*) *Drummond's Case*, 4 Ch. 772; *Pell's Case*, 5 Ch. 11, varying the decision of Romilly, M.R., 8 Eq. 222; *Baglan Hall Colliery Co.*, 5 Co. 346; *Schroder's Case*, 11 Eq. 131; *Jones' Case*, 6 Ch. 48; *Key's Case*, 16 W. R. 1103, in which the decision was similar to that in *Pell's Case*, *supra*, before the Master of the Rolls. The agreement, however, in *Key's Case* was not binding.

(*z*) *Forbes and Judd's Case*, 5 Ch. 270, 272. See *Baglan Hall Colliery Co.*, 5 Ch. 346, 356.

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If there be a contract of such a nature that on action brought by the company it could not be set aside, a payment for shares in kind according to that contract is legal (a).

On these principles a subscriber who was a shareholder in a former company which transferred property to the company (*b*); a subscriber who, according to an agreement in the articles, took paid-up shares as the purchase-money for a business which he had sold to the company (*c*); subscribers who being partners, formed themselves into a company and sold their property, in fact, to themselves (*d*); shareholders who paid in Confederate bonds, which at the time were valuable, but afterwards turned out worthless (*e*), have been held to have discharged the payments on their shares.

The test in such cases is whether, if the company had been prosperous, the subscriber could have compelled the allotment to himself of the shares for which he had subscribed in addition to those which he had taken in payment for property transferred to the company.

In all the above cases it must be taken to have been shewn that the shares subscribed for and the shares agreed to be taken in payment were the same (*f*), or at least that the matter had been so dealt with that neither the company nor the subscriber could deny that they were the same (*g*); for it is clear that payment can never be made by the set-off of another set of shares to which the subscriber is entitled. Such a set-off would be in effect a cancellation of capital (*h*).

So in *Maynard's Case* (*i*), payment by the subscriber was deemed to have been made only because, on the construction of the documents, payment by the company was to have been in cash.

Provisions in the articles as to payments.

It being competent to a subscriber to make payment for his shares in any honest way by anything which is equivalent to actual payment (*k*), there is no inconsistency between a memorandum which is general in its terms and articles which state that payment for the shares subscribed for is to be made in a particular way according to a contract which is referred to in the articles (*l*): but a clause in the articles providing that such shares shall not be paid for at all, but shall be allotted as fully paid up, is simply inoperative and void (*m*).

Payment, whether made.

What the subscriber has to shew is, that he has taken the shares from, and has made payment to, the company. It is idle to allege that there have been allotted to him, as the nominee of another person, shares upon which that other person has made payment (*n*), and, of course, an alleged pay-

(a) *Per* Giffard, L.J., *In re Baglan Hall Colliery Co.*, 5 Ch. 346, 354.

(*b*) *Drummond's Case*, 4 Ch. 772.

(*c*) *Jones' Case*, 6 Ch. 48; *Pell's Case*, 5 Ch. 11; but *per* James, L.J., *quære*, whether the decision of Romilly, M.R., 8 Eq. 222, by which the subscriber in this case was made contributory, and credited with the value of the property handed over, was not right; see 6 Ch. 49; 15 Eq. 411; 8 Ch. 280.

(*d*) *Baglan Hall Colliery Co.*, 5 Ch. 346.

(*e*) *Schroder's Case*, 11 Eq. 131.

(*f*) See *per* Selborne, L.C., *Fothergill's Case*, 8 Ch. 270, 276; *cf. Duke's Case*, 1 Ch. D. 620.

(*g*) See *per* L.JJ., S. C., 8 Ch. 280, 281.

(*h*) *Fothergill's Case*, 8 Ch. 270; *Dent's Case*, 8 Ch. 768, 777. *Quære*, whether by a contract registered under Comp. Act, 1867, s. 25, this could be done. See note to that section.

(*i*) 9 Ch. 60. *Quære*, on this point *Coates' Case*, 17 Eq. 169, stands alone. The registered agreement was to sell for *shares* (the cash payments were otherwise accounted for), and it did not upon that agreement appear that these shares were the same as the shares subscribed for. See note to Comp. Act, 1867, s. 25.

(*k*) *Dent's Case*, 8 Ch. 768, 776.

(*l*) *Per* Giffard, L.J., *Baglan Hall Colliery Co.*, 5 Ch. 346, 354; and see *Dent's Case*, 8 Ch. 768, 776. *Anderson's Case*, 7 Ch. Div. 75.

(*m*) *Dent's Case*, 8 Ch. 768.

(*n*) *Forbes and Judd's Case*, 5 Ch. 270; *Fraser's Case*, 28 L. T. 158; 21 W. R. 642; 42 L. J. (Ch.) 358, *et supra*.

ment, which was, in fact, a mere juggle and handing backwards and forwards of cheques between the promoter, the subscriber, and the company, is not payment (*o*).

But, *semble*, if A., being a subscriber of the memorandum, is a creditor of B., to whom the company is indebted, and A. accepts from B. payment in shares which are issued to B. as paid up in respect of the debt so due to B. from the company, such shares may be attributed to the subscription of the memorandum, and be held paid up, the effect being to discharge the company from an equivalent amount of debt due from the company to B. (*p*).

Agreement to receive calls in money's worth.

In all the foregoing cases that which has been under consideration has been the present payment for shares in money's worth, for, *semble*, the company cannot contract that the calls in respect of what remains to be paid up shall be set off against goods to be from time to time supplied by the shareholder, instead of being paid in money (*q*).

Comp. Act, 1867.

The decisions above noticed must, in cases falling under the Companies Act, 1867, be taken subject to the provision of the 25th section of that Act as to payment in cash. The effect of this section will be found discussed in the note appended to it.

Allotment of paid-up shares.

The subscriber's obligation to take shares is not satisfied by the allotment to him at a subsequent period of fully paid-up shares to which some one else is entitled (*r*), or by anything short of his taking and paying to the company (*s*), either in money or money's worth, the amount payable on the shares.

The same shares cannot be made to do double duty, and shares already allotted and paid for by one transaction cannot, by coming into the hands of a subscriber, discharge that which is the obligation incurred by subscription, viz., the finding a certain amount of capital for the company.

It has been held that if a person subscribe the memorandum for ordinary shares and also for shares which are described on the face of the memorandum as "paid up," he will not be liable as a contributory in respect of the latter shares, although they have not in fact been paid up, because the memorandum itself gives notice that there is no liability on those shares (*t*).

Evidence of real consideration, where nominal consideration stated.

If the deed of assignment to the company of property, given as the consideration for paid-up shares, states only a nominal consideration, this will not prevent the admission of evidence *aliunde* to shew the real consideration (*u*).

Alteration in the articles after subscription.

After F. had signed the memorandum and articles of association of a company, an alteration was made in the articles. It was held that the articles were consequently not binding on F., that the articles and memorandum constitute one instrument, and that F. was therefore not liable as a contributory (*x*).

But an alteration made in the articles under sect. 50, after a person has applied for shares, but before allotment, being an alteration by which the objects of the company are not altered, does not invalidate the allotment (*y*).

(*o*) *Leeke's Case*, 11 Eq. 100 (where see some remarks by Stuart, V.C., on the earlier cases), 6 Ch. 469.

(*p*) *Per* Selborne, L.C., *Dent's Case*, 5 Ch. 768, 777. But, *quære*, is not this making the same shares do double duty?

(*q*) *Pellatt's Case*, 2 Ch. 527; and see Comp. Act, 1867, s. 25, and Table A. art. (4), note.

(*r*) *Migotti's Case*, 4 Eq. 238; *Forbes and Judd's Case*, 5 Ch. 270; *Bennet's Case*, 15 W. R. 1058; 16 L. T. 475; *Nickoll's Case*, 24 Beav. 639; and *cf. Finance Co.*, 19 L. T. 273; *Derham's Case*, W. N. 1867, 8.

(*s*) And not to some one else, *Fraser's Case*, W. N. 1873, 53; 28 L. T. 158; 21 W. R. 642; 42 L. J. (Ch.) 358.

(*t*) *Baron de Beville's Case*, 7 Eq. 11. See also *Baglan Hall Colliery Co.*, 5 Ch. 346, 350, n.

(*u*) *Leifchild's Case*, 1 Eq. 231.

(*x*) *Felgate's Case*, 2 D. J. & S. 456; and see *Peel's Case*, 2 Ch. 674.

(*y*) *Lyon's Case*, 35 Beav. 646.

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Signature of duplicate of memorandum.

Semble, the signature of a person attached to a duplicate of the memorandum of association, and not being the copy which is actually registered, is sufficient to bind him (*z*).

Where P., the owner of a mine, approved of and acquiesced in the publication of a prospectus for the formation of a company to work the mine, in which he was represented as a director and holder of 1000 shares, and he signed copies of the memorandum and articles of association, in which he was also represented as a director and holder of 1000 shares, but the copies which were actually registered did not bear his signature, he was held to be a contributory, although no allotment of shares or register of shareholders had been made (a).

In the same company S. signed a copy of the memorandum of association, but was held, under all the circumstances, not to be liable (*b*).

Signature by agent.

Signature of the memorandum by an agent verbally authorized is sufficient (*c*). But signature by an unauthorized agent is, of course, ineffectual (*d*).

AGREED TO BECOME A MEMBER.

A "member" is by this section defined to be anyone who has "agreed to become a member and whose name is entered on the register." As regards subscribers of the memorandum the section at once sweeps them within the definition by enacting that they shall be deemed to have so agreed. As regards any other person, to fix him as a member it is necessary to shew that he has agreed to become one.

"A man may become a contributory to a company by his acts, although he has not made himself legally a member of it" (*e*).

1. Directors.

First, as to directors acting under articles which contain a director's qualification clause.

Qualification.

The articles of many companies contain a clause prescribing a certain *minimum* number of shares as the qualification of a director (*f*). The acceptance of an office to which the condition of holding a certain number of shares is attached may manifestly be evidence of an agreement to obtain the requisite number of shares.

The same principle applies to the case of an agent for the company where it is part of the original arrangement between the agent and the company that the agent shall take shares (*g*).

The basis of the cases on qualification shares is the existence according to the constitution of the company of a qualification affixed to the office of a director. An entry in the books that at a board meeting it was proposed and seconded that the future qualification of the directors be so many shares is a very different thing: and *quære*, even a resolution passed by the Board on the subject would be insufficient (*h*).

There are to be found in the cases *dicta* which go far to support the proposition, that by agreeing to become a director a man *ipso facto* agrees to become a member for the qualification shares, and that, if he has not already got them, he is thenceforward bound to take them from the company.

(*z*) *New Brunswick and Canada Co.* v. *Boore*, 3 H. & N. 249, decided under the Act of 1856.

(a) *Palmer's Case*, I. R. 2 Eq. 573; and see p. 600

(*b*) *Smyth's Case*, I. R. 2 Eq. 573.

(*c*) *Whitley Partners, Limited*, 32 Ch. Div. 337.

(*d*) *Land Shipping Colliery Co.*, 18 L.T.786.

(*e*) *Per* Lord St. Leonards. *Spackman* v. *Evans*, L. R. 3 H. L. 171, 208.

(*f*) The Act of 1844 (7 & 8 Vict. c. 110, s. 28) required a director to be the holder of one share. But neither the present Act nor Table A. (see art. (52), *et seq.*) contains any such provision.

(*g*) See *Davis' Case*, 26 L. T. 650; 41 L. J. (Ch.) 659, and *infra*.

(*h*) *De Ruvigne's Case*, 5 Ch. Div. 306; *Ranken's Case*, W. N. 1879, 7, 157.

But this is going too far, and no case has decided that acting as a director amounts to a contract to take shares within this section (*i*). Even if an agreement to become a director implies an agreement to take the shares, it does not follow that it is an agreement to take them from the *company* (*k*); neither is there to be extracted from a qualification clause in the articles any agreement *with the company* in the matter, the agreement if any is with the other members (*i*). Moreover the director ought to be allowed a reasonable time to get the shares, and before the authorities had gone so far in holding that the qualification clause imports no contract with the company at all it was said that if the director acquired the shares by purchase in the market, or by transfer from a friend, or in any such way before acting as a director, this would be sufficient (*l*): and that if the company, though formally constituted, had never in fact had any business existence the time would run even after he began to act as a director (*m*).

[If he acquire them in breach of trust from the promoter of or vendor to the company he must be attacked under s. 165 (now s. 10 of the Comp. (W. Up) Act, 1890), he cannot be made a contributory as for unpaid shares (*n*).]

It has been said that the true result of the authorities is only this: that the fact of a man accepting the office of director, "is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorized by himself, the registration of shares which, in the ordinary course of the business of the company, have actually been placed in his name, and which were needful for his qualification" (*o*).

The argument in these cases always is that, whether the shares have been registered or not, a person accepting the office of, and acting for any reasonable length of time as, a director, and not having within a reasonable time otherwise acquired the shares, ought to be deemed to have "agreed to become a member" in respect of the qualification shares, and to have thus concluded a contract to take them from the company (*p*). But *quære* this is to confound duty with contract.

In *Brown's Case* (*q*) the Court, on the facts, held that the intention was to qualify by shares acquired in the manner in which the paid-up shares were there acquired.

The rule as deduced from the previous authorities was stated by Jessel, M.R., in *Miller's Case* (*r*), thus:—"Where the qualification is not indispensable to election the director has a reasonable time for acquiring the qualification either from the company or anybody else, but he must acquire it before he acts. Although he may abstain from acting for a reasonable time, still if he abstains from acting for a very long time he is liable; he is equally liable if he acts—the time ceases to run when he acts (*s*). Again I take it to be also settled in *Brown's Case* (*q*) that if in the ordinary course of the business of the company he is registered in their books as a shareholder the agree-

(*i*) *Wheal Buller Consols*, 38 Ch. Div. 42.

(*k*) See also *Karuth's Case*, 20 Eq. 506, 509; *Hamley's Case*, 5 Ch. Div. 705, 707.

(*l*) *Brown's Case*, 9 Ch. 102; *Forbes' Case*, 8 Ch. 768, 774; *Carling's Case*, 1 Ch. Div. 115.

(*m*) *Hewitt's Case*, 25 Ch. Div. 283.

(*n*) *Carling's Case*, 1 Ch. Div. 115; and note to s. 165.

(*o*) *Brown's Case*, 9 Ch. 102, 107. *Quære*, *Currie's Case*, 3 D.J. & S. 367, and *Kincaid's Case*, 11 Eq. 192, go beyond this, *v. infra*.

(*p*) And *quære* whether *Currie's Case* is not an authority to this effect, *v. infra*. See, however, observations on this case in *Karuth's Case*, 20 Eq. 506, 510. In *Hampshire Co-operative Milk Co.*, W. N. 1880, 194; 29 W. R. 170, the name was not on the register, but the director was held liable: for the facts of this case see 25 Ch. D. 291.

(*q*) 9 Ch. 102.

(*r*) 3 Ch. D. p. 665.

(*s*) Since *Hewitt's Case*, 25 Ch. Div. 283, this must be modified where the company has never in fact had any business existence.

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ment which the man enters into by becoming a director to take the qualification is a sufficient authority for the registration, and therefore he is a duly registered shareholder whether he knew of the registration or not." In this case the company was registered on the 6th of November, the director attended a meeting on the 10th, resigned on the 12th, never afterwards took any part in the company's affairs, never applied for shares, and did not know of their registration in his name. But he was held liable (*t*). In this case the name had been entered on the register, but without Miller's knowledge.

The Marquis of Abercorn's Case (*u*) is the first case on the point, and is undoubtedly a strong decision. The marquis, although he never acted as, was held to be clearly fixed with the character of, a director; but the qualification stock having never been actually registered in his name, the Court refused to make him a contributory in respect of it. The ground of the decision appears to be that there was no express agreement to take the stock, and no knowledge on the part of the marquis that a qualification was necessary; that to imply an agreement therefore would be to create a constructive performance of a constructive obligation. It was also said that if acceptance of the office was acceptance of the stock, a transfer must be implied upon retiring. But *quære* as to this; for there is ample authority to shew that, while the acceptance of shares is a *facilis descensus*, they cannot be parted with but in some strictly authorized manner.

It should not be overlooked that a director in this case was allowed to qualify in either of two ways (*x*), and that one only of these was by holding stock, but the judgment did not turn upon this.

Chapman's Case (*y*) followed the decision in *Lord Abercorn's Case* (*u*). Chapman applied for the shares, but retired from the direction before the first allotment, and the directors refused to allot him any shares. There was clearly no concluded agreement.

In *Tothill's Case* (*z*) a director who, after signing a memorandum for twenty-five shares, applied for fifty shares, which was the qualification of a director, but to whom no allotment was made, was held to be a contributory for twenty-five shares only. On the question of directors' qualification this case is in the same company as, and is governed by, *Stock's Case* (a), the word used being "eligible."

In *Onslow's Case* (*b*) the director applied for twenty-five shares, which were the qualification; the qualification was afterwards reduced to five: five shares were allotted to him; he was held not liable for twenty more.

Eligible.

If the qualification clause provide that "no person shall be *eligible* as a director," &c., this cannot apply to directors appointed by the articles, for they do not require election (*c*). Such a qualification is applicable only to persons thereafter to be elected directors.

So, directors named in the memorandum of association were not within a qualification clause introduced by alteration of the articles under sect. 50, providing that "the future qualification of a director shall be," &c. (*d*).

But where the words were "no shareholder shall be entitled to be a director unless he hold," &c., the subscribers of the memorandum were, in the character of first directors under articles substantially identical in this

(*t*) He escaped liability upon a rehearing on a different ground, 3 Ch. D. 657; 5 Ch. Div. 70.
(*u*) 4 D. F. & J. 78.
(*x*) See 4 D. F. & J. 85.
(*y*) 2 Eq. 567.
(*z*) 1 Ch. 85.
(a) 4 D. J. & S. 426, see note (*c*).
(*b*) W. N. 1887, 79.
(*c*) *Stock's Case*, 4 D. J. & S. 426; *Forbes' Case*, 8 Ch. 768; *cf. Walford's Case*, 20 L. T. 74.
(*d*) *Lord Claud Hamilton's Case*, 8 Ch. 548.

respect with Table A. arts. (52), (53), held contributories for qualification shares (*e*). There was in this case an independent agreement to take the shares, contained in a resolution passed at a meeting held by the promoters before the company was incorporated, but the judgment does not turn upon this. In this case there were shares registered in the directors' names, but none were, so far as appears, so registered in respect of qualification; so that this case would seem to be an authority that a director may be fixed with qualification shares, although not registered in his name (*f*).

Where the possession of the qualification is by the articles made a condition precedent to election, a man who has not the qualification does not by accepting the office of, and acting as, a director come under any contact to take shares. For the result is, that his election is void, and he is not a director at all (*g*). But he may be *de facto*, although not *de jure*, a director (*h*).

No doubt a person who in such a case accepts the office and acts as a director, without possessing the shares which render him eligible, is guilty of a misfeasance in the abstract (*i*), but it is a misfeasance which produces no damage unless it is shewn that damage has resulted from his accepting the office or from his acts as a director. He cannot be rendered liable for the amount of the shares which were the condition for his eligibility (*k*).

Shares *de facto* registered.

In the cases next noticed the shares had in fact, as was pointed out by Lord Selborne in *Brown's Case* (*l*), been registered in the name of the director, and the question was whether the director could get rid of them.

A. Levita's Case (*m*) was a case of application for shares by a director. L. applied for 1000 shares. There was no letter of allotment, and no reply to the application, but his name having been put on the register and advertised as a director, and he having to some extent acted as a director, he was, after two years' acquiescence, held to be a contributory in respect of the shares.

In *Leeke's Case* (*n*) L. was named in the articles as a director, and fifty shares, which formed the qualification, were allotted to him and registered in his name. He never attended the board meetings, and did not sign any application for or acceptance of the shares, and was not aware that they had been allotted to him. But the Court finding, on the evidence, that he knew he was appointed, and had assented to be, a director, held that he must be taken to have accepted a director's qualification.

In *Harward's Case* (*o*) H. allowed his name to be advertised as a director, and was present at a board meeting at which an allotment committee was appointed. The committee allotted him fifty shares, which was a director's qualification, but he never applied for shares or received notice of allotment. But the facts proving that he undertook the office of, and acted as, a director, he was fixed as a contributory for the fifty shares.

(*e*) *Currie's Case*, 3 D. J. & S. 367; 11 W. R. 46, 675; 32 L. J. (Ch.) 57, 421.

(*f*) *Kincaid's Case*, 11 Eq. 192, was decided on the construction of a local Act, but is another authority to the same effect, except that Kincaid signed a print of the Bill.

(*g*) *Brown's Case*, 9 Ch. 102, 109; *Miller's Case*, 3 Ch. D, 661, 665; *Hamley's Case*, 5 Ch. D. 705; *Barber's Case*, 5 Ch. Div. 963; *Jenner's Case*, 7 Ch. Div. 132; *Biron's Case*, W. N. 1878, 111. *Quære*, *Stephenson's Case*, W. N. 1876, 159; 45 L. J. (Ch.) 488, must be wrongly reported.

(*h*) *Pulbrook* v. *Richmond Co.*, 9 Ch. D. 610, 613.

(*i*) See 14 Ch. Div. 672.

(*k*) *Coventry and Dixon's Case*, 14 Ch. Div. 660; *Wheal Buller Consols*, 38 Ch. Div. 42.

(*l*) 9 Ch. 102, 106.

(*m*) 3 Ch. 36; and see *Fletcher's Case*, 37 L. J. (Ch.) 49; 17 L. T. 136; 16 W. R. 75; and others *contra*, cited *infra*.

(*n*) 11 Eq. 100; 6 Ch. 469.

(*o*) 13 Eq. 30.

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In *Fowler's Case* (*p*), the directors' qualification being twenty-five shares, a resolution was, at a meeting of the subscribers to the memorandum of association, passed for the allotment to each of certain persons, of whom F. was one, of twenty-five shares as a condition precedent to their appointment as directors, and at the same meeting they were elected directors. F. had consented to act as a director, but being, as he stated, ignorant that any shares had been allotted to him, and believing that the qualification was twenty shares of £25 each, and not twenty-five shares of £20 each, he applied for twenty shares, which were allotted to him, and on which he paid the deposit. He subsequently acted as a director. He was held liable in respect of the twenty-five shares, and also in respect of the twenty shares allotted to him on his application. This case was, however, doubted and not followed in *Duke's Case* (*q*).

Kincaid's Case (*r*), *Forbes' Case* (*s*), and *Portal* v. *Emmens* (*t*), were decided on the private Acts by which the companies were incorporated. In such cases, where the directors are named in an Act which itself imposes a qualification, there is no need to inquire whether there was a contract to take shares or not (*u*). The contract is found in the Act of Parliament, and *ipso facto* upon the passing of the Act the director becomes a shareholder in respect of the number of shares prescribed as his qualification (*x*).

But inasmuch as he has not actually got any shares which he can transfer, a surrender of the inchoate right to the shares will be inferred from less strict evidence than would be required in the case of a surrender of shares actually allotted: so that where of two directors one resigned immediately after the Act was passed, and the other sixteen months afterwards, and all the capital was allotted to other persons, the directors were, after a lapse of ten years, held to be clearly divested of the character of shareholders, at any rate as against creditors whose claims arose after their resignations (*y*).

In *Esparto Trading Co.* (*z*) a qualification clause "every director of the company shall at the time of his appointment and thenceforth during his continuance in office hold at least four shares," was held to apply to directors named in the articles.

Where, however, the articles provide that A., B., and C. shall be the first directors, and B. signs the articles, he does not thereby *ipso facto* agree to take or become liable for the shares which are to form the director's qualification. The agreement is only to obtain the shares within a reasonable time, and if before that has expired he refuses to be a director and has never acted, and the shares have not been allotted to him, he may escape (a).

In *Re Disderi & Co.* (*b*), the directors' qualifications having been supplied by paid-up shares, the payments in respect of which were fictitious, the directors were put on the list for unpaid shares.

The authorities were considered in a subsequent case (*c*), and it was there held that a person who had agreed to be a director on the proposal of the

(*p*) 14 Eq. 316. See *Colquhoun's Case*, W. N. 1874, 49, where there was also some confusion.

(*q*) 1 Ch. D. 620.

(*r*) 11 Eq. 192.

(*s*) 19 Eq. 353.

(*t*) 1 C. P. D. 201; 1 C. P. Div. 664. See also *Kipling* v. *Todd*, 3 C. P. Div. 350.

(*u*) See *Wheal Buller Consols*, 38 Ch. Div. 42.

(*x*) *Portal* v. *Emmens*, 1 C. P. D. 201, 664; *Kipling* v. *Todd*, 3 C. P. Div. 350, 356.

(*y*) *Kipling* v. *Todd*, 3 C. P. Div. 350. Contrast *North Woolwich Subway Co.* v. *Pym*, W. N. 1873, 204.

(*z*) 12 Ch. D. 191.

(*a*) *Karuth's Case*, 20 Eq. 506.

(*b*) 11 Eq. 242; and see *Imperial Silver Quarries*, 16 W. R. 1220; *Finance Co.*, 19 L. T. 273; *E. p. Daniell*, 1 De G. & J. 372.

(*c*) *Brown's Case*, 9 Ch. 102.

promoter of the company, and who had contemplated qualifying himself by the allotment to him, as the promoter's nominee, of paid-up shares to which the promoter was entitled, was duly qualified by such allotment made within a fortnight after his being formally appointed a director. The judgment was rested entirely upon agreement; there was no contract to take the qualification shares except in the manner in which they were taken.

An agreement to take unpaid shares may, however, in such a case be implied where there is notice and acquiescence (*d*).

Thus, where A. agreed to become a director on having his qualification of twenty shares found for him in paid-up shares, and he acted as a director, and was registered as, and had notice that he was registered as the holder of twenty unpaid shares, but no letter of allotment was sent him, and subsequently twenty paid-up shares were transferred to him, he was held to be the holder as well of the unpaid as of the paid-up shares (*e*).

Green's Case (*f*) is another case which was decided in favour of the director on the ground that there was no independent agreement, that the acceptance of the office was not complete, and that the liability was sought to be enforced after an unreasonable time had elapsed.

Hewitt's Case (*g*) was decided in favour of the director on the ground that the company never had any business existence, and the whole thing was inchoate only.

Where there is anything in the nature of a contract to take the shares, the case falls within the authorities which shew that a director is treated strictly (*h*).

What constitutes a director.

The mere fact that a man's name has been held out to the public as a director is not sufficient to fix him with the consequences attaching to the office (*i*); nor will the mere fact that he has done some formal acts as a director do so (*k*). The question to be determined from the circumstances of each case is, whether the person has agreed to take the office of director.

In the *Marquis of Abercorn's Case* (*l*) there was no proof that the marquis had ever acted, or intended to act, as a director, and that case was distinguished on that ground by Rolt, L.J., in *A. Levita's Case* (*m*).

In *E. p. Cotterell* (*n*), local agents called "provincial directors" were held not to be directors within a qualification clause.

In *Austin's Case* (*o*) Austin escaped on the ground that his acceptance of the office of director was conditional only, and that on receiving the letter of allotment of the shares which would constitute his qualification, he at once returned it and repudiated the office. Wood, V.C., said, "I think it must be taken that the whole matter was not finally concluded." But the case evidently ran very near the line, and he barely escaped, and got no costs.

So in *Green's Case* (*p*), the fact of the publication of Mr. Green's name in the prospectus, and of his having attended meetings of the directors on the conditional agreement that if he was not satisfied with the prospects of the company he was to withdraw, was held insufficient to fix him with the character of director.

(*d*) *Brown's Case*, 9 Ch. 102, 110.
(*e*) *Ilfracombe Railway Co.* v. *Nash*, 22 L. T. 209.
(*f*) 18 Eq. 428.
(*g*) 25 Ch. Div. 283.
(*h*) *Sidney's Case*, 13 Eq. 228.
(*i*) *Harward's Case*, 13 Eq. 30; *Green's Case*, 18 Eq. 428.
(*k*) *Eve's Case*, 16 W. R. 1191; *Austin's Case*, 2 Eq. 435; *Bartlett's Case*, 17 W. R. 131; 19 L. T. 628; *Maitland's Case*, 3 Giff. 28; *Little Down and Ebber Rocks Co.*, 3 L. T. 483; *Self-Acting Sewing Machine Co.*, W. N. 1886, 74.
(*l*) 4 D. F. & J. 78.
(*m*) 3 Ch. 36.
(*n*) 32 L. J. (Ch.) 66; 11 W. R. 13; 8 Jur. (N.S.) 1083; 7 L. T. 241.
(*o*) 2 Eq. 435.
(*p*) 18 Eq. 428.

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Shares however acquired will qualify.

The director's qualification clause does not of course in any case operate to bind the director to take the total number of the qualification shares in addition to shares acquired or contracted to be taken independently. Shares otherwise acquired will be taken as, or towards, the qualifying number (*q*).

If the shares have been acquired by breach of trust, the director may be attacked for misfeasance; but he cannot be made liable for unpaid shares (*r*).

Acting as director under void amalgamation.

Where, under an agreement for amalgamation which was void, two of the directors of the selling company acted as directors of the amalgamated company, they were not liable as contributories of the purchasing company, for they sat only as members of a board having a provisional existence under an amalgamation which was void (*s*).

Share warrant.

The holding of share warrants is not effectual for the qualification of a director (*t*).

Mortgage of qualification shares.

It appears that a director does not lose his qualification by mortgaging his qualification shares (*u*); and he may be qualified by shares to which he is entitled as trustee and not in his own right, and even by shares of which he is a trustee for the company (*x*). By virtue of sect. 30 the trustee is as between himself and the company the person liable, and it is conceived that for all purposes, including qualification, he is as between himself and the company the holder of the shares.

Shares held in trust.

The qualification clause often runs that the director must hold so many shares "in his own right." This Jessel, M.R., held to mean that they must not be shares to which he is entitled as legal personal representative, husband of a female member, or trustee in bankruptcy, but it does not intend that the company is to look behind the register to inquire whether the registered shareholder is or not the beneficial owner (*y*). This has since been questioned in the Court of Appeal, where Cotton, L.J., thought that the holder "in his own right" must have not only the legal right to deal with the shares but also the beneficial ownership, although such ownership might be incumbered; while Lindley, L.J., held that the expression had gained a practical conventional meaning, viz., that the shareholder holds them in such a way that the company may safely deal with them as his shares (*z*).

AGREED TO BECOME A MEMBER.

The question whether a person, other than a subscriber of the memorandum or a director, has agreed to become a member, will turn upon the facts of each particular case. But there will be found in the decisions certain general rules, which may here be noticed.

2. Persons other than directors. Allotment must be communicated.

To constitute a binding contract to take shares between a company and a member of the general public, the letter of application must be followed by an allotment, and that allotment *must be communicated to the applicant* (a).

Thus, in *Pellatt's Case* (*b*), Cairns, L.J., said: "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract."

(*q*) *Miller's Case*, 3 Ch. D. 661, 667; *Duke's Case*, 1 Ch. D. 620 (where *Fowler's Case*, 14 Eq. 316, was doubted); and see *Currie's Case*, 3 D. J. & S. 367.

(*r*) *Carling's Case*, 1 Ch. Div. 115. See note to s. 165.

(*s*) *Stace and Worth's Case*, 4 Ch. 682.

(*t*) Comp. Act, 1867, s. 30.

(*u*) *Cumming* v. *Prescott*, 2 Y. & C. (Ex.) 488; and see *E. p. Masterman*, 4 D. & Ch. 751; S. C. 2 M. & Ayr, 209; *E. p. Littledale*, 6 D. M. & G. 714, 728.

(*x*) See *Saunders' Case*, 2 D. J. & S. 101.

(*y*) *Pulbrook* v. *Richmond Mining Co.*, 9 Ch. D. 610. *Cf. Childers* v. *Childers*, 1 De G. & J. 482.

(*z*) *Bainbridge* v. *Smith*, 41 Ch. Div. 462; and see *Reeves* v. *Bainbridge*, W. N. 1889, 228.

(a) *Pellatt's Case*, 2 Ch. 527; *Hebb's Case*, 4 Eq. 9; *Gunn's Case*, 3 Ch. 40; *Sahlgreen and Carrall's Case*, 3 Ch. 323; *Fletcher's Case*, 37 L. J. (Ch.) 49; 16 W. R. 75; 17 L. T. 136; *Tothill's Case*, 1 Ch. 85; *Ward's Case*, 10 Eq. 659, 662.

(*b*) 2 Ch. 527.

Accordingly it has been held in several cases that an application for shares may be withdrawn at any time before the shares have been allotted (*c*); or the allotment communicated to the applicant; or while the contract is still *in fieri* (*d*).

Until allotment communicated, application may be withdrawn.

Thus, in *Hebb's Case* (*e*) H. applied in writing for shares, and the directors allotted shares to him; after the allotment, but before it was communicated to him, H. withdrew his application; he was held not to be a shareholder, as having never become bound by a completed contract to take shares.

In *Ritso's Case* (*f*) the applicant was chairman of the Board, and there was some evidence that he had been appointed on the faith of a promise that he would take 500 shares. He held fifty shares, and on the 5th March he signed an application for 450 more. On the 14th October, at a Board meeting at which he was in the chair, a resolution was proposed and seconded that the 450 shares be allotted to him. He thereupon handed in a letter withdrawing his application, and deposed that he had previously withdrawn it verbally. The next day an allotment letter was sent him. Within a fortnight winding-up resolutions were passed. On appeal he escaped on the ground that his application was withdrawn before acceptance.

The withdrawal may be made orally.

And the withdrawal may be made orally, and need not necessarily be in writing (*g*). It is even sufficient to constitute a withdrawal that the party to whom an offer is made has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, as *e.g.*, in the case of an offer to sell a property, that the person making the offer has since sold to another person (*h*).

Again, where M. applied for 200 shares of £10 each, and paid a deposit of £500, being £2 10s. per share, but before allotment he proposed to the directors to treat the £500 as paid in respect of fifty fully paid-up shares, and the directors agreed and sent him the certificates for fifty fully paid-up shares, he was held to be a contributory for the fifty paid-up shares only (*i*).

But even after withdrawal company may ratify previous invalid allotment.

It was held in *Bolton Partners* v. *Lambert* (*k*) that where the order of events was (1) that an agent of the company, not authorized so to do, accepted on behalf of the company an offer from the defendant for purchase of property, (2) that the defendant withdrew his offer, and (3) that the company ratified the acceptance of the offer by the agent, that the ratification related back to the acceptance by the agent and that the withdrawal was therefore inoperative.

And following this decision it has also been held that where the order of events was (1) allotment of shares at that which was not a Board meeting, and at which allotment was therefore invalid (*l*), (2) withdrawal of the application, and (3) confirmation at a proper Board meeting of the previous void allotment, the allotment was binding (*m*).

These are decisions of the Court of Appeal.

Communication of allotment:—

Allotment, and entry of the applicant's name on the register, is not sufficient to bind him. It is not his duty to search the register to see whether the allotment has been made or not. The communication of the allotment

(*c*) See *Ramsgate Hotel Co.* v. *Montefiore*, L. R. 1 Ex. 109; *Gledhill's Case*, 7 Jur. (N.S.) 981; 3 D. F. & J. 713. *Cf. Ritso's Case*, 4 Ch. D. 774; *Gold Co. of Southern India*, W. N. 1880, 198.

(*d*) *Pentelow's Case*, 4 Ch. 178.

(*e*) 4 Eq. 9.

(*f*) 4 Ch. Div. 774.

(*g*) *Natal Investment Co., Wilson's Case*, 20 L. T. 962.

(*h*) *Dickinson* v. *Dodds*, 2 Ch. Div. 463.

(*i*) *Miles' Case*, 4 D. J. & S. 471; 12 W. R. 1129; 13 W. R. 218; 11 L. T. 581; 34 L. J. (Ch.) 123.

(*k*) 41 Ch. Div. 295.

(*l*) *Portuguese Copper Mines, Steele's Case*, 42 Ch. Div. 160.

(*m*) *Portuguese Copper Mines, Badman's & Bosanquet's Cases*, W. N. 1890, 36, 111.

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need not necessarily be in writing: but there must be in writing, or verbally, or by conduct, something to shew the applicant that there is a response by the company to his offer (*n*).

in case of amalgamation (*o*).

There may be cases in which, under special circumstances, notice of allotment is not required to complete the contract; but these are not in any way inconsistent with the general rule as stated above.

Thus where, upon the amalgamation of company A. with company B., it was part of the arrangement that the A. shareholders should be entitled to receive in exchange for their A. shares an equal number of B. shares; and there was accordingly sent to them for signature a form of application, containing a request for an allotment of the B. shares to which they were entitled, with an agreement to accept them, and an authority to put their names on the register; the contract was complete as soon as the application was sent, and acceded to (*p*), and notice of allotment was unnecessary.

So that an A. shareholder who signed the application, and whose name was put on the register of the B. company, but as to whom it was a question whether he received notice of allotment or not, was held to be a contributory of the B. company, Bacon, V.C., saying, "*Gunn's Case* (*q*) does not apply, because here the acceptance is clear from the form of application" (*r*).

And a shareholder in and director of the A. company who, under similar circumstances, having received no notice of allotment wrote to withdraw his application after the allotment had in fact been made, was held to be a contributory, for that the shares had been validly allotted to him, although he had received no notice of it (*s*).

These cases are clearly no exception to the rule above stated as laid down in *Pellatt's Case* (*t*), for the application was here made, not by a member of the general public, to whom the company were under no obligation to allot shares, but by an A. shareholder who was entitled, if he chose to take them, to a definite number of B. shares. The company were under a direct obligation to grant him that number, and no less number, of shares, which he was entitled to according to the terms of the agreement for amalgamation. The transaction, therefore, amounted to this, that the company said, "I offer you fifty shares;" and the shareholder, by signing the form of application, said, "I accept them," and by such acceptance a binding contract was concluded (*u*).

Cases on communication of allotment.

Bloxam's Case (*x*) is a case often cited as an authority that an applicant may become bound without having received notice of allotment. B. there applied verbally for shares, and paid the deposit to the secretary of the company on his undertaking to return it if he did not get the shares in a few days. The shares were allotted two days afterwards, and an entry was made to that effect in one of the company's books, but no notice of allotment was sent to B., and there was no acceptance or further act on his part. B.

(*n*) *Gunn's Case*, 3 Ch. 40; and see *E. p. Fox*, 11 W. R. 577; 2 N. R. 1; 8 L. T. 223; *Land Shipping Colliery Co.*, 18 L. T. 786.

(*o*) As to acceptance of shares on amalgamation, see further, *infra*.

(*p*) See *Adams' Case*, 13 Eq. 474, 481; but *quære*, was it necessary to shew acceptance by the company? If it was, was it not also necessary to shew notice of such acceptance?

(*q*) 3 Ch. 40.

(*r*) *E. p. Tucker*, 41 L. J. (Ch.) 157; 20 W. R. 88; 25 L. T. 654.

(*s*) *Adams' Case*, 13 Eq. 474. As to shareholders in amalgamated companies, see further, s. 161, and *infra*.

(*t*) 2 Ch. 527.

(*u*) And see the *Leeds Banking Co. Cases*, cited infra.

(*x*) 33 Beav. 529; 4 D. J. & S. 447; 12 W. R. 995; 33 L. J. (Ch.) 574; 10 Jur. (N.S.) 833; and see *Gregg's Case*, 15 W. R. 82; *quære*, whether the decision in this case could now be supported, both on the ground of want of communication, and of delay in allotment.

was held to be a contributory. Knight Bruce, L.J., however, though not dissenting, expressed himself as not quite satisfied with the decision; and the case has always been regarded as turning upon special circumstances and not determining the simple question (*y*).

Again, in *Cookney's Case* (*z*) C. verbally requested a director to obtain him shares in a company which was in course of formation, and subsequently paid him the deposit. An allotment was made, but C. refused to execute the deed of settlement of the company. He was held to be a contributory. Of this case Rolt, L.J., says (a), "Cookney authorized a director of the company to get him made a shareholder. The director who was thus constituted Cookney's agent did what was necessary to make him a shareholder. There was an agreement completed, not merely resting on the application for shares."

In *Sahlgreen and Carrall's Case* (*b*) S. and C. agreed to become agents for the company on certain terms, one of which was that they should subscribe for shares. They never applied for shares, but about ten months afterwards the directors allotted them shares and put them on the register. No communication of the allotment having been made to them before a winding-up order was made, they were held not to be contributories, and their names were removed from the register.

In *Wallis's Case* (*c*) W. applied for shares in company A., at the instigation and through the agency of J. P., brother of E. P., the managing director of company B., on J. P.'s assurance that he wished him to become a shareholder merely as a trustee for company B., and that he would be indemnified by that company from all liability. The notice of allotment was sent, not to W. nor to J. P., but to E. P.; and therefore W., having received no notice of allotment, either personally or by his agent, was held not to have become a shareholder.

Robinson's Case (*d*) was a case referring to the same company, and under circumstances almost identical with those in *Wallis's Case*, except that E. P. was constituted Robinson's agent to apply for the shares. But the Court holding that E. P. was not his agent for receiving notice of allotment, Robinson was, on the ground of no notice of allotment, held not to be a shareholder.

Unstamped allotment.

A letter of allotment requires a penny stamp (33 & 34 Vict. c. 97). But an unstamped letter of allotment may be sufficient to complete the contract and bind the allottee, although between the date of receipt of the unstamped allotment and the subsequent receipt of a stamped allotment sent in correction of the mistake, the allottee has repudiated the shares (*e*).

Communication of allotment otherwise than by direct notice.

But although a communication of the allotment is necessary to complete the contract, yet direct notice is not necessary; and if notice has in fact been given, or if the applicant stands in such a position that he must have known of the allotment, or has acted in a manner inconsistent with ignorance of it, he cannot escape liability.

Execution of transfer.

Thus in *Crawley's Case* (*f*), which referred to the same company and the same circumstances as the two cases last mentioned, C. had received no notice of allotment, but had *executed a transfer* of the shares, and was there-

(*y*) See *Pellatt's Case*, 2 Ch. 527, 535; *Gunn's Case*, 3 Ch. 40.

(*z*) 26 Beav. 6; 3 De G. & J. 170.

(a) 3 Ch. 44.

(*b*) 3 Ch. 323; and see cases as to agents for the company, cited *infra*.

(*c*) 4 Ch. 325, n.

(*d*) 4 Ch. 330; *cf. Ward's Case*, 10 Eq. 659.

(*e*) *Whitley Partners*, 28 W. R. 241; 42 L. T. 11.

(*f*) 4 Ch. 322; *cf. E. p. Briggs*, 1 Eq. 483; 35 Beav. 273.

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In *Ward's Case* (*g*), however, W. having, at the instance of the promoters, signed an application for shares, and *at the same time* executed a blank transfer, but having never made any payments in respect of shares, or received any notice of allotment, was held not to be a contributory, although the shares had been in fact allotted to him, and the deposit and calls paid by some persons without his knowledge. The Vice-Chancellor there said that the application, in the events that had happened, and the deed of transfer, were a nullity.

And where L.'s name had been signed to an application for shares without his knowledge, and the shares were allotted to him and his name put upon the register, he was held not to have adopted the allotment by signing a blank transfer of a portion of the shares allotted to him in the belief that he would thereby be relieved from all liability (*h*).

Director. Again, where the applicant received no notice of allotment, but his name was advertised as a director, and he attended a meeting of directors, he was held to be a contributory (*i*).

So in *Fletcher's Case* (*k*), F. applied for shares unconditionally, with a view to qualifying himself as a director, and paid the deposit. He was present at a board meeting, at which a resolution was passed to proceed to the allotment of shares, and he afterwards attended meetings of the board as a director. Subsequently the directors, on his request, cancelled the allotment and repaid the deposit. There was no evidence of direct notice of allotment, but he was held to be a contributory.

Again, where a director applied for additional shares and he was entered upon the register in respect of them, but there was no evidence of any allotment to him, he was made contributory (*l*).

Where, however, he withdrew his application concurrently with resolution to allot and before allotment, he escaped (*m*).

In another case, however, B. was induced by S., the managing director of a company, to sign an application for 1000 shares, on the understanding that the application should not be sent in to the directors until S. had paid or given security for the payment of the application and allotment moneys. B. subsequently became a director, and advertisements were issued under his authority and with his knowledge, stating the number of shares subscribed for to be largely in excess of the fact, even if the 1000 shares were included. S. neither paid nor gave security for the moneys, and no formal allotment was ever made, but B.'s name was put on the register, although B. had no actual knowledge of it. It was held that B.'s name must be taken off the list (*n*).

Again, in *Plimsoll's Case* (*o*), it was held that the fact of P. being a director and attending meetings did not give him implied notice of allotment so as to fix him as a contributory in respect of shares for which his name was entered on the register, but for which he had neither sent an application nor received notice of allotment.

(*g*) 10 Eq. 659.
(*h*) *E. p. Little*, 17 W. R. 461; 20 L. T. 162; *cf. Frere's Case*, 15 Sol. J. 674. See also as to the effect of signing a blank transfer, *Bailey's Case*, W. N. 1869, 196; *Lyster's Case*, 4 Eq. 233.
(*i*) *A. Levita's Case*, 3 Ch. 36.
(*k*) 37 L. J. (Ch.) 49; 17 L. T. 136; 16 W. R. 75.
(*l*) *Bird's Case*, 4 D. J. & S. 200.
(*m*) *Ritso's Case*, 4 Ch. Div. 774.
(*n*) *Universal Banking Co., Bartlett's Case*, 17 W. R. 131; 19 L. T. 628.
(*o*) 24 L. T. 653.

So in *Hallmark's Case* (*p*), the Court refused to impute to a director knowledge of entries in the company's books which shewed that shares had been allotted to him when he deposed that he was ignorant of them. And inasmuch as he had never applied for shares he escaped.

Auditor.

Where there was neither application nor allotment, but the shares were *de facto* allotted, and the allottee was an auditor of the company, he was made contributory (*q*). But *quære*, whether this can stand with *Hallmark's Case* (*p*).

An auditor who swore he had never looked into the books or done anything more than help in making up the minute book has been allowed to escape (*r*).

Agent of company.

If it be part of the arrangement under which an agent of the company is appointed that the agent shall take shares in the company, the application for shares and the appointment as agent will constitute together an agreement to become a member of the company, and the applicant will be bound without receiving notice of allotment (*s*).

If, in fact, there be an agreement for valuable consideration to take shares and the consideration be paid, notice of allotment is not necessary (*t*).

Notice to applicant's agent.

Where L. had constituted M. his agent to accept the shares, and M. had received notice of allotment, L. was bound (*u*).

Where there was a direct conflict of testimony between the shareholder and the alleged agent as to the authority of the agent, Romilly, M.R., refused to act upon the evidence, and removed the name from the list. On appeal the order was discharged, the company having instituted an action for calls, and the Court being of opinion that the effect of the evidence would be best ascertained in the action (*x*).

It is for the company to prove notice of allotment (*y*).

Signing a proxy.

The fact that an alleged shareholder has signed a proxy as a shareholder may, as between him and creditors, be decisive as to his having agreed to become a member (*z*); as between him and the company it may be otherwise (a).

In an action for calls, a transferee has been held precluded from disputing the validity of the transfer to himself by having afterwards signed a proxy describing himself as the proprietor of the shares (*b*).

Application and allotment by letter (*c*).

If A. write and send to B. a letter containing an offer, and either directly or impliedly (*d*) tell him to send his answer by post, and B. accept the offer by a letter, which is duly posted, a binding contract is completed between the parties *from the time when the letter of acceptance is posted* (*e*). And an

(*p*) 9 Ch. Div. 329.

(*q*) *Wheatcroft's Case*, 29 L. T. 324.

(*r*) *Land Shipping Colliery Co.*, 18 L. T. 786; and see *Empson's Case*, 9 Eq. 597.

(*s*) *Davis' Case*, 26 L. T. 650; 41 L. J. (Ch.) 659; *Richards* v. *Home Assurance Association*, L. R. 6 C. P. 591; *cf. Ritso's Case*, 4 Ch. Div. 774.

(*t*) *Gorrissen's Case*, 8 Ch. 507. See the judgment of Malins, V.C., p. 512, n., reversed on appeal, but not on this point.

(*u*) *G. H. Levita's Case*, 5 Ch. 589; *Fraser's Case*, 19 W. R. 844; 24 L. T. 746; *De Rosaz' Case*, 20 L. T. 348; 21 L. T. 10; *cf. Barrett's Case*, 4 D. J. & S. 416.

(*x*) *Braginton's Case*, 12 L. T. 67, 259.

(*y*) *Reidpath's Case*, 11 Eq. 86; *De Rosaz' Case*, 20 L. T. 348; 21 L. T. 10.

(*z*) *Langer's Case*, 18 L. T. 67; 37 L. J. (Ch.) 292; and see *Bridger's Case*, 9 Eq. 74; 5 Ch. 305; *Dixon* v. *Evans*, 5 Ch. 79; L. R. 5 H. L. 606.

(a) *McIlwraith* v. *Dublin Trunk Railway Co.*, 7 Ch. 134, 140.

(*b*) *Sheffield Railway Co.* v. *Woodcock*, 7 M. & W. 574.

(*c*) The subject of contract by letter will be found very fully discussed in an article in the American Law Review (April, 1873), vol. vii. p. 433.

(*d*) See *Wall's Case*, 15 Eq. 18, 21.

(*e*) *Adams* v. *Lindsell*, 1 B. & A. 681; *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Duncan* v. *Topham*, 8 C. B. 225; 18 L. J. (C.P.) 310; *Harvey* v. *Johnston*, 6 C. B. 295; 17 L. J. (C.P.) 298; *Potter* v. *Sanders*, 6 Hare, 1; *Hattersley* v. *Carlisle*, W. N. 1879, 112; *MacLagan's Case*, W. N. 1882, 98, 46 L. T. 880.

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application for shares in the usual form does, having regard to the usage in such matters, impliedly authorize an acceptance by post (*f*).

And, therefore, if a person apply for shares, and the application is accepted, and allotment made to him by letter duly posted, the contract is complete when the letter of allotment is put into the post (*g*).

If the letter is posted, not to the applicant, but to some one else not being his agent, this of course is no notice at all (*h*).

Against this current of authority there was the case of *British and American Telegraph Co.* v. *Colson* (*i*), in which the Court of Exchequer established this distinction from the case of *Dunlop* v. *Higgins* (*k*), that although the posting of the letter, if the letter arrives, is a complete contract, yet if from any cause, such as a failure of duty by the Post Office, the letter never arrives at all, then there is a difference; and in that case the letter of allotment having never been received by the applicant, it was held that he was not a shareholder.

British and American Telegraph Co. v. *Colson* was commented on in *Harris' Case* (*l*), and the decision not altogether approved by the Lords Justices; but it will be observed that, although it may not be easy to reconcile that case with *Dunlop* v. *Higgins*, it does not come in collision with *Harris' Case*, for the last-mentioned case need not be put higher than this, that if the letter of acceptance is delivered in due course of post, the contract is complete from the time when the letter was posted.

Upon the point which was decided in *British and American Telegraph Co.* v. *Colson* it was said by Mellish, L.J., in *Harris' Case* (*l*), that it was not necessary to give any decided opinion, because although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post then the parties may act on the assumption that the offer has not been accepted.

In *Household Fire Insurance Co.* v. *Grant* (*m*), however, the exact point of letter of allotment posted and not received arose again, and it was there held by Baggallay and Thesiger, L.JJ. (Bramwell, L.J., dissenting), that the Post Office is to be treated as the agent of both parties, and that where letter of allotment is posted the allottee is bound though the letter be never received; and *British and American Telegraph Co.* v. *Colson* (*i*) was overruled. All the reasons to the contrary of this decision will be found succinctly stated in the judgment of Bramwell, L.J., who dissented, and adhered to *British and American Telegraph Co.* v. *Colson* (*i*).

The following are cases in which it had been held that upon evidence of non-receipt by the applicant of the letter of allotment, or even in default of evidence of its receipt (*n*), the Court will not hold the applicant bound as a shareholder:—

Finucane's Case (*o*), in which a reasonable cause was assigned for the letter not having been delivered, viz., that there was in the street a second house bearing the same number as that to which it was addressed; and *Reidpath's Case* (*p*), where Romilly, M.R., said it was for the company to prove notice of allotment; that evidence of the letter being posted was not

(*f*) *Household Fire Insurance Co.* v. *Grant*, 4 Ex. Div. 216, 218, 228.
(*g*) *Harris' Case*, 7 Ch. 587; *Hebb's Case*, 4 Eq. 9; *Wall's Case*, 15 Eq. 18.
(*h*) *Hebb's Case*, 4 Eq. 9.
(*i*) L. R. 6 Ex. 108.
(*k*) 1 H. L. C. 381; *v. supra.*
(*l*) 7 Ch. 587; *v. supra.*
(*m*) 4 Ex. Div. 216.
(*n*) See *Reidpath's Case*, 11 Eq. 86.
(*o*) 17 W. R. 813; 20 L. T. 729.
(*p*) 11 Eq. 86.

sufficient; and that he could not, in opposition to the oath of the applicant, who said he never received the letter, fix him as a contributory (*q*).

These cases are swept away by the decision of the Appeal Court in *Household Fire Insurance Co.* v. *Grant* (*r*).

In *Townsend's Case* (*s*) the letter of allotment was delayed by the fact of the applicant himself having furnished an incorrect address. Before receipt of the allotment the applicant had written to revoke his application, but he was nevertheless held liable as a contributory.

In *Wall's Case* (*t*) the applicant wrote withdrawing his application on the day on which he ought in due course of post to have received notice of allotment. He denied that he had ever received the notice, but his unsupported evidence was held insufficient to discharge him. The Court further expressed an opinion in accordance with what was said in *Harris' Case* (*u*), that if the letter of allotment had not been received the contract would nevertheless have been binding as from the time of posting the letter.

By way of contrast to the foregoing cases should be put the case where the course of events is (1) application by letter posted and received; (2) revocation of application by letter posted; (3) allotment; (4) revocation of application received. In such case, upon the authority of *Byrne* v. *Van Tienhoven* (*x*), the allottee would be bound. For although he may withdraw his application at any time before allotment, yet the date to be attributed to the withdrawal is not the date of posting, but the date of receipt, for the other party has given him no authority to revoke by post, and the Post Office is, therefore, not the company's agent for that purpose.

So if A. write to B. authorizing B. to act as his agent, B. has no authority until the letter reaches him (*y*).

If A. initiates communication by telegraphing to B. he must be treated as speaking to B. at the place to which the telegram is directed, and if he desires a reply by telegram, the reply is to be treated as given to A. at the office from which the reply is despatched (*y*).

Application subject to a condition.

If an application for shares be made upon a condition precedent which is not complied with, or if the application be conditional, and the allotment unconditional, no completed contract will have arisen, and the applicant will not be bound.

W. applied for shares subject to a condition that he should supply certain goods wanted by the company. Shares were allotted to him; but no definite arrangement having been come to as to his supplying the goods, he did not pay the deposit (*z*) or do any act amounting to unqualified acceptance. The condition being held to be a condition precedent he was held not to be contributory (a).

So where, on the 9th of April, S. applied for shares conditionally on his

(*q*) See also *Ebbett's Case*, 5 Ch. 302; *Townsend's Case*, 13 Eq. 148.

(*r*) 4 Ex. Div. 216.

(*s*) 13 Eq. 148. *Quære*, whether the head-note of this case correctly represents the judgment in saying that the contract was complete when, but for A.'s fault, the letter would have been *delivered*. See the judgment of Malins, V.C., in *Harris' Case*, 7 Ch. 589, n.

(*t*) 15 Eq. 18.

(*u*) 7 Ch. 587; *v. supra*.

(*x*) 5 C. P. D. 344.

(*y*) *Cowan* v. *O'Connor*, 20 Q. B. D. 640, 642.

(*z*) Payment of the deposit, and even attending meetings of shareholders, will not necessarily make the contract binding; *Simpson's Case*, 4 Ch. 184; *Pellatt's Case*, 2 Ch. 527, cited *infra*. And as to payment of deposit see *Waterford, &c., Railway Co.* v. *Pidcock*, 8 Ex. 279; *Edwards* v. *Kilkenny Railway Co.*, 14 C. B. (N.S.) 526.

(a) *Wood's Case*, 3 De G. & J. 85; and see *Coleman's Case*, 1 D. J. & S. 495; 8 L. T. 292; *Howard's Case*, 1 Ch. 561; *E. p. Harwood and Others*, 20 L. T. 736; *Simpson's Case*, 9 Eq. 91; *Simpson* v. *Heaton's Steel Co.*, 19 W. R. 148, 614; 23 L. T. 510; 25 L. T. 179.

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being appointed a director, and they were forthwith allotted to him, and he paid the deposit, but on the 16th of April he withdrew his application, repudiated the shares, and claimed to have the deposit credited on other shares which he held, and this was done and he never was appointed a director, he escaped (*b*).

The test whether an applicant is liable to be placed on the list of contributories may in some cases be whether specific performance of the agreement to take the shares could have been decreed against him (*c*). But where he has entered into a concluded agreement to take shares, and his name is on the register, *semble*, the case cannot be treated as if it were a contract resting *in fieri* (*d*).

S., after an interview with the secretary of a carriage-building company as to taking shares and paying the calls in rolling stock, sent in an application for shares, all future calls to be paid "in rolling stock as arranged." The directors returned no answer, but put S. on the register for shares. He received no notice of allotment, and was never treated as a shareholder. He was held not to be a contributory (*e*).

R. filled up an application for shares in the usual form, and the company's agent forwarded it to the directors, with a letter from himself (the agent) to the effect that the application was made on condition of R.'s being appointed local manager. The shares were allotted; but R. being unable to pay the deposit, the directors refused to give him the appointment. H. made a similar application through the agent, but no letter was sent to the directors stating that the application was conditional. The shares were allotted unconditionally to H. He afterwards declined the appointment, but did not formally repudiate the shares. It was held that R.'s application being conditional, and H.'s unconditional, the latter had become a shareholder, but the former had not (*f*).

W. signed an application for shares upon condition that he should be appointed to, and after inquiries into the stability of the company should accept, the office of secretary. Allotment was made to him the next day, but on the result of his inquiries he declined the secretaryship, and required that the allotment should be cancelled. In a voluntary winding-up his name was removed from the list of contributories. In this case the application did not contain the condition, but was signed under pressure, and for a conditional purpose (*g*).

In *Dixon* v. *Evans* (*h*) the application was made by an agent for D., and upon the assurance that an Act of incorporation would be obtained limiting the liability of the shareholders. This was not done, and by a compromise the directors cancelled the shares. There was no power to cancel shares, but the cancellation was held good under a power to compromise, for there was a *bonâ fide* question whether D. was a shareholder or not (*i*).

So if, upon an amalgamation, the application for shares in the purchasing company be ascertained upon the course of dealing to have been conditional upon the amalgamation being carried out, and it is not carried out, the applicant will not be a shareholder in the purchasing company (*k*).

But application subject to a condition which the applicant ought to have

(*b*) *Shaw's Case*, 34 L. T. 715.
(*c*) *E. p. Preston and Henry*, 15 L. T. 496.
(*d*) *Fisher's Case*, 31 Ch. Div. 120.
(*e*) *Shackleford's Case*, 1 Ch. 567.
(*f*) *Rogers' Case, Harrison's Case*, 3 Ch. 633.
(*g*) *Wood's Case*, 15 Eq. 236.
(*h*) 5 Ch. 79; L. R. 5 H. L. 606.
(*i*) See also Table A. arts. (17)—(19), note.
(*k*) *Dougan's Case*, 8 Ch. 540; *Alabaster's Case*, 7 Eq. 273, *et vide infra sub* tit. "Amalgamation."

known was unmeaning and could not be complied with, followed by allotment and acquiescence, is binding.

Thus, where upon the amalgamation of a limited with an unlimited company, a shareholder in the limited company applied for shares in the unlimited company "if limited," he was bound (*l*).

A large and important class of cases is that in which a person is induced to apply for shares by the promise of some advantage which will only be secured to him on condition that he takes shares; *e.g.* where a tradesman is offered the sole privilege of supplying the company with a particular sort of goods, or a person is offered the post of agent on condition that he takes a certain number of shares. In such cases the promise of advantage not having been performed, or having become incapable of being performed, the question will arise whether the persons who have on the faith of such promise applied for shares have agreed to become members.

Condition precedent or collateral.

To cases of this class the question put by Cairns, L.J., in *Elkington's Case* (*m*), will in general apply. In *Elkington's Case* Messrs. E. applied for shares on the faith of an agreement that they should pay only 30s. per share in cash, and that the further calls should be set off against goods, which they were to supply to the company (*n*). The shares were allotted, the amount payable upon allotment was paid. Messrs. E. received and retained the share certificates, and were entered on the register. No goods were ordered, and the company was subsequently wound up. Cairns, L.J., there said (*o*): "The real point for determination in this case may be said to be this: did Messrs. E. intend and agree to become members and shareholders *in præsenti*, with a collateral agreement as to what should be the effect of their so becoming shareholders? or, on the other hand, did they agree that if and when a certain preliminary condition should be performed, and not otherwise, they would become members and shareholders?" and under the circumstances above stated, it being held that they had agreed to become shareholders *in præsenti*, they were placed on the list of contributories, although the condition had not been performed. Whether or not as against the company, as distinguished from the creditors of the company, they could claim to be indemnified against the calls made upon the shares, was quite another question.

Pellatt's Case (*p*), which had reference to a similar agreement in the same company as the case last mentioned, was exactly the converse of *Elkington's Case*, for P. was held to have agreed to take shares subject to a condition precedent which had not been complied with; the special agreement being one which was either *ultra vires* the directors, and therefore, for want of mutuality, not binding upon P.; or, if *intra vires* the directors, still not enforceable against P., because the stipulations on the part of the company had become incapable of being performed (*q*).

In cases of this character the applicant if registered has not been registered with his consent, and in that state of things although a winding-up order have been made, creditors have no better right than the company to the specific performance of an unexecuted contract with a person whose name is not duly upon the register. What is a defence against the company is then

(*l*) *Perrett's Case*, 15 Eq. 250.

(*m*) 2 Ch. 511; and see *Fisher's Case*, 31 Ch. Div. 120.

(*n*) See Comp. Act, 1867, s. 25, *infra*, as to what is now required to render such an agreement valid, and note to s. 25 of this Act.

(*o*) 2 Ch. 522.

(*p*) 2 Ch. 527; *cf. Thornton's Case*, W. N. 1875, 109.

(*q*) And see *Alabaster's Case*, 7 Eq. 273; *Stace and Worth's Case*, 4 Ch. 682; *E. p. Collison*, 15 W. R. 778; 16 L. T. 340, as to conditions impossible or *ultra vires*.

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a defence against the creditors, because the alleged contributory is not a member, and cannot be made so except upon the terms of the contract, if any, by which he has agreed to become one (*r*).

In *Simpson's Case* (*s*), S. in consideration of having the contract to perform certain works, agreed to subscribe for shares; and to pay the deposit, on being satisfied that a certain number of shares had been subscribed for, and that the directors had passed a resolution that he should have the contract. The directors accepted the application on those terms, and passed a resolution to the effect required. They then sent S. an unconditional allotment of shares, and entered his name on the register. S. retained the notice of allotment, and having ascertained that the resolution had been passed and the requisite number of shares taken up, he sent in a formal application and paid the deposit. No further allotment was made to him: the certificates were not delivered to him, and he was not called upon to pay calls. He subsequently attended two meetings of shareholders for the purpose of seeing that the contract was secured to him. The contract for the works was never prepared, and the company was shortly afterwards wound up. It was held that this was a conditional application, within *Pellatt's Case*; that the condition was not performed by the mere passing of the resolution that S. should have the contract; that S. had not waived the condition by not returning the allotment, or by attending the meetings of shareholders; and that he was not liable as a contributory.

In *Bridger's Case* (*t*), B., the local agent of a company, applied for shares to give the company credit in the neighbourhood in which he was agent, and to assist him in canvassing for business, on the understanding that he was to pay the calls out of his commission on shares sold by him. He sent in a letter of application in the usual form, accompanied by a letter referring to the conditions as to payment. An allotment was made and communicated to him, and his name was entered on the register; but he made no payment on application or allotment, neither did he pay any calls. He attended two meetings as a shareholder, and signed a proxy as a shareholder. This was held to fall under the same head as *Elkington's Case* (*v. supra*), B. having entered into an absolute contract with a collateral agreement.

Fisher's Case (*u*) is another case in which the condition imposed was held to be a condition subsequent and the allottee was held liable.

In *Thompson's Case* (*x*), T. upon his appointment as agent agreed to take shares upon the terms that the payment on the shares should be deducted from his commission, and the certificate was to be delivered to him as soon as his commission was sufficient to cover the deposit and allotment moneys. His name was entered on the register, but the certificate was not issued. The company shortly afterwards dismissed him. He was on appeal held liable as a contributory, for that the agreement to take shares was concluded, the company could not have refused to allot him shares, and the cancellation by the company of his appointment could not operate to cancel his agreement to become a shareholder.

But where T., the paid secretary of a company, offered to take 1000 shares in order to raise money for the purposes of the company, and after he had taken and paid for 850 of the shares he resigned his secretaryship, and the directors, in consideration of his resignation, agreed to relieve him from

(*r*) *Per* Selborne, L.C., *Black and Co.'s Case*, 8 Ch. 254, 259.

(*s*) 4 Ch. 184; and see *Wood's Case*, 3 De G. & J. 85, cited above.

(*t*) 9 Eq. 74; 5 Ch. 305.

(*u*) 31 Ch. Div. 120.

(*x*) 4 D. J. & S. 749; 13 W. R. 852, 958; 34 L. J. (Ch.) 525; 12 L. T. 590, 717; and see *E. p. Burton*, 16 Jur. 967.

further payments in respect of such shares as he had agreed to take; and the directors were, by the articles of association, empowered "to enter into, alter, rescind, or abandon contracts, in such manner as they should think fit:" it was held that T. was not a contributory in respect of the remaining 150 shares—for that he only agreed to take shares on the faith of his position as secretary, and before he had actually taken the 150 shares his occupation as secretary came to an end, and the directors, in exercise of the power given them by the articles, relieved him from his obligation to take them (*y*).

Condition precedent may be waived.

But, although the shares may have been accepted subject to a condition precedent, the condition may have been waived.

Thus, where the condition was the obtaining of a contract of which time was of the essence, and after the time had elapsed the shareholder delayed to set aside the transaction and to repudiate the shares, it was said that the contract to take the shares had become severed from the condition, and the shareholder was held fixed by laches (*z*).

And so the auditor of a company has been held fixed in like manner, although the contract in consideration of which he agreed to take the shares was never given him (a).

Payment by shares for goods supplied.

If a person sell goods to a company and receive shares in part payment, and be actually registered in respect of them, he will be a contributory, although the payment in shares be part of an agreement which becomes in other respects incapable of being carried out.

Thus, where patentees agreed to sell their interest in letters patent to a company at a price to be paid partly in paid-up shares, partly in shares not paid up, and the remainder in cash, as and when the company should receive any money from payments on shares subscribed over and above the first £1000; and it was agreed that if the shares and cash should not be paid within two years the agreement should be void; and the shares were issued, but the event on which the cash was to be paid never happened, and the company was wound up within the two years, the vendors were made contributories—for that the contract to take shares was complete (*b*).

If the agreement be that the person selling goods to or doing work for the company is to take payment in shares at the option of the company, and that option is not declared before the winding-up, he cannot afterwards be compelled to accept payment in shares of a company which is no longer a going concern (*c*).

So far as shares are taken in payment of a debt due they are of course paid by set-off of the amount of the debt (*d*).

Conditional allotment.

If to an application for shares an answer be returned declaring an allotment of shares, but with a new term or condition introduced, there will be no contract.

In the *Leeds Banking Company Cases* (*e*) the directors in issuing reserved shares addressed a circular to the shareholders offering them one new share for every five shares held by them, and asking whether, in the event of any shares remaining, they would wish to have any more allotted to them, the

(*y*) *Thomas' Case*, 13 Eq. 437.
(*z*) *Rankin* v. *Hop and Malt Exchange Co*, 20 L. T. 207.
(a) *Wheatcroft's Case*, 29 L. T. 324.
(*b*) *Gore and Durant's Case*, 2 Eq. 349.
(*c*) *Sharon's Claim*, W. N. 1866, 231.
(*d*) *Manchester Finance Corporation, Re Matlock Old Bath Co.*, 29 L. T. 441; 22 W. R. 41; and see Comp. Act, 1867, s. 25, n.; and *supra*, pp. 47, 48.
(*e*) *Barrett's Case*, 2 Dr. & Sm. 415; 3 D. J. & S. 30; 13 W. R. 541, 826; *Addinell's Case*, 1 Eq. 225; *Howard's Case*, 1 Ch. 561; *Jackson* v. *Turquand*, L. R. 4 H. L. 305.

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payment on any new shares taken up to be made by a day named. The shareholder's reply was in the form: "I agree to take shares, being my proportion of allotment, and shares in addition, if I can have them on the terms stated in your circular." This was held to constitute a *contract* as respects the shares, being the shareholder's proportion of allotment (*f*), and an *application* as respects the additional shares, to which an acceptance was required on the part of the company to constitute a contract. In their reply the directors stated that additional shares had been allotted, and that payment must be made on a day specified *or the shares would be forfeited.* The condition as to forfeiture being a new term introduced, it was held in *Addinell's Case* (*g*) and in *Jackson* v. *Turquand* (*h*) that as respected the additional shares there was no complete contract. In *Barrett's Case* (*i*) Barrett, after receiving the last letter, paid for the additional shares, and that constituted an acceptance.

To an application for shares a company replied that shares had been allotted to the applicant, and that he must sign the memorandum and articles or the shares would be forfeited. He did not comply with the condition, but was nevertheless put upon the register. This being an absolute offer accepted with conditions, a bill to compel the applicant to take the shares and pay the calls upon them was demurrable (*k*).

So in *Beck's Case* (*l*), upon an amalgamation a shareholder of half paid-up shares in the selling company applied, according to the arrangement, for half paid-up shares in the purchasing company, but received an answer that shares had been allotted to him credited with the "proportionate amount of the net assets" of the selling company, which might be nothing at all. It was held that the answer contained fresh terms, and that there was no contract.

In *Harris' Case* (*m*) H. applied for shares in a company on whose prospectus was printed in red ink: "Interest at the rate of 10 per cent. per annum will be paid for the first two years, for which interest warrants, payable half-yearly, will be attached to the share certificates." The notice of allotment contained in red ink the words: "As the interest warrants attached to the shares bear interest from the 21st of March, 1866, punctual payment of the above balance is requisite. The bankers are instructed not to receive payments after that day without charging interest at 10 per cent. per annum." This was held to introduce no new term, but simply to work out the provision in the prospectus, and the contract was therefore complete.

Contract, whether complete.

In the *Leeds Banking Company Cases* (*n*) a circular relating to the issue of reserved shares contained this stipulation as to payment: "The amount must be paid to the bank on or before the 1st of October next (if paid before that time interest at £5 per cent. will be allowed) and the shares will then be entitled to one quarter's dividend at the end of the year." The shares were allotted in July. It was held that a person who on these terms agreed to take shares had an immediate right to the shares, although the time for payment was postponed; that the purchase was not future, but was an out-

(*f*) And see *E. p. Tucker*, 41 L. J. (Ch.) 157; 20 W. R. 88; 25 L. T. 654; *Adams' Case*, 13 Eq. 474, cited *supra.*

(*g*) 1 Eq. 225.

(*h*) L. R. 4 H. L. 305; and see *Capper's Case*, 19 L. J. (Ch.) 394; *Waterford, &c., Co.* v. *Pidcock*, 22 L. J. (Ex.) 146.

(*i*) 2 Dr. & Sm. 415; 3 D. J. & S. 30; 13 W. R. 541, 826.

(*k*) *Oriental Inland Steam Co.* v. *Briggs*, 2 J. & H. 625; 4 D. F. & J. 191.

(*l*) 9 Ch. 392.

(*m*) 7 Ch. 587; and see *English and Foreign Credit Co.* v. *Arduin*, L. R. 5 H. L. 64.

(*n*) *Barrett's Case*, 2 Dr. & Sm. 415; 3 D. J. & S. 30; 13 W. R. 541, 826; *Addinell's Case*, 1 Eq. 225; *Jackson* v. *Turquand*, L. R. 4 H. L. 305.

and-out purchase as from the time when the proposal was accepted; and that, therefore, although the company was wound up before the time for payment arrived, the applicants were liable in respect of the shares.

In *Mallorie's Case* (*o*), reserved shares being offered to shareholders and the executors of deceased shareholders, M. who was related to the surviving executrix of a deceased shareholder, but was not himself a shareholder or the executor of a deceased shareholder, filled up the form of application, and asked for shares to be allotted to himself. The directors allotted the shares to the executors, and sent the letter of allotment to M. It was held that there was between M. and the company no complete contract to take shares.

P. applied for shares in a company, and received a reply that the directors "hereby allot you ten shares in the company on your paying on or before Friday the 11th instant" the sum payable on allotment. Before that day P. wrote to repudiate the shares on the ground of misrepresentations in the prospectus. It was held that the contract was *in fieri* until the 11th, and that P. had a right to repudiate up to that date (*p*).

The case last mentioned went very near the line, and is remarked upon in *Peek's Case* (*q*). In this case P. applied for shares on which £1 was to be paid on application, and £4 more on allotment. The secretary in reply to his application wrote "the directors have allotted you eighty shares, on which shares £5 per share must be paid on or before the 15th inst." On the 10th P. wrote refusing to take the shares. The repudiation was held to be ineffectual, and P. was held to be a contributory.

Alteration of scheme.

If a person take an allotment of shares in a company on the faith of a prospectus detailing the scheme of its proposed operations, and subsequently the scheme is materially altered, his contract to be a shareholder in the first scheme will not necessarily bind him to the second (*r*), but in such a case laches and acquiescence for even a short time may conclude him (*s*).

Scrip companies.

In scrip companies (*t*), where scrip certificates have been issued entitling the holders, on certain conditions complied with, *e.g.*, payment of instalments and registration, to shares, there will, if such conditions are conditions precedent, be no completed contract until the conditions are complied with. The contract will be merely a contract entitling the scrip-holder at some future time to apply for or receive an allotment of shares (*u*).

And, at any rate, an allottee of scrip in such a case who sells his scrip before registration (*x*), or whose scrip is forfeited for non-payment of instalments (*y*), is not liable for shares.

But if an applicant have become and have been registered as a shareholder, and then the company, having no power to issue anything but shares transferable by deed, issue to him scrip certificates transferable by delivery, and he deliver them to a purchaser, this does not discharge him from liability as a shareholder. For the transaction amounts at the most to an equitable contract that the company will accept the holder of the scrip certificates as a shareholder on the allottee doing all acts necessary to clothe him with that character; but this cannot shift the legal liability (*z*).

Suspended right to shares.

Where shares are taken in a company which is subject to a statutory pro-

(*o*) 2 Ch. 181.
(*p*) *Pentelow's Case*, 4 Ch. 178.
(*q*) 4 Ch. 532.
(*r*) *Goldsmid's Case*, 16 Beav. 262; *Meyer's Case*, Ibid. 383. *Cf. Blake's Case*, 34 Beav. 639.
(*s*) See *infra*, sect. 35, note.
(*t*) *Semble*, scrip or shares not paid up transferable to bearer are under this Act illegal, see Table A. art. (8), note.
(*u*) *Ormerod's Case*, 5 Eq. 110; *McIlwraith* v. *Dublin Trunk Railway Co.*, 7 Ch. 134, 139.
(*x*) *Eustace* v. *Dublin Trunk Railway Co.*, 6 Eq. 182.
(*y*) *E. p. Collum*, 9 Eq. 236.
(*z*) *McEuen* v. *West London Wharves Co.*, 6 Ch. 655.

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vision that no share shall be issued to, or vest in, the person accepting the same until a certain amount shall have been paid up, such payment is not a condition precedent to liability upon the shares, but only to the rights of property in and transfer of them (a).

However, if, in such a case, a transfer be made and registered, it may operate as a new contract between the company, the transferor, and the transferee. For, payment not having been made, the shares have not vested, and the company, by accepting the transfer, agrees to substitute the transferee for the transferor (*b*).

Agreement to take paid-up shares.

Where a person has become a shareholder in respect of shares purporting to be, but which are not in fact, paid up, it will often be a question whether he is to be fixed as the holder of shares of a different character from those which he intended to hold (*c*). If the matter rests in contract different considerations arise to those which apply to the case where the name has been placed on the register (*c*).

A *bonâ fide* purchaser and transferee of shares which the company by the share certificates state to be paid who has no notice that the shares are not what they are certified to be, is not liable, although the shares have not in fact been paid (*d*).

The liability of the shareholder is to be measured by his contract as based upon the statutory documents which are registered for the purpose of protecting the shareholders on the one hand, and the creditors on the other. The Court cannot expand the contract, nor will it fix upon a party any engagement larger or other than that into which he has entered. The contract as it exists at the time of the winding-up is the sole measure of liability (*e*).

And, therefore, where directors took a transfer of paid-up shares from the allottee, to whom they had been allotted in payment of purchase-money for property purchased from him by the company, and the validity of the purchase was impugned, it was held that the transaction could not be affirmed in part and repudiated in part, and that the allottee and his alienees, if shareholders at all, were holders of paid-up shares (*f*).

So where the articles provided that the directors should receive certain paid-up shares, which were sufficient in number for their qualification, they could not be fixed with other unpaid shares for their qualification (*g*).

Again, if an application for shares be made under a condition precedent which will ensure the shares being paid in full or in part, an allotment under which this condition is not satisfied is not binding (*h*). In such a case the company have no authority to put the applicant on the register except as the holder of paid-up shares (*i*).

And on a similar principle, where A. applied for shares on the faith of a memorandum of association, which stated the nominal value of each share

(a) *East Gloucestershire Railway Co.* v. *Bartholomew*, L. R. 3 Ex. 15; *Purdey's Case*, 16 W. R. 660; *McEuen* v. *West London Wharves Co.*, 6 Ch. 655.

(*b*) *Morton's Case*, 16 Eq. 104.

(*c*) See *Barangah Oil Co., Arnot's Case*, 36 Ch. Div. 702; *Railway Tables Co., E. p Sandys*, 42 Ch. Div. 98; and see Comp. Act, 1867, s. 25, note.

(*d*) *British Farmers Co., Nicolls' Case*, 7 Ch. Div. 533; 8 App. Cas. 1004; *Waterhouse* v. *Jamieson*, L. R. 2 H. L., Sc. 29; *Spargo's Case*, 8 Ch. 407, 410; *cf. Bush's Case*, 9 Ch. 554; and see *Guest* v. *Worcester Railway Co.*, L. R. 4 C. P. 9; see note to Comp. Act, 1867, s. 25.

(*e*) *Waterhouse* v. *Jamieson*, L. R. 2 H. L., Sc. 29; *Currie's Case*, 3 D. J. & S. 367.

(*f*) *Currie's Case*, 3 D. J. & S. 367; *cf. Carling's Case*, 1 Ch. Div. 115.

(*g*) *Miller's Case*, 3 Ch. D. 661; 5 Ch. Div. 306.

(*h*) *Beck's Case*, 9 Ch. 392; *Wynne's Case*, 8 Ch. 1002; *Bailey's Case*, W. N. 1869, 196; and see *Schroder's Case*, 11 Eq. 131; *Manchester Finance Co.'s Case*, 29 L. T. 441; 22 W. R. 41.

(*i*) *Ashworth* v. *Bristol, &c., Railway Co.*, 15 L. T. 561.

to be £20, but before allotment a resolution was passed, which was not registered, and of which A. had no notice until a year after he had transferred his shares, increasing the nominal value of the shares to £40, A. was held liable on his contract for £20 shares only (*k*).

But where a person by mistake of fact or law accepts shares which he believes to be, but which are not, paid up, he is liable in respect of them (*l*). And in the case of shares which for default of registration of a contract under s. 25 of the Companies Act, 1867, are unpaid, the company in enforcing calls by its liquidator is not taking advantage of its own wrong. For even assuming that it was a wrong of the company not to register the contract, the liability on the shares arises not from the failure to register the contract, but from the fact of taking shares and the provisions of the statute. No covenant not to sue, no accord and satisfaction, no agreement to register a contract, will satisfy the statute. There must be either payment or a registered contract (*m*).

[And by way of illustration reference may be made to the case of trustees accepting shares "as trustees" and being thus registered as shareholders, but who nevertheless become personally liable (*n*).]

If, however, before the allotment is registered, while the matter rests *in fieri*, it be found that the shares are not, or cannot be treated as, paid up, and the invalid contract be repudiated on the part both of the shareholder and of the company, the applicant will not be a shareholder (*o*).

And even if the entry have been made on the register, yet if, on subsequently finding that, by reason of the non-registration under Companies Act, 1867, s. 25, of the contract, the shares cannot be held as paid up, the shares be cancelled, and others issued after registration of a contract, the company has in fact only done what the Court would have done if applied to, and the allottee is, therefore, not liable on unpaid shares (*p*).

Condition *ultra vires*.

If the contract to take shares be founded upon a condition which is *ultra vires* the directors, and which may, therefore, be repudiated by the shareholder, *semble*, it may properly be abandoned by the directors, and treated as a nullity (*q*): for there is no mutuality (*r*), and unless the alleged shareholder have done anything to preclude himself from rejecting the character of a member, he will not be a contributory (*s*).

Amalgamation.

In cases where, upon an amalgamation, a shareholder in the selling company applies for shares in the purchasing company, and the amalgamation is afterwards not completed, the question arises whether the application is or not subject to a condition precedent which has not been complied with.

On this point the rule was, by Mellish, L.J., in *Dougan's Case* (*t*), stated to be as follows:—

If the shareholder enters into no personal negotiation, and only acts through his own company, and does nothing but consent to and act on the amalgamation, then, unless the amalgamation is eventually completed, he is not bound (*u*).

(*k*) *Gustard's Case*, 8 Eq. 438.

(*l*) See *e.g. Dent's Case*, 8 Ch. 768; *Railway Tables Co., E. p. Sandys*, 42 Ch. Div. 98; *Cleland's Case*, 14 Eq. 387; *Disderi & Co.*, 11 Eq. 242; *E. p. Daniell*, 23 Beav. 568; 1 De G. & J. 372; *Nicholl's Case*, 24 Beav. 639; *Re Finance Co.*, 19 L. T. 273; *Imperial Silver Quarries Co.*, 16 W. R. 1220.

(*m*) *London Celluloid Co.*, 39 Ch. Div. 190.

(*n*) *Muir* v. *Glasgow Bank*, 4 App. Cas. 337. See s. 30, note.

(*o*) *Barnett's Case*, 18 Eq. 507.

(*p*) *Hartley's Case*, 18 Eq. 542; 10 Ch. 157.

(*q*) *Coleman's Case*, 1 D. J. & S. 495.

(*r*) *Pellatt's Case*, 2 Ch. 527.

(*s*) *Bunn's Case*, 2 D. F. & J. 275, 295, 299.

(*t*) 8 Ch. 540, 546.

(*u*) *Alabaster's Case*, 7 Eq. 273; *Dougan's Case*, 8 Ch. 540, 546.

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But if he have made a personal application to the purchasing company, and the shares are registered in his name, he is bound, although the amalgamation goes off altogether (*x*).

Thus, where the application was made to, and all the negotiation conducted through, the liquidators of the selling company, and the applicant, although in fact registered, had never received notice of allotment or certificate of shares (*y*); and where a director of the selling company had sent in his share certificates to the secretary of his company to be exchanged, and certificates of the purchasing company had been forwarded to him in exchange, but he had not answered the letter or signed the receipt for the shares (*z*), the applicant was held not to be a contributory, the amalgamation having fallen through.

But, on the contrary, where the application, although it referred to the amalgamation, was made to the directors of the purchasing company, and the shares were allotted and registered accordingly (a), and where there was no application, but the shareholders in the selling company were registered as having transferred their shares to the purchasing company, and the purchasing company sent them share certificates in the purchasing company in exchange, and a shareholder acknowledged the receipt of the certificates and retained them (*b*), an acceptance of shares in the purchasing company was held to have been made, independent of any question as to the validity of the amalgamation.

But, of course, it does not follow that an application to the purchasing company is conclusive; it must be shewn that there was a concluded agreement.

And, therefore, where the shares were allotted upon terms differing from those on which the application was made, the applicant was not bound (*c*); and the fact that the applicant, after allotment, wrote asking for the certificates of his shares, did not, under the circumstances, bind him as an acceptance of the fresh terms (*d*).

In another case (*e*) in the same company as the cases last cited, a contributory who had paid a call in the winding-up, and then, on the authority of those cases, applied to have his name removed from the list, was held entitled to relief and to repayment of the call.

And so it may be that under an application referring distinctly to the transfer of the business, which it afterwards turns out cannot be effected, a conditional agreement only has been entered into, and the applicant may not be bound (*f*).

But where, in sending in a printed form of application for shares in the purchasing company, which was an unlimited company, the applicant introduced after the name of the company the words "if limited," and shares were allotted to him, and he wrote for and received the certificates, he was bound: for the absence of the word "limited" after the company's name was notice to him of the nature of the company, and no effectual condition was therefore imposed by the words "if limited" (*g*).

Shares invalidly issued.

It has been thought (*h*) that if a company improperly, and without power

(*x*) *Hare's Case*, 4 Ch. 503; *Challis's Case*, 6 Ch. 266; *Dougan's Case*, 8 Ch. 540, 546.
(*y*) *Alabaster's Case*, 7 Eq. 273.
(*z*) *Dougan's Case*, 8 Ch. 540; *cf. Somerville's Case*, 6 Ch. 266.
(a) *Hare's Case*, 4 Ch. 503.
(*b*) *Challis's Case*, 6 Ch. 266.
(*c*) *Wynne's Case*, 8 Ch. 1002.
(*d*) *Beck's Case*, 9 Ch. 392.
(*e*) *Nelson's Case*, W. N. 1874, 197.
(*f*) *London and Exchange Bank*, 16 L. T. 340.
(*g*) *Perrett's Case*, 15 Eq. 250.
(*h*) See Lindley on Company Law, 5th ed. pp. 53, 774.

to do so, issues shares, the holders of such shares hold nothing at all, and are not contributories.

Thus, in *Stace and Worth's Case* (*i*), directors of the selling company who, under a void agreement for amalgamation, had been allotted shares in the purchasing company in exchange for shares in the selling company, and had acted as directors in the amalgamated company, were held not to be contributories of the purchasing company.

But it would appear from *Campbell's Case* (*k*) that the doctrines of estoppel and acquiescence are applicable under such circumstances; and that, even if there be grounds for disputing the validity of the creation and issue of the shares, yet if the company are estopped from denying that they were well created, persons who in taking such shares have voluntarily entered into contracts of which they have had the benefit, cannot subsequently be relieved from them.

Transfer of shares by way of mortgage.

A transferee of shares by way of mortgage, as, for instance, a banker lending money to a shareholder and taking a transfer by way of security, has agreed to become a member, and will be a contributory (*l*).

A mortgagee of shares is, in fact, like a trustee (*m*), the owner of the shares as between himself and the company.

And so where the I. Banking Company, having advanced money on the deposit of shares in company A., subsequently took, for their further protection, a transfer of the shares to themselves as transferees, and their name was put on the register of the A. Company, and they sold some of the shares and received dividends on others; the transaction being held not to have been *ultra vires* the I. Company, it was held that on the A. Company being wound up, they were properly put on the list of contributories (*n*).

Acceptance of shares by way of mortgage.

Addison's Case (*o*) is a case of a similar character, and one of peculiar hardship, for there was never any intention to take shares upon which any liability attached. That case was as follows:—

A company having solicited from A. a loan of £500, he accepted absolutely 100 shares, and paid up the whole amount of £5 due on each share, on condition that on his giving a month's notice the shares should be cancelled and the amount paid on them returned. A. subsequently gave the required notice, his money was repaid, and he executed a transfer to a nominee of the company. Ten years afterwards the company was wound up. The transaction was held to be a mortgage of shares. If the company had been wound up while A. remained a mortgagee and his name was on the register, he would have been liable, and the transfer to a nominee for the company being invalid, as the company had no power to cancel or buy up shares, he remained liable and was a contributory (*p*).

But it is not impossible to give a charge upon shares in such way as that the mortgagee shall not become a shareholder.

Thus an hotel company borrowed money from a railway company to complete their hotel, upon the security of unissued shares in the hotel company, which were placed in the names of trustees upon trust to indemnify the railway company against any loss which they might sustain by reason of the advance, with power to sell the shares and reduce the amount of debt, and when the advance and interest should have been repaid to transfer the

(*i*) 4 Ch. 682.

(*k*) 9 Ch. 1, 15; and see *Croom's Case*, 16 Eq. 417, 431; *Richmond's Case*, 4 K. & J. 305.

(*l*) *Weikersheim's Case*, 8 Ch. 831.

(*m*) See *infra*, s. 30.

(*n*) *Royal Bank of India's Case*, 7 Eq. 91; 4 Ch. 252.

(*o*) 5 Ch. 294.

(*p*) *Addison's Case*, 5 Ch. 294; contrast *Manchester Finance Co.'s Case*, 29 L. T. 441; 22 W. R. 41.

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remaining shares as the hotel company should direct. The hotel company being wound up, it was held that the railway company were not shareholders in respect of these shares, but were creditors, and were entitled to deduct from moneys owing from them to the hotel company the advance made upon the security of the shares (*q*).

Equitable mortgagee of shares.

An equitable mortgagee of shares is not, however, liable as a shareholder, for he is in the position of a *cestui que trust*; and where the mortgagee had even accepted a transfer, but the company had neglected to register it, an application by the official liquidator to rectify the register by putting the name on was refused (*r*).

Order and disposition.

Shares in an incorporated company transferable by deed are "things in action" within sect. 44, sub-sect. (iii.) of the Bankruptcy Act, 1883 (*s*), and are therefore not within the "order and disposition" provisions. Debentures are things in action (*t*).

The interest of a bankrupt in shares on which, being already subject to a first mortgage and registered in the name of the first mortgagee, he had agreed to give security by way of second charge, was held to be a thing in action within sect. 15, sub-sect. 5 of the Bankruptcy Act, 1869, and the title of the second mortgagee was good without notice (*u*).

A mortgage of shares may be made by deposit of the certificates (*x*), [and see note to Table A. art. 8]; and although it was previously held that notice of the deposit must be given to the company to take the shares out of the order and disposition of the mortgagor (*y*), it has now been decided that shares (at any rate such as are transferable by deed) are choses in action (*s*), in which case "order and disposition" does not apply.

Where notice is required, verbal notice given in the course of the transaction of the business of the company is sufficient (*z*), but not casual notice brought home to the secretary not as secretary but as an individual (a). After lapse of time and acquiescence notice has been presumed (*b*).

Shares taken in the name of another;

If a person take shares in the name of a fictitious person he will be held liable in respect of the shares, as if they were taken in his own name.

Thus where a father, wishing to take more shares in a company, but the company having refused to allow any more to be put in his name, applied for shares in the name of his married daughter, with an incorrect description of her, and got her to sign the application without knowing what it was; and the father paid the allotment money, and always acted as the owner of the shares, and neither the daughter nor her husband knew her name was on the list till after the winding-up order; the Court treated the case as one of

(*q*) *City Terminus Hotel Co., South Eastern Railway Co.'s Claim*, 14 Eq. 10; but see Lindley on Company Law, 5th ed. p. 806, where this case is doubted.

(*r*) *Sichell's Case*, 3 Ch. 119.

(*s*) *Colonial Bank* v. *Whinney*, 11 App. Cas. 426. Although Bacon, V.C., held otherwise under the Bankruptcy Act, 1869, in *E. p. Union Bank of Manchester*, 12 Eq. 354.

(*t*) *E. p. Rensburg*, 4 Ch. D. 685.

(*u*) *E. p. Barry*, 17 Eq. 113.

(*x*) *E. p. Moss*, 3 De G. and Sm. 599; *E. p. Stewart, Re Shelley*, 13 W. R. 356; 11 Jur. (N.S.) 25; 34 L. J. (Bk.) 6; *Binney* v. *Ince Hall Coal Co.*, 35 L. J. (Ch.) 363; *E. p. Sargent*, 17 Eq. 273; *Colonial Bank* v. *Whinney*, 11 App. Cas. 426. The doubt thrown on this in *E. p. Boulton*, 1 De G. & J. 163, was removed by *E. p. Stewart*, 4 D. J. & S. 543; see 11 App. Cas. 433.

(*y*) *E. p. Lancaster Canal Co.*, Mont. 116; Mont. & Bl. 94; 1 Deac. & Ch. 411; *E. p. Masterman*, 4 D. & Ch. 751; *E. p. Boulton*, 1 De G. & J. 163; *E. p. Union Bank of Manchester*, 12 Eq. 354.

(*z*) *E. p. Agra Bank, Re Worcester*, 3 Ch. 555; *Alletson* v. *Chichester*, L. R. 10 C. P. 319; and see Lindley on Company Law, 5th ed. p. 205.

(a) *Soc. Générale* v. *Tramways Union*, 14 Q. B. Div. 424, 438.

(*b*) *London India Rubber Co.*, 20 L. T. 355.

application in a fictitious name, and put the father's name on the list of contributories (*c*).

But where a husband applied for shares in the name of his wife and the company allotted shares to the wife, and thereupon the husband signed the memorandum and articles "S. for M. his wife" and paid the deposit and calls out of his own moneys, and subsequently executed on behalf of the wife transfers of some of the shares, and all without the wife's knowledge, the liquidator's application to put S. on the list of contributories was refused because the company had accepted the wife as shareholder without any misrepresentation or concealment by the husband. The husband took other shares simultaneously in his own name (*d*).

of an infant.

Where a father purchased shares, and signed the transfer in the name of his infant son, and the son's name was put on the register (*e*); and where a father applied in the name of his infant son, concealing the fact of his infancy, and subsequently, on its being discovered, covenanted that the infant should perform the obligations attaching to the shares (*f*), the father was made contributory.

But where a father applied for shares in the name of his infant son, and paid the deposit, but the company refused to let him execute the company's deed on behalf of his son, the father was held not to be a contributory, for the contract was not complete (*g*).

In such a case, if the facts are not such as to admit of the father being made contributory, yet if he be a director he may in the winding-up be rendered liable in damages for the amount of calls which cannot be enforced against the infant shareholders (*h*).

Application as agent.

Where a director applied for additional shares in his own name, he was, notwithstanding his allegation that he applied only as agent for another person, made contributory, there being no evidence that at the time of the application he communicated the alleged agency to the company (*i*).

But if A. apply in B.'s name, with B.'s consent, B. is the contributory (*k*); *secus*, if the application be made without B.'s consent, and B. have repudiated it before the winding-up (*l*).

Where B. instructed A., a broker, to apply for him for shares in company X., and A. by mistake applied for shares in company Y. and they were allotted, B. was not liable as a contributory, but A. was liable to the company in damages for misrepresentation of authority, and in the circumstances of that case the measure of damage was the whole sum payable on the shares (*m*).

Agreement to place shares.

An agreement "to place" shares is not equivalent to an agreement to take them, and a person who enters into such an agreement is not liable to be placed on the register as a member. If he fail to perform the agreement he may be liable to an action for damages, and the damages may in some cases be the amount of the calls; but, to a person who has agreed to place, a variety of defences may be open, which would not be open to a person who has agreed to take. Thus he might shew that it was through the fault of the company that he had not been able to place, or (notwithstanding a

(*c*) *Pugh's Case, Sharman's Case*, 13 Eq. 566; and see *E. p. Little*, 17 W. R. 461; 20 L. T. 162; *cf. Cox's Case*, 4 D. J. & S. 53.

(*d*) *London, Bombay, &c., Bank*, 18 Ch. D. 581.

(*e*) *Richardson's Case*, 19 Eq. 589.

(*f*) *Reaveley's Case*, 1 De G. & Sm. 530.

(*g*) *Maxwell's Case*, 24 Beav. 321; and see *supra*, s. 22.

(*h*) *E. p. Wilson, Re Crenver Co.*, 8 Ch. 45.

(*i*) *Bird's Case*, 4 D. J. & S. 200.

(*k*) *Barrett's Case*, 4 D. J. & S. 416.

(*l*) *Patent File Co., E. p. White*, 16 L. T. 276.

(*m*) *E. p. Panmure*, 24 Ch. Div. 367.

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winding-up order, which would for this purpose be a bar to a shareholder) that he had been induced to enter into the agreement by fraud. Again, his liability ought to be tried in an action, and not in the winding-up (*n*).

A representation, however, by the promoters of an unregistered company that a certain amount of the capital has been subscribed, may be sufficient to render them liable in respect of that amount, or in respect of so much of it as they are unable to shew has been subscribed by other persons (*o*).

Underwriting shares.

An agreement to "underwrite" shares is an agreement that in the event of the public not taking up the whole or the number mentioned in the agreement, the underwriter will for an agreed commission take an allotment of so many of the shares as the public has not applied for. It is not a guarantee that the shares shall be taken or an agreement to "place" them, but is an agreement to take them if not taken by others (*p*).

Acquiescence by infant after attaining majority.

An infant applied for shares, they were allotted to him, and his name was entered on the register. He attained his majority more than a year before a winding-up order was made, and having done nothing to repudiate the shares, was held bound by acquiescence (*q*).

Delay in allotment.

If after an application for shares an allotment is not made within a reasonable time, the applicant is not bound to accept the shares (*r*).

Thus where M. and G. applied for shares on the 8th of June, and no allotment was made until the 23rd of November, before which date (viz. on the 8th of November) M. had withdrawn his application, but G. had not, it was held that neither M. nor G. was bound to accept the shares allotted to him (*s*).

B. applied on the 6th Oct., 1865, for shares in a company which proposed to start at once, and to allot shares on the 14th Oct. The company was registered in Dec., and then issued a different prospectus. Notice of allotment was sent to B. on the 3rd Feb. 1866, and on the 7th Feb. he wrote to decline to take the shares. He made no application to take his name off the register until, a call having been made in Oct. 1867, he moved in Dec. 1867 to rectify the register by striking out his name. Held, that by reason of the delay before allotment B. was not bound by his application; and that the company being a going concern, he was not prejudiced by the delay from Feb. 1866 to Dec. 1867 (*t*).

Delay in completion.

If an agreement to take shares be not completed by the due performance of all acts necessary to make the applicant a shareholder, lapse of time will bar the right of either party to have it completed. The agreement will in such a case be insufficient to fix the applicant as a contributory, and the question is reduced to one of specific performance, to which the ordinary doctrines of equity apply (*u*).

No allotment.

B. applied for shares, and paid the deposit. The company never commenced operations, and after rather more than a year a winding-up order was made. The directors had retained and used B.'s deposit, and B. had

(*n*) *Gorrissen's Case*, 8 Ch. 507.

(*o*) *Moore and De La Torre's Case*, 18 Eq. 661; and see *infra*, s. 200, n.

(*p*) *Licensed Victuallers Co.*, 42 Ch. Div. 1.

(*q*) *Ebbett's Case*, 5 Ch. 302; and see s. 22, "Infant transferee;" see, however, now the Infants Relief Act, 1874, 37 & 38 Vict. c. 62.

(*r*) *Carmichael's Case*, 17 Sim. 163, 166; and see *Gunn's Case*, 3 Ch. 40; *Ritso's Case*, 4 Ch. D. 774.

(*s*) *Ramsgate Hotel Co.* v. *Montefiore*, *Same* v. *Goldsmid*, L. R. 1 Ex. 109; and see *Mathew's Case*, 3 De G. & Sm. 234. In *Gregg's Case*, 15 W. R. 82, there was no allotment for thirteen months, but the applicant was nevertheless held liable. But, *quære*, this decision cannot be supported, *v. supra*, p. 58, note (*x*).

(*t*) *E. p. Baily*, 5 Eq. 428; 3 Ch. 592; and see s. 35.

(*u*) *Mackenzie's Case* (Eur. Arb.), L. T. 141; 18 Sol. J. 223.

never applied for it to be returned; but no allotment had ever been made to him. He was held not to be a contributory (*x*).

Where E., the surveyor of a benefit building society, purchased land of the society, and then mortgaged it to the trustees of the society by a deed which after reciting that he was a member, and had subscribed for a certain number of shares, and that the mortgage money had been advanced to him in respect of the shares, contained a covenant by him to make payments on the shares, it was held that the deed, which E. believed to be an ordinary mortgage, did not represent the real transaction, and that E. was not a contributory (*y*).

Delegation of allotment to a committee of the directors.

Where the power of allotting shares is vested in the directors, they cannot delegate the power to a committee (*z*) unless authorized by the articles to do so (a).

Executors:—

Executors may become personally liable in respect of their testator's shares (*b*).

accepting testator's shares in their personal capacity;

Thus where the secretary of a company applied to executors to have their testator's shares placed in the name of some responsible person, and the executors in reply requested that the shares might be registered in their names, and all three of them signed a deed of acceptance, but the register was never altered, nor were fresh certificates given; it was held that the deed was an acceptance personally of the shares, which up to that time they held as executors; and the regulations of the company allowing only one person to be registered as a proprietor in respect of the same shares, it was held that the three were received as a proprietor in their joint character, but for their individual benefit, and that, therefore, two of the executors being dead, the liability survived to the survivor (*c*).

But it is not a personal acceptance of shares for executors to receive the dividends in their representative character (*d*).

If, however, the company have dealt with the executor as a shareholder, the company cannot, after a lapse of time, insist on making him contributory in his representative instead of in his personal character (*e*).

accepting new shares.

Again, if executors accept from a company after their testator's death new shares, they will as between themselves and the other contributories be personally liable in respect of them, although they have been offered to and accepted by them in their representative character (*f*).

"With respect to these shares they are personally liable, and can only look to their testator's estate for indemnity. If it were otherwise, the executor of an insolvent estate might purchase any number of shares, and keep them if they were profitable, but repudiate any liability if they turned out otherwise, and thus involve the company in an account of the testator's estate. They have purchased these shares, whether with authority under the will or not is immaterial. They are therefore personally liable" (*g*).

(*x*) *Best's Case*, 2 D. J. & S. 650; 34 L. J. (Ch.) 523; and see *Chesterfield and Midland Colliery Co.*, 14 W. R. 721; 14 L. T. 509; *Land Shipping Colliery Co., E. p. Harwood and Others*, 20 L. T. 736; *Conway's Case*, 5 De G. & Sm. 150.

(*y*) *Empson's Case*, 9 Eq. 597.

(*z*) *Howard's Case*, 1 Ch. 561; and as to delegation of powers, see *Cartmell's Case*, 9 Ch. 691.

(a) *Harris' Case*, 7 Ch. 587.

(*b*) *Buchan's Case*, 4 App. Cas. 549; see as to the liability of executors, s. 76, n., and Table A., (12), n.

(*c*) *Alexander's Case* (Alb. Arb.), 15 Sol. J. 788.

(*d*) *St. George's Steam Packet Co., E. p. Doyle*, 2 H. & T. 221; *Hamer's Devisees' Case*, 2 D. M. & G. 366, 371; *Bulmer's Case*, 33 Beav. 435; 12 W. R. 564; and see *Hall's Case*, 3 De G. & Sm. 80; 1 Mac. & G. 307.

(*e*) *Gunn's Case* (Eur. Arb.), L. T. 118.

(*f*) *Fearnside and Dean's Case, Dobson's Case*, 1 Ch. 231; *Jackson* v. *Turquand*, L. R. 4 H. L. 305; *Duff's Executors' Case*, 32 Ch. Div. 301. In *Mallorie's Case*, 2 Ch. 181, M. was not executor.

(*g*) *Spence's Case*, 17 Beav. 203.

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If once shares are put into the names of executors [with their consent] individually, although they have a right of indemnity against the estate they are liable personally with that right of indemnity, and they cannot say that their liability is to be only a liability to the extent of the assets of the testator (*h*).

Sale of testator's business for shares.

Where a will contains a power of sale of the testator's business, but not in so many words a sale for shares (which is in law not a sale but an exchange), endeavour has in more than one instance been made to carry through a sale for shares in the form of a compromise in an administration action. Such an order was made by Jessel, M.R., in chambers in one case relating to a very large estate, and in *West of England Bank* v. *Murch* (*i*), Fry, J., found his way to support such a sale by the executrix and the testator's partner on the footing of its being a compromise under s. 30 of 23 & 24 Vict. c. 145. But the Court has no general power to do what it thinks best in disposing of property, so that, *e.g.*, in winding up a partnership it has no authority to sell for shares (*k*).

Trustees.

A trustee of shares is personally liable in respect of the shares, and can only look to his *cestui que trust* for indemnity, and this though the company itself be the *cestui que trust* (*l*).

Married woman.

The following authorities upon the law before the recent Married Women's Property Acts will still be valuable.

A married woman may become a shareholder in her own right so as to bind her separate estate, if it appears that the contract was entered into upon the credit of her separate estate, and the deed of settlement do not exclude married women from being shareholders, and she may be put on the list of contributories in respect of the shares (*m*).

But her husband may, it appears, in such a case be put upon the list too (*n*), unless the rules of the company exclude the husband from being a shareholder in respect of his wife's shares, and the company have with knowledge accepted the wife as shareholder, without any participation on the part of the husband (*o*).

If a female shareholder marries and the company is afterwards wound up, the husband, whether he have or not reduced the shares into possession, and although he have not taken the steps necessary for entitling himself to become a member, is liable, and the right course is to settle both husband and wife on the list of contributories, so that if the wife survive, her liability may survive also (*p*).

Where, however, the husband, not having become a member in respect of his wife's shares, survived his wife, it was held that he was liable only in respect of losses incurred during the coverture (*q*).

Where a female shareholder married, and six years afterwards the company, never having had knowledge of the marriage, was wound up, both husband and wife were put upon the list (*r*). So where a female trustee

(*h*) *Duff's Executors' Case*, 32 Ch. Div. 301, 309.

(*i*) 23 Ch. D. 138.

(*k*) *Niemann* v. *Niemann*, 43 Ch. Div. 198.

(*l*) See s. 30, n.

(*m*) *Mrs. Mathewman's Case*, 3 Eq. 781; *London, Bombay, &c., Bank*, 18 Ch. D. 531; *Belcher's Case*, W. N. 1883, 94; but see *Pugh and Sharman's Case*, 13 Eq. 566.

(*n*) *Luard's Case*, 1 D. F. & J. 533.

(*o*) *Angas' Case*, 1 De G. & Sm. 560; *Ness* v. *Angas*, 3 Ex. 805; 18 L. T. (O.S.) 166; *London, Bombay, &c., Bank*, 17 Ch. D. 581.

(*p*) *Burlinson's Case*, 3 De G. & Sm. 18; *Sadler's Case*, Ibid. 36.

(*q*) *Kluht's Case*, 3 De G. & Sm. 210; see also *White's Case*, Ibid. 157.

(*r*) *John Murgatroyd's Case* (Eur. Arb.), L. T. 105; 17 Sol. J. 483.

marries, the proper course would be to settle both husband and wife on the list (*s*).

And a husband who allows his wife to buy shares with a legacy which he consents to her receiving, and who has never dealt with the shares in any way, is nevertheless liable as contributory in respect of them (*t*).

And even if she have bought the shares without his approval, consent, or knowledge, and he have always declined to have anything to do with them, he will not on that account escape liability (*u*).

It is possible, however, that if the company, with knowledge, deal with the wife as principal, and the steps required by the deed of settlement to make the husband the shareholder are not complied with, neither husband nor wife may be liable (*x*).

Where shares are held by trustees in trust for the separate use of the wife, they of course are the contributories (*y*), but are entitled to be indemnified out of the separate estate (*z*), unless a restraint on anticipation stands in the way (a).

Upon the marriage of a female contributory her husband becomes liable, and is to be put upon the list (*b*).

Married Women's Property Act, 1870.

Under the Married Women's Property Act, 1870 (*c*), a married woman may be a member in respect of fully paid-up shares or stock to the holding of which no liability is attached. And if she apply to the company to register her as a "married woman entitled to her separate use," the company must investigate her title, and unless a flaw in the title be shewn, will be compelled by mandamus so to register (*d*).

Married Women's Property Act, 1882.

Under the Married Women's Property Act, 1882 (*e*), a married woman may be a member in respect of shares whether fully paid up or not, and where they stand in her sole name her separate estate will alone be liable. But (sect. 7) "nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company." A summary procedure is provided by the Act (sect. 17) to decide questions between husband and wife as to the title to property, including shares, and application may be made by either party or by the company.

A person who has agreed, cannot escape liability.

If a person has agreed to become a member, then, whatever be the circumstances which induced him to enter into the agreement, he cannot, after the winding-up has commenced, say that he will be released from the contract into which he has *de facto* entered (*f*). Even the fact that the transfer to him was bad as a deed, or that the officers of the company have been guilty of dishonest conduct, will not affect his liability (*g*). If he have been induced to take shares on the faith of a promise which is not kept (*h*), or of representations which turn out to be untrue (*i*), he is nevertheless liable as a

(*s*) *Lang's Case*, 4 App. Cas. 547.
(*t*) *D'Ouseley's Case* (Eur. Arb.), L. T. 137; 18 Sol. J. 282.
(*u*) *Scarisbrick's Case* (Eur. Arb.), L. T. 105.
(*x*) *E. p. Rhodes*, 7 W. R. 510.
(*y*) *Infra*, s. 30.
(*z*) *Butler* v. *Cumpston*, 7 Eq. 16.
(a) *Sheriff* v. *Butler*, 14 L. T. 510; 12 Jur. (N.S.) 329; 14 W. R. 629.
(*b*) *Infra*, s. 78.
(*c*) 33 & 34 Vict. c. 93, amended by 37 & 38 Vict. c. 50.
(*d*) *Reg.* v. *Carnatic Railway Co.*, L. R. 8 Q. B. 299.
(*e*) 45 & 46 Vict. c. 75.
(*f*) *Challis's Case*, 6 Ch. 266; and see s. 35.
(*g*) *Langer's Case*, 18 L. T. 67; 37 L. J. (Ch.) 292; *Bishop's Case*, 7 Ch. 296, n.; and see cases cited under s. 22.
(*h*) *Felgate's Case*, 2 D. J. & S. 456.
(*i*) *Wollaston's Case*, 4 De G. & J. 437; 28 L. J. (Ch.) 721; and *E. p. Barrett*, 12

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contributory, his remedy being only against the persons who have deceived him.

So, it will make no difference in what character he have acquired the shares—as, for instance, in a representative character as executor (*k*), or as trustee (*l*). The only question is, whether he have acquired them or not; and if he have, then he must hold them on the ordinary terms.

Cancellation of allotment.

Moreover, if a shareholder before the winding-up allege that he has taken his shares under a mistake, the directors have no power on that account to cancel the allotment (*m*).

For, except by virtue of a special power of forfeiture or cancellation (*n*), directors have no power to release a shareholder (*o*).

If, however, while the matter is still *in fieri*, before registration both parties discover that the transaction is invalid and repudiate it (*p*); or if, the allotment having been made by mistake to the wrong person, there have been acquiescence for a long time, as eight years, in its being cancelled (*q*) the allottee may escape.

And if the allottee was, by reason of misrepresentation, in a position to repudiate, and he did repudiate the shares, and the directors acquiesced, he is not a contributory (*r*).

So, if by reason of a common mistake, as non-registration of a contract under Companies Act, 1867, s. 25, shares have been registered, and then upon discovery of the mistake the shares have been cancelled and re-issued after registration of a contract, this will be a good cancellation, for the company will have, in fact, only done what the Court would have done if applied to (*s*).

And if the contract to take shares was founded upon a condition which was *ultra vires* the directors, and which might therefore be repudiated by the shareholders, it may properly be abandoned by the directors and treated as a nullity (*t*).

So where the question in dispute is whether the person is a shareholder or not it is possible by way of compromise of this question to relieve him of his shares (*u*).

Body corporate may be shareholder.

"Person" in this section, and other general words, such as "shareholder" throughout the Act, must be read as including a body corporate: and although it is at first sight beyond the province of one trading corporation to become a shareholder in another, yet it may do so if authorized by its own memorandum and articles of association (*x*).

Thus, where the memorandum of association stated as one of the objects, "To purchase or accept any obligations, bonds, debentures, notes, and shares

W. R. 925; 4 N. R. 308; 4 D. J. & S. 416; *Gower's Case*, 6 Eq. 77.

(*k*) *Spence's Case*, 17 Beav. 203; *Fearnside and Dean's Case*, *Dobson's Case*, 1 Ch. 231; *Sculthorpe* v. *Tipper*, 13 Eq. 232; *Duff's Executors' Case*, 32 Ch. Div. 301; and see *Hoare's Case*, 2 J. & H. 229; *Sheriff* v. *Butler*, 14 W. R. 629; 12 Jur. (N.S.) 329; 14 L. T. 510; *Alexander's Case* (Alb. Arb.), 15 Sol. J. 788.

(*l*) *Muir* v. *Glasgow Bank*, 4 App. Cas. 337.

(*m*) *Fletcher's Case*, 37 L. J. (Ch.) 49; 16 W. R. 75; 17 L. T. 136; and see *Wheatcroft's Case*, 29 L. T. 324.

(*n*) See Table A., (17)–(19), note.

(*o*) *Adams' Case*, 13 Eq. 474; *Hall's Case*, 5 Ch. 707; *London Coal Co.*, 5 Ch. D. 525; *Duff's Executors' Case*, 32 Ch. Div. 301; *Henly's Case*, W. N. 1878, 133.

(*p*) *Barnett's Case*, 18 Eq. 507.

(*q*) *E. p. Keightley*, W. N. 1874, 18, 47.

(*r*) *Blake's Case*, 34 Beav. 639; 12 L. T. 43; *Bell's Case*, 22 Beav. 35.

(*s*) *Hartley's Case*, 18 Eq. 542; 10 Ch. 157.

(*t*) *Coleman's Case*, 1 D. J. & S. 495.

(*u*) *Bath's Case*, 8 Ch. Div. 334, and others cited in Table A., art. 19, n.

(*x*) *Barned's Banking Co.*, *E. p. Contract Corporation*, 3 Ch. 105; *Royal Bank of India's Case*, 7 Eq. 91; 4 Ch. 252; *et v. supra*, s. 6.

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in any foreign or English company, and to negotiate the sale of any such securities;" and the articles authorized the directors to invest any of the moneys of the corporation on such securities, other than the shares of the corporation itself, as the directors might think desirable, an application for and acceptance of shares in another company was held valid (*y*).

So where the memorandum named as an object the "undertaking, assisting, and participating in financial, commercial, and industrial operations and undertakings both singly and in connection with other persons, firms, companies, and corporations," it was held that the company could take unpaid shares in another company (*z*).

So, where the articles of a banking company gave the directors very ample powers of management, and the directors advanced money on the deposit ot shares in another company (which is "within the ordinary course of dealing of bankers," *per* Selwyn, L.J.), and subsequently, becoming alarmed by a judicial opinion that the shares remained within the order and disposition of the depositors, had them transferred into the name of the banking company, the banking company were held contributories in respect of the shares (a).

So, also, a partnership firm may be a member; and if the transaction be a transfer accepted, by way of security for a loan, by one member of a firm of bankers, it may under the constitution of the partnership be within the authority of one partner to accept the shares so as to bind the firm (*b*).

But where the memorandum of a company, established for carrying on the business of a bill-broker and scrivener, provided for "the making advances and procuring loans on, and the investing in, securities," this did not authorize the application for a large number of shares in a proposed company with a view to its construction for the purpose of assisting the discount business of the investing company (*c*).

In the absence of authority contained in the instrument which governs its constitution, it is *ultra vires* for a company to become the registered holder of shares in another company. Such a transaction is in effect to render the aggregate body of the shareholders partners with new persons under a new constitution (*d*).

Industrial Society.

By the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 12 (4), a society may invest any part of its capital in the shares of any other society registered under that Act or under the Building Societies Acts, or of any company registered under the Companies Acts, or incorporated by Act of Parliament, or by charter, provided that no such investment be made in the shares of any society or company other than one with limited liability, and a society so investing may make such investment in its registered name, and shall be deemed to be a person within the meaning of the Companies Acts, 1862 and 1867, and the Building Societies Act, 1874.

Company purchasing its own shares.

A company cannot legally purchase its own shares although its articles or even its memorandum (*e*) contain authority enabling it to do so. Such a purchase is *ultra vires*, and in contravention of the statute (*f*).

The general question of a company purchasing its own shares and of the

(*y*) *Barned's Banking Co., E. p. Contract Corporation*, 3 Ch. 105; *cf. London Financial Association* v. *Kelk*, 26 Ch. D. 107.

(*z*) *Financial Corporation, Goodson's Claim*, 28 W. R. 760; W. N. 1880, 88.

(a) *Royal Bank of India's Case*, 4 Ch. 252.

(*b*) *Weikersheim's Case*, 8 Ch. 831; *Niemann* v. *Niemann*, 43 Ch. Div. 198.

(*c*) *Joint Stock Discount Co.* v. *Brown*, 3 Eq. 139; 8 Eq. 381.

(*d*) *British Nation Association*, 8 Ch. Div. 679.

(*e*) *Klenck* v. *East India Exploration Co.*, Ct. of Sess. Cas., 4th series, vol. xvi. p. 271.

(*f*) *Trevor* v. *Whitworth*, 12 App. Cas. 409, 437; *Walker and Hacking*, W. N. 1887, 202.

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Transfer by personal representative.

24. Any transfer of the share or other interest of a deceased member of a company under this Act, made by his personal representative, shall, notwithstanding such personal representative may not himself be a member, be of the same validity as if he had been a member at the time of the execution of the instrument of transfer (*a*).

(*a*) Sch. I., Table A., art. (12), u.

A shareholder became bankrupt, the certificates of his shares were taken in possession by his assignees. Five years afterwards the company, having received no notice of the bankruptcy, issued to the shareholder's executrix duplicate certificates on a statutory declaration that the original certificates had been lost. The executrix sold the shares and executed a transfer, and it was registered. The purchaser's title was held to prevail against the assignees (*i*).

The Companies Clauses Acts do not contain any section similar to this enabling the legal personal representative to transfer. If in a company under those Acts the names of the legal personal representatives are placed on the register, even though under the description of executors, they become joint shareholders in their individual capacity, and any transfer of the shares must be signed by all of them (*k*). A transfer by one to which the signature of the other is forged does not pass a moiety or any part of the shares or stock, but is inoperative altogether (*l*).

In a company under the Companies Acts no doubt a transfer signed by one of two executors who are noted as executors but not registered as shareholders may (subject to any provisions in the articles) be a valid transfer (*l*).

Register of members.

25. Every company under this Act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars (*a*):

(1.) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number: and the amount paid or agreed to be considered as paid on the shares of each member:

(2.) The date at which the name of any person was entered in the register as a member:

(3.) The date at which any person ceased to be a member:

(*g*) Comp. Act, 1867, s. 9, note.

(*h*) *Trevor* v. *Whitworth*, 12 App. Cas. 409, 437; *Walker and Hacking*, W. N. 1887, 202.

(*i*) *London and Provincial Telegraph Co.*, 9 Eq. 653.

(*k*) *Barton* v. *L. & N. W. Railway Co.*, 24 Q. B. Div. 77.

(*l*) *Barton* v. *North Staffs. Railway Co.*, 38 Ch. D. 458.

And any company acting in contravention of this section shall incur a penalty not exceeding five pounds for every day during which its default in complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorize or permit such contravention shall incur the like penalty.

(α) Where share warrant issued, *v.* Comp. Act, 1867, s. 31; where capital converted into stock, s. 29 of this Act.

"One or more books."

The register may consist of different books which by reference from one to the other supply all the information required by this section (*m*). It was held (though not necessary for the decision) in *Sand's Case* (*n*) that a company which has foreign as well as English shareholders may keep one register abroad and another at home (*n*). It is conceived that this is not so: the Companies (Colonial Registers) Act, 1883, was passed to cover the difficulty of there being no legal provision for keeping local registers.

"Amount paid."

A transferee of shares who has not notice to the contrary is entitled to rely upon the company's statement in the register and certificate of the shares of the amount paid on the shares he purchases, and he cannot be made liable for such amount, although it has not in fact been paid (*o*).

An account is to be kept of the amount paid, or agreed to be considered as paid, on the shares of each member. *Quære*, whether, having regard to this section, an agreement can be supported by which a member advances a sum of money to the company on the understanding that if the company goes on it is to be treated as a loan and repaid with interest; but that if the company is wound up it is to be treated as paid upon shares in anticipation of calls (*p*).

Payment in money's worth.

If shares be paid in whole or in part, not in money, but in money's worth, the directors will properly state on the register that the shares are to the extent of such money's worth paid up, although no money has passed (*q*); but as to so much as is not paid the shareholder's obligation is to pay in cash; and, *semble*, a contract on the part of the company that calls shall be set off against goods to be supplied by the shareholder instead of being paid in money is *ultra vires* (*r*).

Annual list of members.

26. Every company under this Act, and having a capital divided into shares (α), shall make, once at least in every year (β), a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting (γ), or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by

(*m*) *Weikersheim's Case*, 8 Ch. 831, 836.
(*n*) 32 L. T. 299.
(*o*) *Nicolls' Case*, *Burkinshaw* v. *Nicolls*, 7 Ch. Div. 533; 3 App. Cas. 1004; *Waterhouse* v. *Jamieson*, L. R. 2 H. L. Sc. 29; *Spargo's Case*, 8 Ch. 407, 410; and see *Guest* v. *Worcester Railway Co.*, L. R. 4 C. P. 9; and Comp. Act, 1867, s. 25, n.
(*p*) *Barge's Case*, 5 Eq. 420.
(*q*) *Anglesea Colliery Co.*, 2 Eq. 379; 1 Ch. 555; and see cases under s. 23.
(*r*) *Pellatt's Case*, 2 Ch. 527; *E. p. Clark*, 7 Eq. 550; and see *supra*, p. 48; and Table A. (4), note, and Comp. Act, 1867, s. 25, *infra*.

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(1.) The amount of the capital of the company, and the number of shares into which it is divided:

(2.) The number of shares taken from the commencement of the company up to the date of the summary:

(3.) The amount of calls made on each share:

(4.) The total amount of calls received:

(5.) The total amount of calls unpaid:

(6.) The total amount of shares forfeited:

(7.) The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

The above list and summary (ε) shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the Registrar of Joint Stock Companies.

(α) As to other companies, s. 45.

(β) *I.e.*, a year from 1st Jan. to 31st Dec.: *Gibson* v. *Barton*, L. R. 10 Q. B. 329; *Edmonds* v. *Foster*, 33 L. T. 690.

(γ) s. 49.

(δ) Where share warrant issued, *v.* Comp. Act, 1867, s. 32; where capital converted into stock, s. 29 of this Act; where capital reduced under Comp. Act, 1880, *v.* s. 6 of that Act.

(ε) Sch. II., Form E.

It appears that this list will not necessarily shew what amount of capital is uncalled.

Thus, on the one hand, if the regulations of the company provide that a certain proportion of profits shall not be paid to, but shall be credited in account to, the shareholders by way of addition to the amount paid on their shares, this will not appear in the accounts directed by (3) and (4) of this section, but the amount remaining uncalled will be *pro tanto* diminished (*s*). The list, therefore, will not shew this at all, for (5) is of course only an account of calls made and not paid.

On the other hand, if bonuses have been improperly paid out of capital, a shareholder may be liable whose shares appear upon the list as paid up (*t*).

It is not always easy to say what is a repayment of capital. Where company A. sold its business to company B., and the shareholders in company A. (who were fully paid up) took in payment shares in company B., it was held that this was not a return of capital so as to make the shares no longer fully paid (*u*).

Forfeiture. A forfeiture is not invalidated by the fact of its not having been noticed in the register of members or in this list (*x*).

(*s*) *Cathie's Case* (Eur. Arb.), L. T. 18; Reil. 27; 17 Sol. J. 29.

(*t*) *Murrough and Chamberlain's Cases* (Alb. Arb.), 16 Sol. J. 483; *Lord Digby's Case* (Eur. Arb.), L. T. 150; 18 Sol. J. 184; and see *Stringer's Case*, 4 Ch. 475; *Rance's Case*, 6 Ch. 104; *Habershon's Case*, 5 Eq. 286; *Sykes' Case*, 13 Eq. 255; *McDougall* v. *Jersey Imperial Hotel Co.*, 2 H. & M. 528.

(*u*) *Cardiff Coal Co., E. p. Norton*, 9 L. T. 186; 11 W. R. 1007; 2 N. R. 562; and see *Cardiff Coal Co.* v. *Norton*, 2 Eq. 558; 2 Ch. 405. See this case referred to by Lord Cairns in *Murrough and Chamberlain's Cases* (Alb. Arb.), 16 Sol. J. 483.

(*x*) *Lyster's Case*, 4 Eq. 233.

27. If any company under this Act, and having a capital divided into shares, makes default in complying with the provisions of this Act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the registrar, such company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager (*a*) of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty (*β*).

Penalty on company, &c., not keeping a proper register.

(*a*) Including a manager *de son tort*, *Gibson* v. *Barton*, L. R. 10 Q. B. 329, and see *Edmonds* v. *Foster*, 33 L. T. 690; *Coventry and Dixon's Case*, 14 Ch. Div. 660.

(*β*) As to companies engaged in or formed for working mines in the Stannaries, see further Stannaries Act, 1887, s. 31.

Upon a summons for penalties the justices or magistrate have jurisdiction to inquire into the truth of the statements contained in the list and summary, and are not precluded from hearing evidence by the fact that the list and summary are in accordance with the register. The jurisdiction to rectify the register no doubt resides under s. 35 in the High Court, but the register is only *primâ facie* evidence, and upon evidence that the register contains fictitious entries, the magistrate may treat the summary as false, although he cannot rectify the register (*y*).

28. Every company under this Act, having a capital divided into shares, that has consolidated and divided its capital into shares of larger amount than its existing shares, or converted any portion of its capital into stock (*a*), shall give notice to the Registrar of Joint Stock Companies of such consolidation, division, or conversion, specifying the shares so consolidated, divided, or converted.

Company to give notice of consolidation or of conversion of capital into stock.

(*a*) s. 12; Sch. I., Table A. (23)—(25).

29. Where any company under this Act, and having a capital divided into shares, has converted any portion of its capital into stock (*a*), and given notice of such conversion to the registrar (*β*), all the provisions of this Act which are applicable to shares only shall cease as to so much of the capital as is converted into stock; and the register of members hereby required to be kept by the company (*γ*), and the list of members to be forwarded to the registrar (*δ*), shall show the amount of stock held by each member in the list instead of the amount of shares and the particulars relating to shares hereinbefore required.

Effect of conversion of shares into stock.

(*a*) s. 12; Sch. I., Table A. (23)—(25).
(*β*) s. 28.
(*γ*) s. 25.
(*δ*) s. 26.

30. No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this Act and registered in England or Ireland.

Entry of trusts on register.

(*y*) *Briton Medical Association*, 39 Ch. D. 61.

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Scotland.

This section, it will be observed, does not extend to Scotland, and the exception arose from the fact that it was the Scotch practice to notice trusts in the transfer and registration of stocks. The practice, however, was "not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust" (*z*).

Even in Scotland, therefore, the result of the acceptance of stock "as trust disponees," the signature of the transfer "as trust disponees," and the registration in the company's books "as trust disponees," is to leave the trustees personally liable, and not to limit their liability to the trust estate (a). For in construing the words "as trust disponees," a construction must if possible be adopted which will make the contract between the shareholders and the company a valid one having regard to their respective powers of contracting. If, therefore, the trustees were contracting with a person competent to make any contract he pleased, a contract by them "as trustees" would, no doubt, mean that they contracted not as individuals, but so as to bind only the trust estate (*b*). But an unlimited company [or *quære* a limited company either] has no power by law to fix any limit of liability upon the shares except by virtue of the statute, and it cannot accept A. as a shareholder except upon the terms that A. shall be liable. The words "as trustees," therefore, must in such case be construed, not so as to import a contract which is not competent to the company, but as referring to an identification of the trust property for the protection of the *cestuis que trust* (*c*). Where the company certifies A. to be holder "in trust" a transferee may be bound to inquire whether the transfer is authorized by the nature of the trust (*d*).

The case of an executor as distinguished from a trustee is in some respects different. For an executor has a representative character, and if he simply intimates to the company his title as executor in order to claim his rights as legal personal representative, and makes or gives no request or authority to register his name as shareholder, he need not become personally liable (*e*). Comp. Act, 1862, s. 76, distinctly recognises representative liability in the case of executors. Under the Companies Clauses Act the statutory provisions are, and therefore the result is different (*f*).

Notice.

This section does not provide, as did the Act of 1856 (*g*), that notice of a trust shall not be receivable by the company; but, as respects liability to creditors, at any rate, such notice would be of no effect (*h*).

The object of the section is to relieve the company from taking notice of equitable interests in shares, and to preclude persons claiming under equitable titles from converting the company into a trustee for them. As between

(*z*) *Per* the Lord President, *Muir's Case*, Court Sess. Cas., 4th series, vol. vi. p. 400; Scottish Law Reporter, vol. xvi. p. 147; and see *Lumsden* v. *Buchanan*, Court. Sess. Cas., 3rd series, vol. ii. p. 695; and vol. iii. (H. L.), p. 89; 4 Macq. 950.

(*a*) *Muir* v. *Glasgow Bank*, 4 App. Cas. 337.

(*b*) *Gordon* v. *Campbell*, 1 Bell's App. 428; Court of Sess. Cas., 2nd series, vol. ii. p. 639.

(*c*) *Muir* v. *Glasgow Bank*, 4 App. Cas. 337; *Lumsden* v. *Buchanan*, 4 Macq. 950; Court Sess. Cas., 3rd series, vol. ii. p. 695, vol. iii. p. 89; *Bell's Case*, 4 App. Cas. 547.

(*d*) *Bank of Montreal v. Sweeny*, 12 App. Cas. 617.

(*e*) *Glasgow Bank*, *Buchan's Case*, 4 App. Cas. 549, 588, 594; and see Table A. art. (12), note.

(*f*) *Barton* v. *L. & N. W. Railway Co.*, 24 Q. B. Div. 77.

(*g*) 19 & 20 Vict. c. 47, s. 19. As to the effect of this section, see *E. p. Stewart, Re Shelley*, 13 W. R. 356; 11 Jur. (N.S.) 25; 34 L. J. (Bk.) 6.

(*h*) *Chapman and Barker's Case*, 3 Eq. 361.

successive equitable mortgagees of shares, therefore, priority will be determined by priority of charge, not by priority of notice (*i*). An equitable assignee or mortgagee can no doubt sue the company in a proper case (*k*). And if he desires to assert his equitable title as against the company, he should apply under 5 Vict. c. 5, s. 4, and Order XLVI. for an order restraining the company from allowing a transfer to be made (*l*). No doubt, too, if the directors receive notice of an equitable claim they ought to allow time for a proper restraining order to be obtained (*l*). But tho company is not bound to receive or record notices of equitable interests, and such a notice cannot affect the company with any trust (*m*).

Lien.

Again, the section does not render inapplicable to a company the principle of *Hopkinson* v. *Rolt* (*n*). So that where the articles of association give the company "a first and permanent lien and charge" for the debts of the holder, the company cannot claim priority in respect of money becoming due from the holder to the company after notice of security given upon the shares to another person (*o*). In such a case, the notice is not notice of a trust, but is a notice affecting the company in their capacity as traders (*o*).

Where trustees of a marriage settlement invested part of the trust funds in the shares of a company under whose articles the company had a lien on shares for sums due to the company from the member, and one of the trustees was a member of a firm which, some years after the shares were purchased, failed and then owed the company money, it was held that the equitable lien of the company prevailed over the title of the *cestuis que trust* under the marriage settlement (*p*).

The company's lien attaches only for the debt of the registered holder. If in fact he is, and the company knows that he is, and even if it has been judicially determined that he is trustee for another, the company cannot assert a lien for the debt of the *cestui que trust* (*q*).

Liability of trustee of shares.

As between himself and the company, the trustee whose name is on the register is the shareholder, and is the person holding "in his own right," *e.g.*, for the purpose of qualification as a director (*r*); and he, and not the *cestui que trust*, is the person liable to the company for all payments and obligations attaching to the shares (*s*); moreover, his liability is not, and cannot be (*t*), limited to the amount of the trust estate (*u*). The liability of the trustee, too, is the same even when the company itself is the *cestui que trust* (*x*).

(*i*) *Soc. Générale* v. *Tramways Union*, 14 Q. B. Div. 425; *Soc. Générale* v. *Walker*, 11 App. Cas. 20.

(*k*) *Binney* v. *Ince Hall Coal Co.*, 35 L. J. (Ch.) 363.

(*l*) *Soc. Générale* v. *Tramways Union*, 14 Q. B. Div. 453.

(*m*) 11 App. Cas. 30.

(*n*) 9 H. L. C. 514.

(*o*) *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29; S. C. 29 Ch. D. 149; 31 Ch. Div. 19. *Miles* v. *New Zealand Co.*, 32 Ch. Div. 266, must be taken as over-ruled by this case.

(*p*) *New London and Brazilian Bank* v. *Brocklebank*, 21 Ch. Div. 302. *Quære* this case since *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29, if the company had notice that the trustees held as trustees.

(*q*) *Mexican Mining Co., Re Perkins*, 24 Q. B. Div. 613; *Ystalyfera Gas Co.*, W. N. 1887, 30.

(*r*) *Pulbrook* v. *Richmond Co.*, 9 Ch. D. 610. But see *Bainbridge* v. *Smith*, 41 Ch. Div. 462; *Reeves* v. *Bainbridge*, W. N. 1889, 228.

(*s*) *E. p. Isaac Bugg*, 2 Dr. & Sm. 452; 13 W. R. 911; 12 L. T. 696; *Bunn's Case*, 2 D. F. & J. 275, 300; *Drummond's Case*, 2 Giff. 189; *Barrett's Case*, 4 D. J. & S. 416; *cf.* the cases as to executors, *supra*, p. 77, and mortgages, p. 73.

(*t*) *Muir* v. *Glasgow Bank*, 4 App. Cas. 337.

(*u*) *Hoare's Case*, 2 J. & H. 229; *Leifchild's Case*, 1 Eq. 231.

(*x*) *Chapman and Barker's Case*, 3 Eq. 361; *Universal Banking Corporation, E. p. Challis*, 16 W. R. 451; 17 L. T. 637; *Easum's Case* (Alb. Arb.), 15 Sol. J. 750; *Cree* v. *Somervail*, 4 App. Cas. 648.

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One of the objects of the section is to free, not the company only, but creditors also, from the responsibility of inquiring after persons for whom shares are held in trust; the trustee, therefore, cannot escape personal liability in respect of the shares standing in his name.

If there are several trustees their liability is *in solido*, each for the total amount of which they are joint holders, and not *pro ratâ parte* each for his proportion (*y*).

But if it have been part of the bargain between the company and its trustee that the trustee shall not be put on the register except by his own direction, and he accordingly has not been registered before the winding-up, the liquidator cannot afterwards register him and make him a contributory (*z*).

If the shares have not become vested by transfer in the trustee, and he is therefore not in fact a member, he will of course not be liable (a).

Charging orders.

It has been held that shares of which the registered owner is trustee for another, may be made the subject of a charging order under 1 & 2 Vict. c. 110, s. 14, upon a judgment obtained against the registered holder (*b*). But it is difficult to understand how for this purpose such shares are standing in the name of the judgment debtor "in his own right" (see *ante*, p. 56); and a subsequent decision (*c*), and a case before Malins, V.C., where his Lordship discharged a charging order obtained against a son upon stock standing in his name in trust for his father (*d*), seem inconsistent with such a view of the statute.

The words of the statute are, "standing in his name in his own right, or in the name of any person in trust for him:" the beneficial interest of the *cestui que trust* in the shares may therefore be charged (*e*), and none the less so if the trust be not for him *simpliciter* but for him and others in settlement (*f*); but an interest in the general residue of a testatrix' estate, including the produce of sale of shares subject to a prior trust for payment of the testatrix' debts, is not an interest in the shares capable of being charged (*g*).

Trustee's right to indemnity.

As between the trustee and the *cestui que trust*, the latter is the shareholder, and is bound to indemnify the trustee against all liabilities attaching to the shares (*h*).

This right to an indemnity, however, is a question between the trustee and the *cestui que trust* only. If the company itself be the *cestui que trust*, the right to an indemnity will be a question between the trustee and the company—*i.e.*, the other shareholders—which the trustee may assert in a proper way, but it cannot be asserted against creditors and the external world—see sect. 38 (7) (*i*).

Saunders' Case (*k*) is not an authority against the rule above stated; for in that case Saunders' name was not on the register; and the Lord Justice held that the company could not insist on putting their own trustee on the list of contributories (*l*).

(*y*) *Cuninghame* v. *Glasgow Bank*, 4 App. Cas. 607; *Gillespie* v. *Glasgow Bank*, Ibid. 632.

(*z*) *Gray's Case*, 1 Ch. D. 664.

(a) *Hall's Case*, 3 De G. & Sm. 80; 1 Mac. & G. 307.

(*b*) *Cragg* v. *Taylor*, L. R. 1 Ex. 148.

(*c*) *Gill* v. *Continental Union Gas Co.*, L. R. 7 Ex. 332.

(*d*) *Blakely Ordnance Co., Coates' Case*, 35 L. T. 617.

(*e*) *Cragg* v. *Taylor*, L. R. 2 Ex. 131.

(*f*) *South Western Loan Co.* v. *Robertson*, 8 Q. B. D. 17.

(*g*) *Dixon* v. *Wrench*, L. R. 4 Ex. 154.

(*h*) *Butler* v. *Cumpston*, 7 Eq. 16; *James* v. *May*, L. R. 6 H. L. 328; *Cruse* v. *Paine*, 6 Eq. 641; 4 Ch. 441; *Hemming* v. *Maddick*, 7 Ch. 395; *Hughes-Hallett* v. *Indian Mammoth Co.*, 22 Ch. D. 561.

(*i*) *Chapman and Barker's Case*, 3 Eq. 361; *Easum's Case* (Alb. Arb.), 15 Sol. J. 750.

(*k*) 2 D. J. & S. 101.

(*l*) *Cf. Gray's Case*, 1 Ch. D. 664.

The trustee cannot maintain an action for indemnity before the damage has accrued which gives rise to the right to indemnity (*m*). So that even where a winding-up order had been made, the trustee's action for indemnity was dismissed as a mere *quia timet* action where no call had been and there was no evidence that any call would be made (*m*). But where the official liquidator had asserted an intention to make the trustee liable and the *cestui que trust* denied his right to indemnity, the trustee obtained judgment for a declaration of right to indemnity before he was on the list and before any call had been made on him (*n*).

Whether available for the benefit of the company.

But although the company can look in the first instance for payment only to the trustee whose name is on the register, and cannot put the *cestui que trust* on the list of contributories (*o*), yet it may be that the company may become entitled to enforce and receive payment on account of the indemnity which the trustee can claim from his *cestui que trust*, and thus may through the trustee render the *cestui que trust* practically liable as a contributory (*p*).

Thus, where C. held shares in company B. as trustee for company A., and, both companies being in liquidation, calls were made upon C., which he did not pay; it was held, on C.'s application in the matter of company A., that he was entitled to rank as a creditor of company A., in respect of the calls which had been made and any future calls, he undertaking that the liquidator of company A. should be at liberty to pay over to the liquidator of company B. the dividends on the debt as and when paid, and the liquidator of company B. consenting to accept such payments in satisfaction of all claims against C. or his estate in respect of the shares (*q*).

And in *Hemming* v. *Maddick* (*r*) a trustee of shares, having entered into a compromise with the liquidator, in respect of his liability, upon terms including a stipulation that the liquidator should be at liberty to continue a suit, instituted by the trustee against his *cestui que trust* to enforce his right to an indemnity, it was held by Malins, V.C. (although upon a motion for leave to amend the bill his Honour had expressed some doubt upon the point (*s*),) and affirmed upon appeal, that the liquidator could properly maintain the suit, and a decree was made in his favour for the full amount of the calls made in the winding-up.

In *May's Case* (*t*) M., on receiving £15, allowed a large number of shares in the W. Company, a company originated and financed by the C. Company, to be placed in his name. He did not receive any certificates for the shares, and stated that he thought they belonged to the directors of the C. Company, and that he was a mere dummy in the matter. M. executed transfers of the shares to the C. Company, and took no further trouble in the matter. The C. Company was wound up compulsorily. The W. Company was wound up under supervision. A call was made on M. in respect of the W. shares, and the shares were forfeited for non-payment of calls. M. afterwards explained all that had been done, and the W. directors, in consideration of his transferring to them all his rights and interests in the shares, purported to release him from all liability to them. M. took out a summons for the purpose of compelling the C. Company to indemnify him against any demands that

(*m*) *Hughes-Hallett* v. *Indian Mammoth Co.*, 22 Ch. D. 560, notwithstanding *Lord Ranelaugh* v. *Hayes*, 1 Vern. 189.

(*n*) *Hobbs* v. *Wayet*, 36 Ch. D. 256.

(*o*) *Gillespie* v. *Glasgow Bank*, 4 App. Cas. 632.

(*p*) *British Nation Association*, 8 Ch. Div. 708.

(*q*) *National Financial Co., E. p. Oriental Commercial Bank*, 3 Ch. 791; and see *Cruse* v. *Paine*, 6 Eq. 641; 4 Ch. 441; *Massey* v. *Allen*, 9 Ch. D. 164.

(*r*) W. N. 1871, 198; 25 L. T. 483; 7 Ch. 395.

(*s*) 9 Eq. 175.

(*t*) *James* v. *May*, L. R. 6 H. L. 328, reported below in 23 L. T. 643; W. N. 1871, 18.

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might be made on him by or on account of the W. Company; and it being held that it was a mere case of trustee and *cestui que trust*, and the release being invalid as made without the sanction of the Court, M. was held entitled to the indemnity, and the fact that the W. Company was joined with him for its own benefit was immaterial. *Heritage* v. *Paine* (*u*), the facts of which are fully stated presently, is another case in which the liquidator, by arrangement with the *cestui que trust*, recovered judgment against the trustee.

Quantum of indemnity.

The right of the trustee to an indemnity is a right to compel the *cestui que trust* to pay in full all calls that may be made upon the trustee as registered owner of the shares (*x*), and the right of the company, it is conceived, is to continue pressing the trustee for payment until the means of the *cestui que trust* are exhausted. In other words, that which the company can get is measured by the depth of the pockets of the *cestui que trust*, not only by that of the trustee. This seems to follow from the form of the order in some of the cases.

Thus, where a trustee of shares instituted a suit for indemnity, and he having died, his executor, who had been placed on the list of contributories, revived the suit; it was held that, although the assets of the late plaintiff were insufficient to pay his debts in full, the decree must be for payment, not of such sums as, having regard to the amount of the late plaintiff's assets, would be properly payable thereout, but for payment in full of the actual calls made upon him (*y*); on appeal (*z*) the decree was varied, and was to procure the release or discharge of the late plaintiff's estate, either by payment of the calls or otherwise, and to indemnify his estate against all costs, damages, and expenses in respect of the calls. This was as between trustee and *cestui que trust*.

Then as to the company. In *Heritage* v. *Paine* (*u*), a vendor of shares, who was entitled to an indemnity from stock-jobbers for giving him the name of an infant as transferee, filed a bill against them for indemnity. The plaintiff then as between himself and the liquidator compromised the liquidator's claims against him on the terms of paying £2000, and of practically giving the liquidator the benefit of the pending suit as to anything above £2000 which might be recovered therein from the jobbers. The plaintiff having paid the £2000 was not in any event to be further liable. Hall, V.C., made declarations, (1) that the defendants were bound to indemnify the plaintiff; (2) that the defendants were liable to pay the liquidator the whole of the calls to be made by him, and ordered payment of £2000 to the plaintiff, and payment to the liquidator of the amount of the calls. It was unsuccessfully sought to distinguish this case as not being a case of trusteeship.

Colourable and fraudulent trusts.

But when it is said that the trustee of shares, and not the *cestui que trust*, is liable as contributory in respect of them, this must be understood only of a *bonâ fide* trusteeship, for if the trusteeship be only colourable or fraudulent, the real owner will be liable.

Thus where, on the formation of a cost-book mining company, it was arranged between the promoters, of whom C. was one, that C. should take 300 shares; and, in order to increase the apparent number of shareholders, C. caused 100 of the shares to be transferred into the name of A., and 100 into that of B., it was held that, in the absence of *bonâ fide* trusteeship on the part of A. and B., and having regard to sect. 200 of this Act (a), C. was

(*u*) 2 Ch. D. 594.
(*x*) *Cf. Laccy* v. *Hill*, *Crowley's Claim*, 18 Eq. 182, 191.
(*y*) *Cruse* v. *Paine*, 6 Eq. 641.
(*z*) 4 Ch. 441.
(a) But see note to that section.

properly made contributory for the total number of 300 shares, without prejudice to any application which might be made to add the names of any other person or persons in respect of the 200 shares (*b*).

And so if, in a failing company, a shareholder, in order to escape liability, transfers his shares to a pauper, with a reservation of benefit to himself in case the shares should become valuable, the transferor, and not the transferee, will be put on the list of contributories (*c*).

So, if a person take shares in the name of a fictitious person (*d*), or improperly take an allotment or transfer of shares in the name of a person who has never agreed or intended to accept them, the real owner will be the contributory (*e*).

Bonâ fide purchase in name of nominee.

But a *bonâ fide* purchase in the name of a nominee is valid and effectual; and in such a case the nominee, being a *bonâ fide* trustee, will be the contributory. For the two principles must not be confounded, that (1) a shareholder in a failing company cannot transfer his shares so as to escape liability, and at the same time reserve to himself the benefit (if any) in respect of the shares; and (2) that a person may stand as a shareholder, not having any beneficial interest, but merely as a trustee for some other person (*f*).

A broad distinction, too, must be drawn between the case of a person who, being a shareholder, has transferred his shares, and that of a person who, not being a shareholder, has purchased shares in the name of a trustee. If a shareholder executes a transfer which is fraudulent and improper, then, the transfer being set aside, the former shareholder remains a shareholder, and is a contributory. But if a person has never been a shareholder, and has never contracted with the company to become a shareholder, but has done nothing more than purchase shares in the name of a trustee, it is not easy to see what equity there can be to make such a person a contributory at all.

And therefore in *King's Case* (*g*), where K., the secretary of a cost-book mining company, purchased shares and had them transferred to a nominee, who was a man of small means (his object being to prevent its being known that he was trafficking in the shares of the company), and the transfer was registered, and about three years afterwards the company was wound up; it was held that the purchase being in the name of a *bonâ fide* trustee, K. could not be put on the list of contributories; and, *semble*, he could not have been made a contributory even if it had been proved that he placed the shares in the name of a nominee simply for the purpose of escaping liability (*h*).

Cox's Case (*v. supra*) was there distinguished by the fact that Cox *had agreed* with the company, or with the other promoters of the company, to take a certain number of shares, and had then placed some of them in the names of persons who had no real interest in them for an improper purpose. So that a parallel might, perhaps, be drawn with the case of a subscriber of the memorandum of association of a registered company subsequently taking in the name of nominees the shares for which he subscribed the memorandum (*i*).

King's Case (*g*) was followed in *London, Bombay, &c. Bank* (*k*), where a husband applied for shares in the name of his wife, and the company allotted

(*b*) *Cox's Case*, 4 D. J. & S. 53; 33 L. J. (Ch.) 145; 12 W. R. 92; 3 N. R. 97; see *Barrett's Case*, 4 D. J. & S. 416; *Davidson's Case*, 3 De G. & Sm. 21.

(*c*) *v.* cases, s. 22.

(*d*) *Supra*, p. 74.

(*e*) See notes to ss. 22, 23, *passim*.

(*f*) *E. p. Bugg*, 2 Dr. & Sm. 452.

(*g*) 6 Ch. 196; *cf. Colquhoun* v. *Courtenay*, 29 L. T. 877.

(*h*) *Cf. W. W. Williams' Case*, 1 Ch. D. 576.

(*i*) See *Nokes' Case*, 16 W. R. 413, 1135; 37 L. J. (Ch.) 470, 624; and s. 23.

(*k*) 18 Ch. D. 580.

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them to the wife, and the husband signed the memorandum and articles in respect of the shares "S. for M. his wife," and paid the deposit and calls out of his own moneys, and subsequently executed on behalf of the wife transfers of some of the shares, and all without the wife's knowledge. The liquidator's application to put the husband on the list of contributories was there refused because the company had accepted the wife as shareholder without any misrepresentation or concealment on the part of the husband. The husband took other shares simultaneously in his own name.

Where a purchaser of shares, finding that his vendor was a director of the company, took the transfer not into his own name but into that of his foreman, describing him as "gentleman" but giving his true address at the works where he was employed, the foreman and not the purchaser was made contributory (*l*). The articles here contained a discretionary clause as to approval of transferees.

Trustees of unauthorized investment.

A railway company, having no power to purchase or hold shares in another company, took shares in another railway company in the name of a trustee. The trustee became bankrupt, and the shares were claimed by the assignees as being in his order and disposition. But it was held that, though the purchase of the shares was illegal, the company as *cestuis que trust* were entitled to the value bought with their money, and that the shares were not in the order and disposition of the bankrupt so as to pass to his assignees (*m*).

So where the trustees of a friendly society advanced moneys of the society to one who was not a member on the security of his promissory note with sureties, the society were held entitled to recover on the note, for the contract was not illegal but unauthorized, and the makers of the note could not allege by way of defence that the trustees had no authority to lend the money (*n*).

Infant trustee.

Where a shareholder transferred shares into the name of an infant as trustee for himself, nearly three years before the commencement of the winding-up, the infant being perfectly well aware of it and allowing it to be done, and the company, having the means of knowing the nature of the transaction, registered the transfer and took no objection before the winding-up, and the infant attained his majority nearly two years before the winding-up, it was held that the trustee, and not the *cestui que trust*, was the contributory, and that neither the trustee nor the official liquidator was entitled to have the register rectified (*o*).

Trustee and third parties.

It is, of course, only as between the trustee, the *cestui que trust*, and the company that the *cestui que trust* is ignored, and the trustee treated as being for all purposes the owner of the shares: as between the trustee, the *cestui que trust*, and third parties, as, *e.g.*, a person with whom the certificates have been wrongfully deposited by the trustee (*p*) or the assignees in bankruptcy of the trustee (*q*), the equitable title of the *cestui que trust* will be duly recognised.

Certificate of shares or stock.

31. A certificate, under the common seal of the company, specifying any share or shares or stock held by any member of a

(*l*) *W. W. Williams' Case*, 1 Ch. D. 576.

(*m*) *Great Eastern Railway Co.* v. *Turner*, 8 Ch. 149; and see *Pinkett* v. *Wright*, 2 Hare, 120, 127.

(*n*) *Coltman* v. *Coltman*, 19 Ch. Div. 64.

(*o*) *Mitchell's Case*, 9 Eq. 363; and see s. 22, *sub* tit. "Infant transferee;" see now the Infants Relief Act, 1874, 37 & 38 Vict. c. 62.

(*p*) *Shropshire Union Railway* v. *The Queen*, L. R. 7 H. L. 496.

(*q*) *Great Eastern Railway Co.* v. *Turner*, 8 Ch. 149.

company, shall be *primâ facie* evidence of the title of the member to the share or shares or stock therein specified. Sect. 31.

Table A. in the first schedule to this Act provides (*r*) for a member's right to require a certificate, but the Act is silent on the subject.

Under articles which require an intending transferor to provide his title (*s*) the company may require the certificate to be left for inspection (*t*).

Effect of certificate as against the company.

The certificate, as against the company, amounts to a statement that the company take upon themselves the responsibility of asserting that the person to whom the certificate is granted is the registered shareholder entitled to the specific shares included in the certificate (*u*), and further, in the case of a *bonâ fide* transferee who has no notice to the contrary, that the amount certified to be paid has been paid (*x*). The power of granting certificates is one for the benefit of the company, as affording facilities for dealing in shares by shewing at once a marketable title, and thus rendering the shares of greater value; and the issuing of the certificate amounts to a declaration on the part of the company to all the world that the person to whom it is issued is a shareholder, and it is given by the company with the intention that it shall be so used by the person to whom it is given. The company are, therefore, estopped from denying the validity of a certificate which has been obtained by fraud or under mistake, against a subsequent *bonâ fide* purchaser for value, accepting a transfer on the production of the certificate (*y*).

In *Shaw* v. *Port Philip Co.* (*z*) the company was held to be estopped by a certificate issued by the fraud of its secretary, and which was in fact a forgery, and this upon the principle that the company was responsible for the fraud of its agent acting within the scope of his employment. The secretary there purported to transfer to G. shares which in fact he did not possess, and issued to G. a certificate sealed with the company's seal, affixed without the authority of the directors, and purporting to be signed by a director whose signature in fact was forged, and G. deposited this certificate with S. as security for advances. S. was held entitled to recover damages against the company. It is conceived that this case misapplied the principle of *Barwick* v. *English Joint Stock Bank* (a), for the secretary was clearly acting not "for the benefit," *i.e.*, "for" or "on behalf of" the company, but for his own interest, and in such case the company is not, in an action for deceit, liable for the fraud of its agent (*b*).

Damages against company.

An erroneous certificate will not, of course, confer a title to the shares. The result will be to make the company liable in damages. Thus:—

Five shares in a company were transferred to S. and G., and share certificates were given to them. S. and G. transferred to A., and share certificates were given to him. The transfer to S. and G. was a forgery. It was held that the giving of the certificates to S. and G. amounted to a statement by

(*r*) Art. (2), *v. infra.*
(*s*) Table A., art. (16), *infra.*
(*t*) *East Wheal Martha Mining Co.*, 33 Beav. 119; 2 N. R. 543.
(*u*) *Bahia and San Francisco Railway Co.*, L. R. 3 Q. B. 584.
(*x*) *Nicolls' Case, Burkinshaw* v. *Nicolls*, 7 Ch. Div. 533; 3 App. Cas. 1004, 1027; *Waterhouse* v. *Jamieson*, L. R. 2 H. L. Sc. 29; *Spargo's Case*, 8 Ch. 407, 410; *Bush's Case*, 9 Ch. 554; and see *Guest* v. *Worcester Railway Co.*, L. R. 4 C. P. 9.
(*y*) *Bahia and San Francisco Railway Co.*, L. R. 3 Q. B. 584; *cf. Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642; *Romford Canal Co.*, 24 Ch. D. 85; and as to a forged transfer see *Johnston* v. *Renton*, 9 Eq. 181; *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. Div. 188.
(*z*) 13 Q. B. D. 103.
(a) L. R. 2 Ex. 259.
(*b*) *British Mutual Banking Co.* v. *Charnwood Forest Co.*, 18 Q. B. Div. 714.

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the company, intended by the company to be acted upon by purchasers of shares in the market, that S. and G. were entitled to the shares, and that A. having acted upon that statement, the company were estopped from denying its truth; and that, therefore, the transfer to A. being in fact a nullity (*c*), he was entitled to recover from the company the value of the shares (*d*).

Again, where, a sale of shares not having been completed by registration, the vendor had to pay a call, of which he demanded repayment from the purchaser, and thereupon the purchaser, before making repayment, required the transfer to be registered, and it was registered accordingly, and the company issued to him a certificate of title to the shares, and on the faith of this he repaid the call; it was held that by registration and delivery of the certificate, followed by the payment of the call, the company were estopped from denying the purchaser's title, and the title being in fact bad, they were liable to pay him the value of the shares (*e*).

But it is only the person entitled by estoppel who can render the company liable in damages. Thus, where by a forged transfer stock belonging to C. purported to be transferred to S., a nominee of B., and S. was registered as owner, and then B., having borrowed money from a bank, caused S. to transfer the stock to I. as trustee for the bank by way of security, and the company registered I. as owner and issued a certificate to him, the bank by I. as their trustee would have been entitled by estoppel, and could have made the company liable in damages, but the bank having been paid off, I. became a bare trustee for B., and as between B. and the company there was no estoppel. An action brought, therefore, by I. and B. against the company for damages failed (*f*).

Equitable title.

Again, the certificate purports only to shew the legal and not the equitable title, and if persons are content to deal on the faith of the certificate with the registered shareholder without inquiring into the beneficial ownership and without obtaining a legal title by transfer they may find themselves ousted by an earlier equitable title (*g*).

Thus a mortgagee by deposit of certificates of shares of which the depositor was in fact trustee for the company could not claim the shares as against the company (*h*).

In *In re London and Provincial Telegraph Co.* (*i*) A. was, at the time of his bankruptcy, entitled to fifty shares in a limited company. The assignee in bankruptcy took no steps for five years to assert his right, and the shares were transferred by the company into the name of C., the bankrupt's widow and executrix, and upon a statutory declaration that the original certificates had been lost or mislaid, duplicate certificates were issued to C. Under these circumstances it was held that the title of D., a registered purchaser for value from C., prevailed against that of the assignee in bankruptcy, the transfer by C. being by sect. 24 of the same validity as if C. had been a shareholder at the time of its execution; and an application by the assignee, under sect. 35, for rectification of the register was refused, but without giving any opinion as to the liability of the company to an action for compensation on the part of the assignee in bankruptcy.

(*c*) See also *Barton* v. *North Staffs. Railway Co.*, 38 Ch. D. 458.

(*d*) See note (*y*), p. 93.

(*e*) *Hart* v. *Frontino, &c., Co.*, L. R. 5 Ex. 111. See observations on this case in *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. Div. 188, 204.

(*f*) *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. Div. 188.

(*g*) See further note to Table A. art. 8.

(*h*) *Shropshire Union Railways* v. *The Queen*, L. R. 7 H. L. 496, reversing S. C. L. R. 8 Q. B. 420; *cf. Carritt* v. *Real Advance Co.*, 42 Ch. D. 263, 270.

(*i*) 9 Eq. 653.

Legal title.

It is often difficult to say at what exact moment the legal title passes upon a transfer of shares. If the transfer duly executed has been registered the legal title of course has passed, but it would seem that something short of registration may be sufficient, and that a legal title to the shares (as distinguished from a legal right of action against the company if they refuse to register the transfer) is acquired as soon as all necessary conditions have been satisfied, to give the transferee as between himself and the company a present absolute and unconditional right to have the transfer registered (*k*).

Upon receiving the transfer the company is not bound to act upon it at once, but may take a reasonable time to make reasonable inquiries, and if before the expiration of such reasonable time the company receive notice of a prior equitable title, it is not necessarily bound to proceed further (*l*), so that during this time it would seem that the legal title has not passed so as to exclude the prior equity.

If, however, the company register the transfer without notice of the prior equity, the legal title may enure for the benefit of the registered holder. This was so held in the case of purchaser for value without notice who after notice got the transfer registered (*m*). In that case a sole trustee of shares executed and delivered to a mortgagee a transfer of the shares with the certificate, which shewed that the shares had formerly stood in the names of two persons. It was held that this was not sufficient to fix the mortgagee with notice, or set him upon inquiry, and that when after notice of the trust he procured the shares to be registered in his name he could hold such legal title against a prior equity (*m*).

Certification of transfer.

Upon a transfer of shares the practice is that the transferor lodges with the company the certificates of the shares, and thereupon the company marks the transfer with the words "certificate lodged." This is known as "certification." The effect of certification is to represent that the transferor has produced to the company a certificate shewing him to be registered owner, or a certificate shewing some other person to be registered owner, and transfers purporting to transfer the shares from such person to the transferor. But such certification does not warrant the title of the transferor nor the validity of the documents which go to shew his title (*n*).

Inspection of register.

32. The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned (*a*); except when closed as hereinafter mentioned (*β*), it shall, during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling, or such less sum as the company may prescribe, for each inspection; and every such member or other person may require a copy of such register, or any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of sixpence for every hundred words re-

(*k*) *Nanney* v. *Morgan*, 37 Ch. Div. 346; *Roots* v. *Williamson*, 38 Ch. D. 485.

(*l*) *Soc. Générale* v. *Walker*, 11 App. Cas. 20, 28; *Roots* v. *Williamson*, 38 Ch. D. 485, 493.

(*m*) *Dodds* v. *Hills*, 2 H. & M. 424.

(*n*) *Bishop* v. *Balkis Co.*, W. N. 1890, 160.

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quired to be copied: If such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues, and every director and manager of the company who shall knowingly authorize or permit such refusal shall incur the like penalty; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers or the Vice-warden of the Stannaries, in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register (γ).

(α) s. 39. (β) s. 33. (γ) Note to s. 35, *sub* tit. "Stannaries."

A company is not entitled to refuse a shareholder an inspection of the register because he is the solicitor of parties engaged in litigation against the company, although it be stated on affidavit and not denied that the inspection is required in the interest of his client, and not in the interest of the company or any member of the company as such. In the case referred to, a decree in Chancery had been obtained against the company, and the shareholder's object was said to be to canvass the members and endeavour to induce them to vote against an appeal (*o*).

It has been said that a member applying for inspection ought to state the object for which he wants it, but this was a mere *obiter dictum* (*p*), and the contrary has been determined in *Holland* v. *Dickson* (*q*).

This section contains provisions as to taking copies and as to the authority to enforce inspection which are not found in the Companies Clauses Acts. But under those Acts it has been determined that there is a right to take copies (*r*), and that the right to inspect may be enforced by injunction without the necessity of applying for a mandamus (*s*).

The fact that the person seeking inspection is actuated by motives hostile to the company is no defence to his legal right to inspect (*t*), except it be in a suit in which he purports to sue on behalf of himself and all other shareholders (*u*).

A solicitor cannot obtain a lien upon the register of members (*x*).

As to colonial registers and their duplicates in this country, see the Companies (Colonial Registers) Act, 1883, *infra*.

Power to close register.

33. Any company under this Act may, upon giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, close the register of members for any time or times not exceeding in the whole thirty days in each year.

Where there is a colonial register, the Companies (Colonial Registers) Act, 1883, must also be complied with.

(*o*) *Reg.* v. *Wilts and Berks Canal Navigation*, 29 L. T. 992; contrast *Reg.* v. *Liverpool, &c., Railway Co.*, 16 Jur. 949.

(*p*) *Rex* v. *Wilts and Berks Canal Navigation*, 3 A. & E. 477.

(*q*) 37 Ch. D. 669.

(*r*) *Mutter* v. *Eastern and Midlands Railway*, 38 Ch. Div. 92.

(*s*) *Holland* v. *Dickson*, 37 Ch. D. 669.

(*t*) *Mutter* v. *Eastern and Midlands Railway*, 38 Ch. Div. 92; *Bloxam* v. *Metropolitan Railway*, 3 Ch. 337.

(*u*) *Forrest* v. *Manchester Railway*, 4 D. F. & J. 126; *Mutter* v. *Eastern and Midlands Railway*, 38 Ch. Div. 92, 104.

(*x*) *Capital Fire Ass.*, 24 Ch. Div. 408.

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Notice of increase of capital and of members to be given to registrar.

34. Where a company has a capital divided into shares, whether such shares may or may not have been converted into stock, notice of any increase in such capital beyond the registered capital, and where a company has not a capital divided into shares, notice of any increase in the number of members beyond the registered number shall be given to the registrar, in the case of an increase of capital, within fifteen days from the date of the passing of the resolution by which such increase has been authorized, and in the case of an increase of members within fifteen days from the time at which such increase of members has been resolved on or has taken place, and the registrar shall forthwith record the amount of such increase of capital or members: If such notice is not given within the period aforesaid the company in default shall incur a penalty not exceeding five pounds for every day during which such neglect to give notice continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

As to companies engaged in or formed for working mines in the Stannaries, see further Stannaries Act, 1887, s. 31.

Remedy for improper entry or omission of entry in register.

35. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself (*a*), may, as respects companies registered in England or Ireland, by motion in any of Her Majesty's Superior Courts of law or equity (*β*), or by application to a judge sitting in chambers (*γ*), or to the Vice-warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the Court of Session, or in such other manner as the said Courts may direct, apply for an order of the Court that the register may be rectified (*δ*), and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. The Court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such

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(α) If the company is in liquidation, the application ought to be in the name of the company, not of the official liquidator, *E. p. Kintrea*, 5 Ch. 95.

(β) In the case of a colonial register the colonial Court may rectify, see the Comp. (Colonial Registers) Act, 1883, *infra*.

(γ) Motion rather than summons, *Duffin v. Mexican Co.*, W. N. 1890, 116.

(δ) See also s. 98.

(ε) The words in italics are repealed by 44 & 45 Vict. c. 59.

Jurisdiction:— The jurisdiction given by this section for rectification of the register has been the subject of much discussion.

When there is no dispute as to a person being, or having ceased to be a member, the jurisdiction to compel the company to perform the ministerial act of entering the fact on the register is, of course, clear, and can admit of no argument.

And so, if the company have improperly registered a member in respect of fully paid-up shares before the necessary contract has been filed under Companies Act, 1867, s. 25, the register may be rectified upon motion under this section (*y*).

But when there are equities to be determined between the parties, it becomes a question whether or not there is jurisdiction to determine such equities on a motion hereunder.

as between members and company; As between alleged shareholders and the company, there are numerous cases in which this section has been made use of for determining the equities (*z*), although, if the case be one of difficulty and complication, the Court may decline to proceed, and may refuse the motion without prejudice to an action being brought (a).

as between members and alleged members. But as between members or alleged members themselves, the jurisdiction is not so clear, and the doubts which have arisen upon the section may be said to have turned upon the question whether or not the section gives the Court power to decide all questions, not only between the company and its members, but between the members and alleged members themselves.

Stewart's Case (*b*) was a case of a contest between an alleged shareholder and the company; but Lord Justice Turner, in his judgment, there puts the case of a dispute arising between the vendor and purchaser of shares, and of an application made by the purchaser under this section to have his name entered on the register, and expresses the opinion that, although it is left perfectly open to the Court whether it will grant the application or not, yet that there would be jurisdiction in such a case, although, if the matter were not free from complication, the Court might decline to exercise it; and that it would rest in the discretion of the Court whether it would interfere *brevi*

(*y*) *Denton Colliery Co., E. p. Shaw*, 18 Eq. 16; and other cases cited under Comp. Act, 1867, s. 25.

(*z*) *Stewart's Case*, 1 Ch. 574; and see the cases there cited, p. 583; and the cases cited under this section, *post*.

(a) *Simpson's Case*, 9 Eq. 91; *E. p. Parker*, 2 Ch. 685, 690; and see *infra*.

(*b*) 1 Ch. 574.

manu to order the rectification of the register, or whether it would direct the matter to stand over until it had been decided between the parties in a suit for specific performance whether the applicant was entitled to relief or not.

The question came directly before the Court in *Ward's Case* (*c*), where, the dispute being between vendor and purchaser, Romilly, M.R., said: "I am of opinion that I am compelled to go into the question as to who is in equity the real owner of the shares;" and an order was made removing the name of the vendor, and settling that of the purchaser on the list of contributories.

It is submitted, but with great deference (*d*), that the decisions of the Master of the Rolls in *Head's Case* (*e*) and *White's Case* (*f*) are not inconsistent with that in *Ward's Case* (*v. supra*); for *Head's* and *White's Cases* only go to shew that the exercise of the jurisdiction is in the discretion of the Court, and that the shareholder may by laches lose his right to relief. In those cases no steps were taken to procure the registration of the transfer for two years, and Romilly, M.R., therefore refused to rectify the register after the winding-up order (*g*).

The decision in *Ward and Garfit's Case* (*h*) followed that in *Ward's Case* (*c*). Malins, V.C., there said: "The terms of the 35th section are very extensive, and give a general power, of which there are numerous instances; and the Court may, either with or without costs, if it is satisfied of the justice of the case, make an order to rectify the register generally. That is an absolute power where the circumstances are such as, in the opinion of the Court, call for its exercise. The Court is armed with power . . . to decide any question 'necessary or expedient' for the rectification of the register; and I am now called on to decide whether the equitable title, which is clearly vested in Mr. Ward, must not be completed by making it legal. I am of opinion that I am armed with this power."

The decision of Romilly, M.R., in *Ward's Case* was reversed on appeal (*i*), Turner, L.J., holding that the case being one of complication, the Court would in its discretion decline to exercise the summary jurisdiction of this section; while Cairns, L.J., held that, in the circumstances of that case, the Court had no authority to rectify the register. Lord Justice Turner there substantially confirmed the opinion he had expressed in *Stewart's Case* (*k*): "I am inclined to think that the jurisdiction is general, and not limited as suggested. The intention of the section is to provide a summary means of dealing with cases which the Court in its discretion should think might be so dealt with." But he adds: "I am far from saying that all cases in which there is a question of specific performance could properly be dealt with under this section. On the contrary, I think that but few of such cases could properly be so dealt with, and I think this case cannot be so dealt with." In the same case a somewhat narrower construction was put upon the section by Cairns, L.J., who held that its object was simply to provide for the correction of errors in the register occasioned by the default of the company; that there lay upon the company a statutory obligation to keep a faithful register of shareholders, which would shew at any time who were entitled to the profits and who were liable for the debts of the company; that inasmuch as the mere imposition of penalties would not necessarily secure the performance of this duty, and inasmuch as the rights of persons entering or leaving

(*c*) 2 Eq. 226; reversed on appeal, 2 Ch. 431, *vide infra*.

(*d*) See the remarks of Cairns, L.J., in *Ward and Henry's Case*, 2 Ch. 431, 443.

(*e*) 3 Eq. 84.

(*f*) 3 Eq. 86.

(*g*) As to this point, see further *infra* under this section.

(*h*) 4 Eq. 189.

(*i*) *Ward and Henry's Case*, 2 Ch. 431.

(*k*) *v. supra;* and 1 Ch. 574.

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the company ought not to be prejudiced by its non-performance, it was necessary to provide for the correction of errors in the register occasioned by the default of the company; and that this was the whole scope and object of the section. And he held that in the case before him the Court had no jurisdiction to rectify the register. On the provisions of the section that the company itself may apply for rectification of the register, his Lordship added: "This provision might, I apprehend, be acted on by the company if it claimed adversely to omit or insert a name, and desired to have this claim adjudicated upon by the Court in presence of the party interested; or if it desired to establish, in the presence of the party interested, its right to omit from the register the name of a person which, *per dolum aut incuriam*, had been entered there" (*l*).

Reading, with the above judgment, the judgment of Lord Cairns in the House of Lords in *Reese River Silver Mining Co.* v. *Smith* (*m*), it is submitted that his Lordship's construction of this section amounts to this, that the jurisdiction in case of default or delay on the part of the company is clear; that there is also jurisdiction in any case of contest between an alleged shareholder and the company; but that, in case of a contest between two members or alleged members, in the case, in fact, of the application being practically one to enforce specific performance of a disputed contract between vendor and purchaser, the jurisdiction, if it exists at all, cannot be exercised in a case of complication and difficulty.

With respect to the somewhat conflicting judgments of the Lords Justices in *Ward and Henry's Case* (*n*), Channell, B., said, in *E. p. Ward* (*o*): "The true effect of the words used by the Lords Justices is, that if the applicant shews a clear right to have his name put on or taken off the register, then, as the result of determining this question, the Court will ministerially exercise the power of rectifying the register: but the right must first be established" (*p*). And in *E. p. Kintrea* (*q*) Giffard, L.J., said: "There was (in *Ward and Henry's Case*) a complicated state of circumstances, and the Lords Justices held that it was not a proper case for summary interference under the 35th section."

In *Musgrave and Hart's Case* (*r*) Malins, V.C., again said: "It seems to me that the intention of the Legislature was to arm the Court with the most complete power of settling who were or who were not shareholders in a company. . . . Of course the Court must exercise its discretion, and if there were a point not clearly ascertained the Court would stop the summary proceeding, reserving the question until it could be decided in a more formal manner, taking care somehow or other that justice should be done between the parties. Therefore, my own opinion is, that the Act gives the Court a power to decide all questions, not only between the company and its members, but between the members and alleged members themselves, for the purpose of finally settling the list of contributories;" and then, after going on to consider the cases, his Lordship decided the case on another ground, viz., that the transfer had not been executed by the transferee.

In *In re London and Provincial Telegraph Co.* (*s*) a preliminary objection to the jurisdiction as between shareholders was, after some discussion, waived.

In *E. p. Sargent* (*t*) Jessel, M.R., expressed himself as inclining to the

(*l*) 2 Ch. 442.
(*m*) L. R. 4 H. L. 64, 79.
(*n*) *Ward and Henry's Case*, 2 Ch. 431.
(*o*) L. R. 3 Ex. 180.
(*p*) Adopted by Jessel, M.R., in *E. p. Sargent*, 17 Eq. 273, 281; see also *Los' Case*, 34 L. J. (Ch.) 609; 13 W. R. 883; 12 L. T. 690; 11 Jur. (N.S.) 661.
(*q*) 5 Ch. 95, 99.
(*r*) 5 Eq. 193.
(*s*) 9 Eq. 653.
(*t*) 17 Eq. 273.

view adopted by Lord Cairns in *Ward and Henry's Case* (*u*), in preference to that taken by Turner, L.J.; and held that there was not, under the section, jurisdiction to decree specific performance of a contract to transfer shares which may be in fact the object of an application as between members; that the decision of equitable questions of title arising between the applicant and third parties could not be entertained, but a legal title to the shares must be shewn in order to entitle the applicant to an order under the section.

The matter was again discussed *ab initio* in *E. p. Shaw* (*x*). That was a case of a sale negotiated through an agent. The transfer was executed both by transferor and transferee, and the money paid by the transferee to the agent. He misappropriated it and falsely told the transferor that the transferee would not complete. The transferor thereupon demanded back the transfer: the agent cut the transferor's signature off the transfer and sent him the signature and afterwards absconded. Upon the transferee's application under this section it was held that his legal title was complete, and rectification was ordered.

The jurisdiction as between members (subject to a discretion as to its exercise in cases of difficulty) was there affirmed as existing in every case of legal title notwithstanding what was said by Cairns, L.J., in *Ward and Henry's Case* (*y*): a decision of *E. p. Swan* (*z*) under the Acts of 1856, 1857, was much relied on.

In *Davies' Case* (a) a mortgagee by deposit of certificates and blank transfer signed by the mortgagor filled up the transfer by inserting his own name, sent it in to the company and applied for rectification. Malins, V.C., held that on the application (which was by motion under this section) an account could be directed between mortgagor and mortgagee, and in the event of the mortgagor declining to take the account ordered rectification.

The question did not seem, by the cases above cited, to have been thoroughly and satisfactorily settled. The short result perhaps is that there is jurisdiction in every case of legal title, but that in a case of complication and difficulty, at least as between members, the Court may decline to exercise the jurisdiction, and direct an action to be brought (*b*).

Jurisdiction, whether discretionary as between member and company.

But, *semble*, the discretion which, according to *Ward and Henry's Case* (*c*), the Court has as to the exercise of the jurisdiction between two members does not exist in the same manner so as to make the jurisdiction discretionary only as between a member claiming to be taken off the register and the company (*d*).

And at least the Court is not readily disposed to refuse to act under the section, as between a member and a company, on the ground that an action ought to be brought (*e*).

But, whether as between vendor and purchaser (*f*), or as between a shareholder and the company (*g*), if the Court is of opinion that upon the whole an action had better be brought, it is probably entitled in its discretion to decline to proceed under this section, and to direct the matter to stand over

(*u*) 2 Ch. 431, *v. supra.*
(*x*) 2 Q. B. Div. 463.
(*y*) 2 Ch. 441, 442.
(*z*) 7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113.
(a) 33 L. T. 834.
(*b*) See also *Kimberley Mining Co., Werner's Case*, W. N. 1888, 126.
(c) 2 Ch. 431.
(*d*) *E. p. Parker*, 2 Ch. 685.
(*e*) *E. p. Penney*, 8 Ch. 446, 448; *Stranton Iron Co.*, 16 Eq. 559.
(*f*) See *Stewart's Case*, 1 Ch. 574, 586; *E. p. Watkins*, 14 L. T. 696; 14 W. R. 817.
(*g*) *E. p. Parker*, 2 Ch. 685, 690; *E. p. Penney*, 8 Ch. 446, 448.

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for an action to be brought. And the same held good when the question would have been better tried in a common law action (*h*).

For, as was held under the Act of 1856 (*i*), the section does not give the member or alleged member *ex debito justitiæ* the summary remedy (*k*).

And, therefore, in *Simpson's Case* (*l*) a motion by a shareholder against the company under this section was refused, without prejudice to a bill being filed, on the ground that the case was one of so much doubt and difficulty that the Court was not justified in making an order.

Member's right to an order.

A person whose name has been improperly entered on the register is entitled to have it removed by the order of the Court, although the shares in respect of which it was entered have been declared forfeited, and the forfeiture has been entered on the register (*m*).

For when a person's name has been wrongfully put upon the register the order of the Court under this section to remove it is, as against the company, a complete indemnity to him, and thereby every other member of the company is precluded from moving for the restoration of the name. But it is not in the power of the directors by simply removing his name effectually to indemnify him. And, therefore, if the directors desire to remove the name they must apply to the Court for the purpose; and if they do not do so, the shareholder may himself apply, although his name has been in fact removed (*n*).

Court will regard principles of equity.

On an application under the section the Court is not bound to follow what a Court of law would do in such a case, but will take into consideration any principle of equity applicable to the subject; and if registration have been obtained by fraud on the directors the Court may interfere to rectify the register (*o*).

Application of official liquidator.

The Court will have regard to who is the applicant; and where, owing to the default of the company, a transfer has not been registered before the winding-up, the Court will not rectify the register on the application of the official liquidator, whatever may be the right of the transferor to have it rectified; for the official liquidator in such a case represents only the company, to whose default the error is owing—and the contributories have no interest in the question except through the company, and the creditors have no direct equity against a person whose name has never been held out to them (*p*). The company may by laches lose their right to have the register rectified (*q*).

Where, however, registration of a transfer has been obtained by fraud there are numerous cases in which, on the application of the official liquidator, the register has been rectified (*r*).

Jurisdiction, when given.

The jurisdiction arises in two cases: (1) where the name of a person is, *without sufficient cause*, entered in or omitted from the register; and (2) if *default* is made or *unnecessary delay* takes place in entering on the register the fact of any person having ceased to be a member of the company.

Except in the two cases above mentioned, no jurisdiction to rectify the register exists.

(*h*) *Askew's Case*, 9 Ch. 664.

(*i*) 19 & 20 Vict. c. 47, s. 25.

(*k*) *Re British Sugar Refining Co.*, 3 K. & J. 408.

(*l*) 9 Eq. 91. On bill filed the name was on appeal removed: *Simpson* v. *Heaton's Steel Co.*, 19 W. R. 148, 614; 23 L. T. 510; 25 L. T. 179.

(*m*) *Los' Case*, 34 L. J. (Ch.) 609; 13 W. R. 883; 12 L. T. 690; 11 Jur. (N.S.) 661.

(*n*) *Bank of Hindustan, China, and Japan, Martin's Case*, 2 H. & M. 669.

(*o*) *E. p. Parker*, 2 Ch. 685; *E. p. Penney*, 8 Ch. 446, 451; *Stranton Iron and Steel Co.*, 16 Eq. 559; and see *E. p. Kintrea*, 5 Ch. 95, and other cases cited *supra*, s. 22.

(*p*) *Sichell's Case*, 3 Ch. 119; and see *General Floating Dock Co., Hughes' Case*, 15 W. R. 476; 15 L. T. 526.

(*q*) *Parsons' Case*, 8 Eq. 656.

(*r*) See s. 22.

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Thus, in *E. p. Ward* (*s*) the articles of association provided that in case the whole of the shares should not be subscribed for or allotted, the registered members of the company for the time being should, *if the directors should by resolution so declare,* be and continue associated for the objects thereof and the business of the company should commence from that time. No such resolution was passed, and a shareholder, having successfully resisted an action for calls, applied under this section to have his name removed from the register. The Court held that it had no power to remove it, none of the circumstances specified by the section having occurred.

It is not necessary that there shall have been default on the part of the company. If upon deciding the question of legal title it appears that the right name is not registered, there is jurisdiction to rectify (*t*).

I. "WITHOUT SUFFICIENT CAUSE."

"If a man has been induced by fraudulent mis-statements or fraudulent suppression to become a member of a company, and thereupon his name has been entered on the register, that entry will have been without sufficient cause" (*u*); to which Giffard, L.J., adds, in *E. p. Kintrea* (*x*), "It is clear, then, according to this, that if there is a fraud, or if the transaction is such that it cannot stand, the name is on the register without sufficient cause."

The remedy of a shareholder who has been induced to take his shares by fraud is rescission and *restitutio in integrum.* He cannot retain the shares and have damages for the fraud in the same way as if it had been a purchase of goods, he could retain the goods and have damages. He cannot remain a member of the corporation and have damages against the corporation of which he himself is a member (*y*).

Misrepresentation:—

Any person who, upon the faith of the prospectus issued by a company, has been induced to obtain an allotment of shares, and who, upon referring within a reasonable time to the memorandum of association, has found that the business is to be of a character different to or more extensive than that which the prospectus indicated, is entitled, upon an application made within reasonable time and before proceedings have been taken or initiated (*z*) to wind up the company, to withdraw and have his name removed from the register upon a motion under this section.

But this is subject to this exception, that if the applicant be a paid-up shareholder the Court will refuse to interfere; for he is under no liability, and the order to remove his name amounts to a decision that he is entitled to the repayment of what he has paid for the share (a). The matter, therefore, being capable of being more satisfactorily tried in some other form of action than a summary application under this section, the Court will refuse the order (*b*).

The effect of partial misrepresentation is not to alter or modify an agreement *pro tanto,* but to destroy it entirely, and to act as a personal bar to the party who has practised it (*c*).

"If it can be shewn that a material representation, which is not true, is contained in the prospectus, or in any document forming the foundation of the contract between the company and the shareholder, and the shareholder comes within a reasonable time, and under proper circumstances, to be

(*s*) L. R. 3 Ex. 180.
(*t*) *E. p. Shaw,* 2 Q. B. Div. 463.
(*u*) *Per* Kelly, C.B., in *E. p. Ward,* L. R. 3 Ex. 180.
(*x*) 5 Ch. 95, 99.
(*y*) *Houldsworth* v. *Glasgow Bank,* 5 App. Cas. 317; *Addlestone Linoleum Co*, 37 Ch. Div. 191.
(*z*) *Muir* v. *Glasgow Bank,* 4 App. Cas. 337.
(a) See *Alison's Case,* 15 Eq. 394; 9 Ch. 1.
(*b*) *Askew's Case,* 9 Ch. 664.
(*c*) *Clermont* v. *Tasburgh,* 1 Jac. & W. 112; *Rawlins* v. *Wickham,* 3 De G. & J. 304, 321; *Adam* v. *Newbigging,* 34 Ch. Div. 582; 13 App. Cas. 308.

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released from that contract, the Courts are bound to relieve him from it, and to take his name off any list of shareholders or contributories on which it may have been put" (*d*).

Contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals, subject, however, to this rule, that, whereas upon the faith of a person becoming a member of the company various persons are induced to deal with the company, and to become shareholders, it is necessary for him, in order to set aside a contract of this description, to come with the utmost diligence for that purpose, so that no person may be misled by the fact of his remaining a member (*e*).

And the rule laid down by Turner, L.J., in *Jennings* v. *Broughton* (*f*) will also be borne in mind, "that, although it is the undoubted duty of the Court to relieve persons who have been deceived by false representations, it is equally the duty of the Court to be careful, that in its anxiety to correct frauds, it does not enable persons who have joined with others in speculations, to convert their speculations into certainties at the expense of those with whom they have joined."

But, where it is clear that there has been material misrepresentation or suppression, the shareholder is, unless barred by laches or acquiescence, entitled as against the company to have his name removed from the register (*g*).

The *onus* of proving that one of several misrepresentations which led to a contract was not a material inducement to enter into it is on the party who has made the misrepresentation (*h*).

need not be sole inducement;

It is not necessary to shew that the misrepresentation was the sole cause of the complainant acting as he did. The question is whether he acted upon the misrepresentation, not whether he acted upon the misrepresentation alone. He may therefore recover although he was induced also by other things, as for instance by his own mistake (*i*).

of agent imputable to the company.

And as to the question of the company being responsible for misrepresentations on the part of the directors, the rule was laid down by Lord Chelmsford, in *Western Bank of Scotland* v. *Addie* (*k*), that "where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations [or by fraudulent concealment (*l*)] of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents" (*m*).

And Wood, V.C., said, in *Henderson* v. *Lacon* (*n*): "I think the cases

(*d*) *Per* Turner, L.J., in *Reese River Co., Smith's Case*, 2 Ch. 604, 609; and see *Blake's Case*, 34 Beav. 639; 5 N. R. 352; *Rye's Case*, 3 Jur. (N.S.) 460; *Ship's Case*, 2 D. J. & S. 544; and other cases cited below, *Stewart's, Austin's, Webster's Cases*, &c.

(*e*) *Railway Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99, 125.

(*f*) 5 D. M. & G. 126, 140.

(*g*) *Downes* v. *Ship*, L. R. 3 H. L. 343.

(*h*) *Nicol's Case*, 3 De G. & J. 387.

(*i*) *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459; *London and Leeds Bank*, W. N. 1887, 31, 56 L. T. 115: 56 L. J. (Ch.) 321; *Arnison* v. *Smith*, 41 Ch. Div. 348, 359, 369; *Peek* v. *Derry*, 37 Ch. Div. 541, 574.

(*k*) L. R. 1 H. L., Sc. 145, 157; *Nicol's Case*, 3 De G. & J. 387.

(*l*) See *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 344; *Peek* v. *Gurney*, 13 Eq. 79; L. R. 6 H. L. 377.

(*m*) See also *Houldsworth* v. *Glasgow Bank*, 5 App. Cas. 317.

(*n*) 5 Eq. 249, 261; and see *Houldsworth*

clearly shew this, that any representations made by the agents of a company which form the foundation of a contract between that company and a third person—those misrepresentations lying at the root of the contract—will entitle the other party to avoid the contract, and the company must in that sense take upon themselves the consequences of the misrepresentation of their agents."

This is plain enough, the principal cannot retain a profit made by the fraud of his agent, whether he authorized the fraud or not. The principle is best stated in *Barwick* v. *English Joint Stock Bank* (*o*), in the words, "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." In which statement the words "for the master's benefit" are to be read "for the master" (*p*).

The statement of the law in *Barwick* v. *English Joint Stock Bank* (*o*) was criticised by Bramwell, L.J., in *Weir* v. *Bell* (*q*), where his Lordship expressed the opinion that that case could not be supported on the reasons given in the judgment, but could be supported on the ground that every person who authorizes another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract. And this seems consistent with the authorities if it be understood as confined to cases where the agent is acting for the principal and not for his own interest.

But in an action of deceit brought to render the company liable in damages for the agent's fraud, the point is entirely different. In such a case there is no authority for holding the principal liable for the unauthorized and fraudulent act of a servant or agent committed not for the general or special benefit of the principal, but for the servant's own private ends (*p*).

The decision in *Shaw* v. *Port Philip Co.* (*r*) cannot, it is conceived, be reconciled with the principle as thus stated in the Court of Appeal in *British Mutual Co.* v. *Charnwood Forest Co.* (*s*).

Again, the company is not responsible for representations made by an agent within the scope of whose authority it does not lie to make such representations.

Thus if an officer of the company, not being a director, answer inquiries which do not properly fall within the business of the company deputed to him, the representations of such officer cannot, in the absence of proof, be imputed to the directors (*t*).

And it is not *primâ facie* within the authority of the secretary to make representations, and the company cannot be rendered liable for representations made by the secretary in the absence of evidence of authority given him to make them (*u*).

And so it may be even that an officer, as the manager of a banking company, making a representation as to the solvency of a customer, although acting within the scope of the general authority given him, makes the

v. *Glasgow Bank*, 5 App. Cas. 317, 331; *New Brunswick Co.* v. *Conybeare*, 9 H. L. C. 711; 31 L. J. (Ch.) 297.

(*o*) L. R. 2 Ex. 259, 265; and see *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301, 312.

(*p*) *British Mutual Co.* v. *Charnwood Forest Co.*, 18 Q. B. Div. 714.

(*q*) 3 Ex. Div. 238, 243.

(*r*) 13 Q. B. D. 103.

(*s*) 18 Q. B. Div. 714.

(*t*) *Partridge* v. *Albert Life Assurance Co.* (Alb. Arb.), 16 Sol. J. 199.

(*u*) *Barnett, Hoares & Co.* v. *South London Tramways*, 18 Q. B. Div. 815.

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representation in his own character, and not as the officer and on behalf of the company (*x*).

Agent's report to his principal is not evidence against principal.

A singular point arose in *Devala Provident Co.* (*y*) as to the admissibility of the agent's statement as evidence against his principal. There was alleged to be misrepresentation in the prospectus; there was no evidence of misrepresentation except a speech of the chairman of the company addressed to a meeting of shareholders. This was held not to be admissible evidence against the company. If the agent of the company makes a statement in the course of a transaction with a third party in which he is acting as agent of the company, and it is within the scope of his agency, this will be admissible evidence against the company (*z*). But his confidential report to his own principal is not admissible evidence in favour of a third party (*y*).

Comp. Act, 1867, s. 38.

It is conceived that it must be taken to be settled that the fact that shares have been taken under a prospectus fraudulent by statute under Companies Act, 1867, s. 38, does not give a right to be relieved of the shares under Companies Act, 1862, s. 35 (a). But the judgments of the Appeal Court in *Gover's Case* (*b*) cannot be said to conclude the point. Mellish, L.J., is clear that, assuming fraud, the remedy is not rescission, while Brett, L.J., is clear that it is. James, L.J., found no fraud, and it was not therefore necessary for him to decide whether, if there had been fraud, rescission could have been obtained, but his Lordship indicated pretty clearly that in his opinion it could not, and in this judgment Bramwell, L.J., agreed.

It will be convenient to consider in order the following points:—

Questions to be discussed.

(i.) What constitutes such a misrepresentation, or such a discrepancy between the prospectus and memorandum, as entitles the shareholder to be relieved from his contract.

(ii.) What is a reasonable time within which he must apply for rescission.

(iii.) The difference in his right to rescission as against the persons who prepared and issued the prospectus, or the company, and as against the creditors of the company.

(iv.) Apart from rescission of the contract, what rights he has against the persons or the company who have fraudulently induced him to take shares.

(i.) What constitutes misrepresentation in prospectus.

A contract to take shares cannot be set aside because it was founded on a prospectus which contains exaggerated views of the advantages of the company, but does not contain any material mis-statement of fact (*c*).

The object of a prospectus is to invite the public generally to join the proposed undertaking: and in an advertisement of this description allowance must always be made for the sanguine expectations of promoters, and no prudent man will accept the prospects which are always held out by the originators of every new scheme, without considerable abatement. But though some high colouring, and even exaggeration, may be expected, yet no mis-statement or concealment of any material facts or circumstances ought to be permitted. The public ought to have the same opportunity of judging of everything which has a material bearing on the true character of the adventure as the promoters themselves possess (*d*).

(*x*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; reversing *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244.

(*y*) 22 Ch. D. 593.

(*z*) *Meux' Executors' Case*, 2 D.M. & G. 522.

(*a*) *Gover's Case*, 20 Eq. 114; 1 Ch. Div. 182; *E. p. Dick*, 32 L. T. 536.

(*b*) 20 Eq. 114; 1 Ch. Div. 182.

(*c*) *Denton* v. *Macneil*, 2 Eq. 352; *cf.* *Bellairs* v. *Tucker*, 13 Q. B. D. 562, which was an action of deceit; and see *New Brunswick Co.* v. *Conybeare*, 1 D. F. & J. 578; 31 L. J. (Ch.) 297; 9 H. L. C. 711; on misrepresentation generally, and the liability of the company for the representations of its agents.

(*d*) *Central Railway Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99, 113; and see 3 D. J. & S. 122, 135.

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Exaggeration is a totally different thing from a misrepresentation of any precise or definite facts, as to which there must be *uberrima fides* on the part of the contractors (*e*).

"Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares" (*f*). Concealment may be fraud (*g*).

Concealment.

In *Oakes* v. *Turquand* Lord Chelmsford said (*h*): "The objection to the prospectus is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood."

Some general observations by Fry, J., on the duty of disclosure by those who are and those who are not in a fiduciary relation will be found in *Davies* v. *London Insurance Co.* (*i*).

But it is not every concealment or suppression which will entitle the shareholder to relief (*k*). The suppression must be such as to make that which is stated misleading; and there must be shewn that which a Court of Equity holds to be fraud (*l*).

It is not, however, necessary to shew such an active mis-statement of fact as must be shewn in a proceeding in the nature of an action for misrepresentation (*m*). That which would not sustain an action for deceit may be sufficient to sustain an action for rescission. No mere silence will ground an action of deceit; but silence as to a material fact which ought to have been disclosed may, it is conceived, ground an action for rescission. And an action for rescission may succeed where the misrepresentation was innocent, while in an action for deceit the representation must be either wilfully false or made with reckless disregard as to whether it is true or not (*n*).

Variation.

A mere difference in the language of the prospectus and the memorandum will not relieve the shareholder from his liability. The question in every case is, whether the obligations incurred under the memorandum do or do not go beyond those which would have been incurred under the prospectus (*o*).

"In all those matters which are not contradictory to the prospectus, but are compatible with it, the applicant for shares cannot plead ignorance of the clauses of the articles of association, which profess to execute the objects of the prospectus, even if they go somewhat beyond it, unless they are wholly incompatible with it" (*p*).

(*e*) *Per* Wood, V.C., *Ross* v. *Estates Investment Co.*, 3 Eq. 122, 136.

(*f*) *Per* Kindersley, V.C., in *New Brunswick and Canada Railway Co.* v. *Muggeridge*, 1 Dr. & Sm. 363, 381; approved in *Railway Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99, 113; and see *Henderson* v. *Lacon*, 5 Eq. 249, 262.

(*g*) *Bentinck* v. *Fenn*, 12 App. Cas. 652.

(*h*) L. R. 2 H. L. 342.

(*i*) 8 Ch. D. 469, 474.

(*k*) *Heymann* v. *European Central Railway Co.*, 7 Eq. 154.

(*l*) *New Brunswick Co.* v. *Conybeare*, 9 H. L. C. 711, 724; *Houldsworth* v. *Glasgow Bank*, 5 App. Cas. 317.

(*m*) *Peek* v. *Gurney*, L. R. 6 H. L. 377, 390, 403; S. C. 13 Eq. 79; and *cf. Ship* v. *Crosskill*, 10 Eq. 73, with *Downes* v. *Ship*, L. R. 3 H. L. 343.

(*n*) *Arkwright* v. *Newbold*, 17 Ch. Div. 301.

(*o*) *Downes* v. *Ship*, L. R. 3 H. L. 343, 354.

(*p*) *Per* Romilly, M.R., *E. p. Briggs*, 1 Eq. 483, 486; 35 Beav. 273.

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Again, in construing a prospectus, the preliminary character of the document must be taken into account, so that often a future sense must be given to words which it contains in the past and present tense; and unless it distinctly refers to what is actually existing at the time, it must be taken to represent what will be the state of things when the company is completely formed (*q*).

Change of facts after prospectus issued.

If a fact stated in the prospectus which was true at the date of the prospectus becomes untrue before allotment, the allottee is entitled to rescind (*r*).

"If a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances, and the Court will not hold the party to whom the representation has been made bound unless such a communication has been made" (*s*).

In an action for deceit it may be otherwise (*t*).

Instances of misrepresentation;

The following instances of misrepresentation have, amongst others, been the subject of judicial decision.

Relief has been given in consequence of misrepresentation in the prospectus as to:—

The objects of the company, which were afterwards materially varied by the memorandum (*u*); the persons who were to be the directors of the company (*x*) [although in such case it has also been refused, for the materiality of such a statement must depend upon the circumstances of the case (*y*)]; the capital of, and contract price of work to be done for, the company, the acquisition by the company of a certain concession, the character of the contractor for the works, and the dividend guaranteed by the contractor during construction, and afterwards by the government (*z*); the number of shares subscribed for, and the facts as to properties to be purchased by the company (a); the value of mines to be purchased by the company (*b*); the amount of capital subscribed, and the price paid for land purchased by the company (*c*); the purchase of property by the company, concealing the interest of a director, who was selling to the company at a greatly increased price (*d*); a large portion of the capital having been subscribed by the directors and their friends (*e*); the share list being closed, but a few shares

(*q*) *Hallows* v. *Fernie*, 3 Ch. 467; and see *Jennings* v. *Broughton*, 5 D. M. & G. 126, 135.

(*r*) *Anderson's Case*, 17 Ch. D. 373; *Scottish Petroleum Co.*, 23 Ch. Div. 413.

(*s*) Turner, L.J., in *Traill* v. *Baring*, 4 D. J. & S. 318, 329. See *Scottish Petroleum Co.*, 23 Ch. Div. 413, 438.

(*t*) *Arkwright* v. *Newbold*, 17 Ch. Div. 301, 310, 325, 329.

(*u*) *Downes* v. *Ship*, 2 D. J. & S. 544; L. R. 3 H. L. 343.

(*x*) *Munster's Case*, 14 W. R. 957; 14 L. T. 723; *Blake's Case*, 34 Beav. 639; 5 N. R. 352; *Anderson's Case*, 17 Ch. D. 373; *Scottish Petroleum Co.*, 23 Ch. Div. 413; and see *Hallows* v. *Fernie*, 3 Eq. 520, 537; 3 Ch. 467, 472.

(*y*) *Smith* v. *Chadwick*, 20 Ch. Div. 27; 9 App. Cas. 187.

(*z*) *Central Railway Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99; 3 D. J. & S. 122.

(a) *Ross* v. *Estates Investment Co.*, 3 Eq. 122; 3 Ch. 682.

(*b*) *Reese River Silver Mining Co.* v. *Smith*, 2 Ch. 604; L. R. 4 H. L. 64.

(*c*) *Kent* v. *Freehold Land Co.*, 4 Eq. 588; reversed on another ground, 3 Ch. 493.

(*d*) *Askew's Case*, 22 W. R. 762; reversed on another ground, 22 W. R. 833; 9 Ch. 664; contrast *Heymann* v. *European Central Railway Co.*, 7 Eq. 154.

(*e*) *Henderson* v. *Lacon*, 5 Eq. 249.

remaining to be disposed of (*f*); the amount of capital which would be required to be subscribed before the company commenced business (*g*); the liability on the shares by concealment of the fact that two calls had been made and were due (*h*).

But relief has been refused where, there having been misrepresentation as to the value of a mine, the shareholder did not rely on the statement, but himself inspected the property (*i*); where an invention, so far as tested, was represented as valuable, but the prospectus expressly stated that it was intended to test the invention further (*k*); where some transactions between the promoter and the directors were suppressed (*l*); where the prospectus stated that no promotion money would be paid to the directors by the company, and the facts were that there was an understanding that the directors were to receive remuneration from the vendors (*m*); where there was not a full disclosure as to the company's title to certain land (*n*); where a change of directors took place before allotment, and there was an ambiguous statement as to certain ships with which the company would commence operations (*o*); where the prospectus stated the capital to be 15,000 shares, "First issue 10,000 shares" and 900 only were taken (*p*); where in a prospectus, headed "Second issue of 10,000 shares," it was stated that the first issue of 10,000 shares had been fully subscribed for, and it appeared that although applications for the first 10,000 shares had been made, 2,500 had been cancelled for non-payment of the deposit, but the prospectus further stated that the paid-up capital was £25,000, and the capital at call £46,835, making together £71,835, whence "it might be concluded that the company considered the first issue of available shares was covered by the £71,835" (*q*); where the prospectus proposed to incorporate a previously existing company and the articles made an arrangement for buying out of the funds of the new company the shares in the old one (*r*); where there was acquiescence and delay (*s*); where the mis-statements relied upon included statements that A. B. was a director, and an omission to state that interest was payable on instalments of purchase-money (*t*).

Where the prospectus stated that the Crédit Foncier would, in conjunction with the A. Bank and the B. Bank, receive applications for the capital of the company, and on the back of the prospectus was printed, "issued by the Crédit Foncier, in conjunction with the A. Bank and the B. Bank," and the A. Bank had no connection with the company except as its bankers; it was held that there was nothing to lead a reasonable man to suppose that the A. Bank held shares in the company, and no misrepresentation entitling to relief (*u*).

(*f*) *Blake's Case*, 34 Beav. 639, 643.

(*g*) *Elder* v. *New Zealand Land Co.*, 30 L. T. 285; W. N. 1874, 85; but see *supra*, p. 23; and contrast *Lyon's Case*, 35 Beav. 646; see also *Sharpley* v. *Louth Railway Co.*, 2 Ch. Div. 663.

(*h*) *Western Insurance Co., Briggs' Case*, 19 L. T. 758.

(*i*) *Jennings* v. *Broughton*, 17 Beav. 234; 5 D. M. & G. 126.

(*k*) *Denton* v. *Macneil*, 2 Eq. 352.

(*l*) *Heymann* v. *European Central Railway Co.*, 7 Eq. 154.

(*m*) *Arkwright* v. *Newbold*, 17 Ch. Div. 301.

(*n*) *New Brunswick Railway Co.* v. *Conybeare*, 1 D. F. & J. 578; 9 H. L. C. 711; and see *New Brunswick Railway Co.* v. *Muggeridge*, 1 Dr. & Sm. 363.

(*o*) *Hallows* v. *Fernie*, 3 Eq. 520; 3 Ch. 467.

(*p*) *Lyon's Case*, 35 Beav. 646.

(*q*) *Green* v. *General Provident Assurance Co.*, 18 L. T. 500; *quære*, whether this case is satisfactory; *cf. Dixon's Case*, 15 L. T. 651.

(*r*) *Accidental and Marine Insurance Co.* v. *Davis*, 15 L. T. 182, an action for calls.

(*s*) *Sharpley* v. *Louth Railway Co.*, 2 Ch. Div. 663.

(*t*) *Smith* v. *Chadwick*, 20 Ch. Div. 27; 9 App. Cas. 187.

(*u*) *Parbury's Case*, 19 W. R. 584.

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In *Re Silver Valley Mines* (*x*) Bacon, V.C., upon the contents of the articles of association alone, which he considered grossly fraudulent, rescinded the contract to take shares.

as to contents of document.

A question which is repeatedly arising upon a prospectus is whether, where a document is referred to and is offered for inspection, the persons who issue the prospectus are relieved from responsibility as to all which the document contains and discloses. Upon this question Jessel, M.R., in *Smith* v. *Chadwick* (*y*), an action for deceit, said, "It has always been held, and I think rightly held, that if a man in a prospectus . . . falsely states the contents of a written document he cannot escape from such false statement by saying 'I offered to shew you the document.' But if he makes an incomplete statement, altogether true but imperfect, I take it he can;" and again, in *Redgrave* v. *Hurd* (*z*), "One of the most familiar instances in modern times is where men issue a prospectus in which they make false statements of the contracts made before the formation of a company, and then say that the contracts themselves may be inspected at the offices of the solicitors. It has always been held that those who accepted those false statements as true were not deprived of their remedy merely because they neglected to go and look at the contracts."

But this does not, it is conceived, cover the question in the form in which it generally arises, viz., that of promoter who, being anxious to conceal something (generally the payment of promotion money) from the intending shareholders, and at the same time to be able to say he has disclosed it, puts the whole story into a contract, and then, having referred in the prospectus to the contract in compliance with Companies Act, 1867, s. 38, is anxious to say that he has disclosed everything which the contract discloses. It is conceived that such disclosure is no disclosure at all. If a promoter, standing as he does in a fiduciary relation, is desirous of taking a profit, he must not merely give his *cestuis que trust* the means of finding out that he is taking a profit, but must actually inform them of it, and obtain their ratification by active assent or acquiescence.

Representation not wilfully false.

If the representation in the prospectus be untrue in point of fact, it is perfectly immaterial, so far as an application to rescind the contract is concerned, whether the directors when they made it believed or did not believe it to be true (a). If a person accept shares on the faith of that representation, the parties who have made it cannot compel the party who has contracted to take the shares to perform the contract (*b*).

Thus, in *Reese River Silver Mining Co.* v. *Smith* (*c*) Lord Cairns said: "It may be quite possible that the directors were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law that if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue" (*d*).

The rule of Courts of Equity on this point may be put in either of two ways, either first that a man cannot be allowed to get a benefit from a statement which he now admits to have been false, although he did not know its falsity at the time: or secondly, that assuming that moral fraud is neces-

(*x*) W. N. 1881, 124.
(*y*) 20 Ch. Div. 27, 57.
(*z*) 20 Ch. Div. 1, 14; Ibid. p. 24.
(a) *Smith's Case*, 2 Ch. 604.
(*b*) *New Brunswick and Canada Railway Co.* v. *Muggeridge*, 1 Dr. & Sm. 363, 383.
(*c*) L. R. 4 H. L. 64, 79. See also as to this passage, *Derry* v. *Peek*, 14 App. Cas. 337, 370.
(*d*) See also *Attorney-General* v. *Ray*, 9 Ch. 397, 402, n.

sary to set aside a contract, you have it where a man having obtained a beneficial contract by a statement which he now knows to be false insists upon keeping that contract (*e*).

But if there is nothing to shew that the parties who made the representation knew, or ought to have known, that it was false, and there was nothing like neglect in ascertaining what they represented to be the fact, the shareholder will not be allowed to escape liability merely because the concern afterwards turns out not to be in the flourishing condition in which the directors honestly represented it to be (*f*).

Comp. Act, 1867, s. 38.

By the Companies Act, 1867, s. 38 (*v. infra*), the prospectus is to specify the dates and names of parties to any contract made prior to the issue of such prospectus: but, *semble*, the omission will not entitle a shareholder to rescind (*g*). The shareholder's remedy in respect of this statutory fraud is discussed hereafter (*h*).

(ii.) Reasonable time.

Where the memorandum of association goes beyond the prospectus, and where, therefore, it is in the power of the applicant for shares either to decline to accede to the memorandum or to agree to such enlarged memorandum, then, even if there has not been a memorandum in existence at the time when he applies for his shares, it is his bounden duty, at the earliest practical moment, to ascertain what is the charter or title deed under which the company in which he has agreed to become a shareholder is carrying on business. If the memorandum and articles of association are in existence when he applies for shares, and if he agrees to take his shares on the footing of the memorandum and articles of association, then he ought to be held bound to look to the memorandum and articles of association before he applies for shares (*i*). But where they are not in existence at the time of application, at the very latest when he receives his allotment of shares he ought to satisfy himself that there is nothing in the memorandum or articles of association to which he desires to make any objection (*k*).

But if a person takes shares in a company, and forbears to make any examination into it, and becomes bound by the articles of association, and continues his connection with it for a time, by which other persons may be induced, upon the credit of his name, to take shares in the association or to deal with it, then it is too late for him to get rid of his liability on the ground of his having been induced by false representation to take shares in the company (*l*).

For the relief is given not at the expense of those who have done the person a wrong by misrepresentation, but at the expense of the persons who have taken shares in the company after it has been formed; and to the possible damage of creditors who may have trusted the company on the faith of the complaining party being a shareholder (*m*).

The rule as to applying within reasonable time, although now well established by the later decisions (*v. post*), was not so thoroughly recognised in the earlier cases.

(*e*) *Redgrave* v. *Hurd*, 20 Ch. Div. 1, 12.

(*f*) *Jackson* v. *Turquand*, L. R. 4 H. L. 305.

(*g*) See *ante*, p. 106.

(*h*) Comp. Act, 1867, s. 38, n.

(*i*) In such a case if the prospectus refers him to the document which will shew the truth or inaccuracy of any of its statements, and he chooses not to make use of his means of knowledge, he cannot afterwards be heard to complain: *Hallows* v. *Fernie*, 3 Ch. 467, 477. And see *Nichols' Case*, W. N. 1867, 77.

(*k*) *Per* Cairns, L.J., *Peel's Case*, 2 Ch. 674, 684, approved in *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 352; and see Ibid. p. 369; *Hallows* v. *Fernie*, 3 Ch. 467, 477; *Ogilvie* v. *Currie*, 37 L. J. (Ch.) 541.

(*l*) *Railway Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99, 125.

(*m*) *Downes* v. *Ship*, L. R. 3 H. L. 343, 356.

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In *Ship's Case* (*n*) the allotment of shares having been made on the 1st of June, 1864, and a petition to wind up the company having been presented in December, 1864, Ship served his notice of motion to have his name removed from the register on the 14th of January, 1865; and an order was made by Wood, V.C., to remove his name accordingly (*o*). This order was affirmed on appeal by the Lords Justices (*n*) and by the House of Lords (*p*); but the judgment of the House of Lords rested entirely on the fact that the only appellant was Downes, one of the persons who issued and signed the prospectus, and who registered the memorandum of association; and the decision only went to this, that on Downes' application the Lords Justices had rightly refused to rescind the order for the removal of Ship's name. Lord Cranworth there said: "In the present case the general question does not arise:" and Lord Westbury: "The decision of your Lordships proceeds entirely upon the personal exception to the individual Downes, and his being thereby personally estopped from saying that Ship ought to be bound by a memorandum differing from the prospectus which contained the representation made by Downes himself and others with whom he was associated."

In *Stewart's Case* (*q*) shares were allotted on the 29th of April, 1865, and Mr. Stewart having, as he deposed, become on the 30th of May, 1866, for the first time acquainted with the difference between the prospectus and memorandum, on the following day repudiated his shares, and shortly afterwards applied to have his name taken off the register. His name was, by an order of Wood, V.C., affirmed on appeal, taken off accordingly.

Webster's Case (*r*) was one in which the circumstances and the relief given were very similar to those in *Stewart's Case*.

But a shareholder who delayed from May till October in repudiating his shares was not allowed to escape (*s*).

Of the decisions in *Ship's Case*, *Stewart's Case*, and *Webster's Case*, Lord Chelmsford said, in *Oakes* v. *Turquand* (*t*): "I confess that these decisions are not at all satisfactory to my mind. I think that persons who have taken shares in a company are bound to make themselves acquainted with the memorandum of association, which is the basis upon which the company is established. If they fail to do so, and the objects of the company are extended beyond those described in the prospectus, . . . the persons who have so taken shares on the faith of the prospectus ought, in my opinion, to be held to be bound by acquiescence."

And on *Ship's Case* coming before the House of Lords on appeal, his Lordship intimated, that as against the official liquidator or a shareholder free from personal exception the delay from June to December would have barred any right to relief (*u*).

In *Laurence's Case* (*x*) L. applied for shares on the 4th of September, 1865; the company was registered on the 11th of September. Shares were allotted to L. on the 7th of October, and on the 14th of October he paid upon them the sum payable on allotment. On the 14th of May, 1866, he was supplied with copies of the memorandum and articles of association; and on the 27th of September, 1866, he, for the first time, gave the company notice that he had repudiated the shares. It was held that the delay from May

(*n*) 2 D. J. & S. 544.
(*o*) 13 W. R. 450.
(*p*) L. R. 3 H. L. 343.
(*q*) 1 Ch. 574.
(*r*) 2 Eq. 741.
(*s*) *Jackson's Case*, 16 L. T. 278.
(*t*) L. R. 2 H. L. 325, 351; and see *per* James, L.J., in *Askew's Case*, 22 W. R. 833; 31 L. T. 55.
(*u*) *Downes* v. *Ship*, L. R. 3 H. L. 343, 360.
(*x*) 2 Ch. 412.

to September, 1866, was sufficient to bar L. of any right to relief which he might have had in May; and further held by Cairns, L.J., that he had not in May, 1866, any title to relief; and, *semble*, he had none after the payment on allotment on the 14th of October, 1865. His Lordship there said: "Admitting that there existed no memorandum of association which Mr. Lawrence could have seen when he applied for shares, he was, in my opinion, entitled to a reasonable time after the registration of the memorandum to acquaint himself with, and, if so disposed, to object to its contents. What would be a reasonable time might, in some degree, vary in different cases, but would always be measured with reference to the thing to be done; and in this case I am unable to see why, at the time Mr. Lawrence received his letter of allotment of the 7th of October, 1865, and made his second payment upon it, he should not be held either to have had knowledge of the charter and rules under which the company was about to undertake business, or to have been content to waive any examination into them" (*y*).

The decision in *Kincaid's Case* (*z*) was similar to that last mentioned, the dates being—application for shares 18th April, 1865; company registered 28th April; shares allotted 29th April; payment on allotment 11th of May; payment on account of a call 25th April, 1866; application to rectify the register 17th July, 1866.

In *Wilkinson's Case* (a), the shareholder not having examined the memorandum of association for more than eighteen months, and having taken no steps for some time after that, and until after a winding-up order had been made, to repudiate his shares, was retained as a contributory. Lord Cairns there said: "In my opinion, where a man agrees to take shares, and to be bound by the memorandum and the articles, he must be affected with notice of their contents, unless, at all events, within a reasonable time during which he can acquire knowledge of the contents, he repudiate the shares."

In *Peel's Case* (*b*) the application for shares was made on the 27th June, 1865, and the allotment on the 18th July. A winding-up order was made on the 8th of May, 1866, and a summons to rectify the register was taken out on the 26th January, 1867. Lord Cairns there said: "It is much too late to come, as Mr. Peel comes, considerably more than a year after the allotment, to examine for the first time the memorandum."

In *Smith's Case* (*c*) the company was registered on the 5th of June, 1865, and on the day of registration S. received a prospectus, on the faith of which he applied for shares, and was registered as a shareholder on the 2nd August. On the 30th December, 1865, he received a report from the company, promising a detailed report in a short time, and on the 19th of January, 1866, received the detailed report, shewing that the property purchased by the company, which had been represented in the prospectus as very valuable, was in fact worthless. On the 6th of February, 1866, S. filed his bill to be relieved from his shares, and was held not to be debarred by laches.

In *Central Railway Co. of Venezuela* v. *Kisch* (*d*) four months elapsed between the allotment of shares and the inspection of the concessions and contracts referred to in the prospectus; and after such inspection another two months elapsed before Kisch filed his bill in Chancery; but, having during such two months done no act which amounted to acquiescence, it was held that he had not precluded himself by laches from his right to have the contract rescinded.

(*y*) 2 Ch. 425.
(*z*) 2 Ch. 412.
(a) 2 Ch. 536.
(*b*) 2 Ch. 674.
(*c*) *Reese River Silver Mining Co.*, 2 Ch. 604; L. R. 4 H. L. 64.
(*d*) 3 D. J. & S. 122; L. R. 2 H. L. 99.

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In *Taite's Case* (*e*), however, A. having on the 2nd July given the company notice that he should apply to the Court to have his name removed, and the directors having on the next day replied that they should oppose his application; but A. having taken no steps for a month, before the beginning of the Long Vacation, this delay was held fatal to his application.

Semble, a delay of more than three months after discovery of the misrepresentation before the shareholder brings his action to be relieved of his shares may be fatal to his right to relief (*f*). And in the case of a going concern, *quære* whether a delay of even a fortnight after knowledge may not be enough (*g*).

Where a shareholder, who had since the end of the year 1865 been in the attitude of suspicion and dissatisfaction, became aware on the 30th May, 1866, of the misrepresentations, Lord Cairns expressed himself prepared to hold that a repudiation on the 21st July, 1866, came too late (*h*).

"If a man claims to rescind his contract to take shares in a company, on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts, or else he forfeits all claim to relief" (*i*).

Shareholder having put himself at arm's length cannot subsequently advance new grounds of objection.

If a shareholder have once put himself at arm's length with the company, he must be held then to have notice of all the discrepancies on which he intends to rely, and cannot be allowed subsequently to advance new grounds of objection.

Thus where A., in August, 1865, repudiated his shares, but took no further step till March, 1866, but paid a call in the meantime, and then wrote demanding the return of his allotment money on the ground of a new discrepancy of a totally different character, his motion to remove his name from the register was refused (*k*).

Delay caused by negotiation with the company.

If the delay of the shareholder in making application is to be attributed to the negotiation of the company with him, he may, notwithstanding lapse of time, obtain relief (*l*).

Acquiescence after misrepresentation discovered.

If after discovering the misrepresentation in the prospectus, the shareholder deal with the shares in a manner inconsistent with a repudiation of them, he cannot afterwards set aside the contract (*m*).

Thus, if after notice of the misrepresentations he have paid a further call and received a dividend, this is conclusive that he has elected to continue a member of the company, and by such conduct he will have affirmed a contract which might before have been voidable at his option (*n*).

And in *Kent* v. *Freehold Land and Brickmaking Co.* (*o*) Wood, V.C., said: "I have always held that a person taking dividends cannot afterwards quarrel with the articles of association. He must know what the company is when he takes a dividend" (*p*).

In *Dixon* v. *Evans* (*q*) Dixon had signed a receipt for a dividend which was, however, in fact paid to Wilkie, who had induced him to take the

(*e*) 3 Eq. 795; and see other cases in this company, 15 W. R. 891.

(*f*) *Heymann* v. *European Central Railway Co.*, 7 Eq. 154; *Perrett's Case*, 15 Eq. 250.

(*g*) *Scottish Petroleum Co.*, 23 Ch. Div. 413.

(*h*) *Ogilvie* v. *Currie*, 37 L. J. (Ch.) 541; *cf. E. p. Blackstone*, 16 L. T. 273, where however the time was much longer, and there was acquiescence.

(*i*) *Per* James, L.J., *Sharpley* v. *Louth Railway Co.*, 2 Ch. Div. 685.

(*k*) *Whitehouse's Case*, 3 Eq. 790.

(*l*) *Niell's Case*, 15 W. R. 894.

(*m*) *E. p. Briggs*, 1 Eq. 483; 35 Beav. 273; *Nicol's Case*, 3 De G. & J. 387, 431; *E. p. Blackstone*, 16 L. T. 273; *cf. Crawley's Case*, 4 Ch. 322.

(*n*) *Scholey* v. *Central Railway Co. of Venezuela*, 9 Eq. 266, n., L. C.

(*o*) 4 Eq. 588, 600; *E. p. Spartali*, 17 L. T. 193.

(*p*) *Cf. Rooper* v. *East Norfolk Tramway Co.*, W. N. 1875, 178.

(*q*) L. R. 5 H. L. 606; S. C. 5 Ch. 79.

shares. The grounds on which Dixon escaped will be found stated elsewhere (*r*); it appears that Lord Westbury thought he had not (*s*), while Lord Cairns thought he had become a shareholder (*t*).

And *semble*, if a person who was entitled to repudiate his shares on the ground of misrepresentation, subsequently take a transfer of other shares in the company, he cannot then set up a case of variance between the prospectus and memorandum; but must be taken to have notice of the contents of the articles, whether in fact he had such notice or not (*u*).

Whether the shareholder will be concluded if he have sold and transferred some of his shares, *quære*. In *Maturin* v. *Tredinnick* (*x*), on bill filed to rescind a contract for the purchase of shares, on the ground of fraud on the part of the defendant the vendor, it was held that the plaintiff was not, by reason of having sold some of the shares before bill filed, disentitled to rescind the contract as to the rest.

A director will be treated more strictly than other people, for he may have it in his power to ascertain the facts (*y*).

(iii.) Right to relief as against third parties :—

But while it is not competent for a person who was a party to the misrepresentation of which the shareholder complains, to seek to retain the shareholder's name on the register, even though the latter may have been guilty of delay in applying for its removal (*z*); and while, as against the company, the shareholder may be entitled to relief, if he come in reasonable time, and under proper circumstances, to apply for it; yet if the company be wound up whether voluntarily (a), or by or under the supervision of the Court (*b*), or if it stop payment, and its directors issue notices convening a meeting to pass resolutions for voluntary liquidation (*c*), and the contest thus become one between the shareholder and the creditors of the company, or between the shareholder and his co-contributories as distinguished from the corporation (*d*), this equity will be lost. The doctrine is that after the company is wound up it ceases to exist, and rescission is impossible. There are then only creditors and contributories, and no company (*e*).

The distinction which is to be drawn between the shareholder's equity as against the company and his equity as against the creditors of the company or his co-contributories is most strongly illustrated by the cases of *Venezuela Railway Co.* v. *Kisch* (*f*), *Oakes* v. *Turquand* (*g*), and *Burgess' Case* (*d*).

put an end to by winding-up;

To the rules, therefore, which may be deduced from the cases above cited to shew that the equity to rescind a contract obtained by fraud or misrepresentation may be lost by laches or acquiescence, must be added the clear rule—established by *Oakes* v. *Turquand* (*g*), extended to the case of a purely voluntary winding-up in *Stone* v. *City and County Bank* (*h*), carried back in point of date to stoppage and notice of meeting to wind up in the *Glasgow Bank Cases* (*i*), and extended to the case where all creditors are satisfied and the question is only as between contributories, in *Burgess' Case* (*d*)—that if a man has with his own consent become fully a legal share-

even as between contributories;

(*r*) See Table A. (17)—(19), note.
(*s*) See L. R. 5 H. L. 615, 617, 619.
(*t*) Ibid. p. 621.
(*u*) *Paige's Case*, 15 W. R. 892.
(*x*) 2 N. R. 514; 4 N. R. 15.
(*y*) *Munster's Case*, 14 L. T. 723; 14 W. R. 957.
(*z*) *Downes* v. *Ship*, L. R. 3 H. L. 343.
(a) *Stone* v. *City and County Bank*, 3 C. P. Div. 282.
(*b*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 367.
(*c*) *Muir* v. *Glasgow Bank*, 4 App. Cas. 337.
(*d*) *Burgess' Case*, 15 Ch. D. 507.
(*e*) *Per* Jessel, M.R., *Burgess' Case*, 15 Ch. D. 507, 509.
(*f*) L. R. 2 H. L. 99.
(*g*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 367.
(*h*) *Stone* v. *City and County Bank*, 3 C. P. Div. 282.
(*i*) *Muir* v. *Glasgow Bank*, 4 App. Cas. 337.

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holder by registration of shares which he has agreed to take, then if he have not avoided the contract, or done what is tantamount to avoiding it (*k*) before the commencement of the winding-up, or before stoppage and notice of meeting to wind up, he is liable as a contributory (*l*), and equities which might be good as between the shareholders and the company cannot after a winding-up be set up against the creditors of the company (*m*) or his co-contributories (*n*). "Whenever the rights of other persons intervene, a contract to take shares though induced by fraud cannot be rescinded" (*o*).

For a contract induced by fraud is not void, but voidable at the option of the party defrauded, provided that he avoids it while matters remain in the same position (*p*).

And by a contract being voidable is meant, not that it is void till ratified, but that it is valid until rescinded, where the rights of third parties intervene (*q*); and if, before it be rescinded, a winding-up be commenced, or the concern cease to be a going concern, the shareholder can no longer be relieved, but will be held liable as a contributory.

"There may be equities between the shareholders *inter se* which may be adjusted in the course of working out the order: but with these the official manager and the creditors have nothing to do. The former must ascertain who are the existing shareholders of the company, and the latter must bring in their claims against the company; and those claims must be satisfied by the contributions of all who are shareholders of the company at the date of the winding-up order" (*r*).

The case of *Henderson* v. *Royal British Bank* (*s*) decided that under the 7 & 8 Vict. c. 113, it was no defence, as against a creditor of the company, that the shareholder against whom execution was levied, or sought to be levied, was induced to become a shareholder by the fraud of the company. From the judgment of Lord Campbell in that case a passage may be cited, which has often since been quoted as equally applicable to companies formed under the Companies Act, 1862: "It would be monstrous to say that he, having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank, who had given credit to it on the faith that he was a shareholder."

The decision in this case was followed in *Dossett* v. *Harding* (*t*) and in *Daniell* v. *Official Manager of the Royal British Bank* (*u*), and adopted by the House of Lords in *Oakes* v. *Turquand* (*x*) as enunciating a principle equally applicable to companies formed under the Companies Act, 1862.

For the limited liability Acts have not changed the right of the creditor

(*k*) *Reese River Silver Mining Co.* v. *Smith*, 2 Ch. 604; L. R. 4 H. L. 64; and see *post*.

(*l*) See *Marshall* v. *Glamorganshire Iron Coal Co.*, 7 Eq. 129, 137; *Gower's Case*, 6 Eq. 77; *Scottish Petroleum Co.*, 23 Ch. Div. 413, 436.

(*m*) *Black & Co.'s Case*, 8 Ch. 254, 259.

(*n*) *Burgess' Case*, 15 Ch. D. 507.

(*o*) Bramwell, L.J., *Stone* v. *City and County Bank*, 3 C. P. Div. 309.

(*p*) *Deposit Life Assurance Co.* v. *Ayscough*, 6 E. & B. 761; *Mixer's Case*, 4 De G. & J. 575; approved in *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L., Sc. 145, 156; *Clarke* v. *Dickson*, E. B. & E. 148.

(*q*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 375; *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 73.

(*r*) *Per* Lord Chelmsford, *Spackman* v. *Evans*, L. R. 3 H. L. 171, 238.

(*s*) 7 E. & B. 356.

(*t*) 1 C. B. (N.S.) 524; *Powis* v. *Harding*, Ibid. 533.

(*u*) 1 H. & N. 681.

(*x*) L. R. 2 H. L. 325.

on the one hand, or (except in its extent) the liability of the shareholder on the other; but have merely changed the remedy which the creditor previously possessed, of issuing execution against the shareholder, into a right of obtaining satisfaction of his debt by means of a winding-up. And where a limited liability company is wound up, the liability of a member with respect to creditors resembles the liability of a member of a company under the Acts of 1844. No new principle is introduced; but the form of proceeding is altered so as to fit it to be applied to the principle of limited liability.

or by suspension:—

Oakes v. *Turquand* (*y*), while it decided negatively that a contract could not be rescinded on the ground of fraud after a winding-up had commenced, did not decide affirmatively the converse proposition that up to the time of the commencement of a winding-up a contract to take shares could be rescinded on the ground of fraud. Whether it can or not be so rescinded must depend upon the particular circumstances of the case (*z*).

In the Glasgow Bank cases the dates were as follows:—1878, Oct. 2, the bank suspended payment with enormous liabilities: the stoppage was notorious throughout the United Kingdom: Oct. 5 notice was given by the directors by circular and advertisement of a meeting to be held on Oct. 22 to pass extraordinary resolutions for voluntary liquidation: Oct. 18 a report on the bank's affairs was sent to all the shareholders: Oct. 19 this report was published in the newspapers: the report disclosed, as the fact was and as the directors previously knew, that the bank was insolvent to an enormous extent. Oct. 22 voluntary resolutions were passed.

Under these circumstances a shareholder who from the report received on Oct. 19 discovered for the first time, as he alleged, that his taking shares in 1872 and 1873 had been induced by fraudulent misrepresentations of the directors, and who commenced his action on Monday Oct. 21, was held to be too late, because the rights of third parties had intervened (*z*). The right of transfer of shares irrespective of creditors' claims and the right of throwing back upon the company shares which the company has placed by fraud cease to exist so soon as the concern has ceased to be a going concern, and by reason of the company's stoppage the assumption of new liabilities, or the loss of assets has become the affair not of the company but of its creditors (a).

In the same winding-up it was held that as from the 5th of October the directors were entitled, if not bound, to refuse to register transfers of shares (*b*).

The fact that the transferors know that the company is on the eve of winding-up voluntarily will not prevent their validly transferring their shares (*c*). So the mere fact that the company was insolvent before the repudiation of shares taken under misrepresentation does not exclude the applicant from relief (*d*).

Nature of rights of creditor of the company.

It was said by Cairns, L.J., in *Smith's Case* (*e*), that "there is, with regard to companies established under the Act of 1862, no contract whatever between a creditor of the company and a shareholder in the company. The contract is between the creditor and the company." The creditor's remedy is against

(*y*) L. R. 2 H. L. 325.

(*z*) *Tennent* v. *Glasgow Bank*, 4 App. Cas. 615, 621; *cf. Sunderland Building Soc.*, 24 Q. B. D. 394; *North British Building Soc., Carrick's Case*, 22 Sc. L. R. 833.

(a) *Tennent* v. *Glasgow Bank*, 4 App. Cas. 615, 621, 622.

(*b*) *Alex. Mitchell's Case*, 4 App. Cas. 548; *Rutherfurd's Case*, Ibid.; *Nelson Mitchell's Case*, Ibid. 624.

(*c*) *Taurine Co.*, 25 Ch. Div. 118.

(*d*) *London and Leeds Bank*, W. N. 1887, 31, 56 L. T. 115; 56 L. J. Ch. 321.

(*e*) *Reese River Silver Mining Co.*, 2 Ch. 604, 616.

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the company, not against the shareholder. "There is no doubt that the direct remedy of a creditor is solely against the incorporated body" (*f*). But although the liability of the shareholders is not under a contract with the creditors (so that except there be a winding-up order the creditor cannot touch the shareholder (*g*)), yet it is a statutable liability, under which the creditors have a right which attaches upon the shareholders to compel them to contribute to the extent of their shares towards the payment of the debt of the company (*h*); and the change from a right to levy execution to a right to wind up the affairs of the company does not affect the question who are liable to the creditors; and, therefore, according to the principle acted on in *Henderson* v. *Royal British Bank* (*i*), the member who is a member at the commencement of the winding-up is liable as a contributory (*k*).

And it is not competent for the shareholder to say that all the creditor can look to is the assets of the company, and that therefore the only question is of what those assets consist; that this question is one between the company only and the persons who have to furnish the assets; and that, therefore, whatever equities there may be between himself and the company, the liquidator can only take the rights of the company subject to such equities, and subject, therefore, to his right to be relieved from the contract induced by the fraud of the company. For though, as between himself and the company, he may have a good legal or equitable defence, he may still be statutably liable to contribute to the assets required for the payment of the company's debts (*l*).

The official liquidator is bound to collect all the assets of the company and distribute them by the direction of the Court among the creditors, and is in a position in which he may assert rights as against the company, and may assume a position against the members of the company which the company itself might not be in a position to assert (*m*).

The winding-up calls into existence new rights and imposes new liabilities which did not exist before the winding-up, and which can be enforced only in the winding-up (*n*).

The following are Lord Westbury's words:—

"I take it to be quite settled that the rights of creditors against the shareholders of a company when enforced by a liquidator must be enforced by him in right of the company. What is to be paid by the shareholders is to be recovered in that right. What is due to the company is that only which is in fact recoverable by the company. The liquidator, therefore, standing in the place of the company, the question is, has he a right to impeach the memorandum, set aside the articles, reduce the certificate, and recover in right of the company that which the company could not for one moment as against a *bonâ fide* shareholder be entitled themselves to recover?" (*o*).

But these words are not in conflict with what precedes, for if the statute gives to the company, whether it be a going company or whether it be in

(*f*) *Per* Lord Cranworth, *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 357.

(*g*) *Accidental and Marine Insurance Corporation*, 5 Ch. 428; see further, s. 38.

(*h*) L. R. 2 H. L. 356.

(*i*) 7 E. & B. 350.

(*k*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 364.

(*l*) See *per* Lord Cranworth in *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 357; and further, s. 38.

(*m*) See Lord Hatherley in *Waterhouse* v. *Jamieson*, L. R. 2 H. L., Sc. 29, 32; and Jessel, M.R., in *National Funds Co.*, 10 Ch. D. 123.

(*n*) See *National Funds Assurance Co.*, 10 Ch. D. 118, 125; *Whitehouse & Co.*, 9 Ch. D. 595, 599; *Burgess' Case*, 15 Ch. D. 507, 511.

(*o*) *Waterhouse* v. *Jamieson*, L. R. 2 H. L., Sc. 29, 37; and see *Re Duckworth*, 2 Ch. 578, 580, Cairns, L.J.; *Dronfield Co.*, 17 Ch. Div. 76, 96; see also note to s. 94.

liquidation, particular rights, the enforcement of such rights is but an enforcement in right of the company. Thus, *e.g.*, assume a sale for fully paid shares, and an allotment of the shares and entry of the allottee on the register of members, but default in the registration of a contract under s. 25 of the Companies Act, 1867. It is true that after winding-up the allottee cannot have rectification, and that he is and must remain liable upon the shares. But this is not by reason of any alteration of the contractual relations, but by reason of the statutory provisions of s. 25 of the Companies Act, 1867, which give the company a right to cash which can be excluded only by the registration of a contract (*p*).

It is not in fact universally true that a liquidator is in no better position than the company. Where winding-up has put an end to the right to rectification, or where the statute gives him a new right, the liquidator is in a better position (*p*).

Secus where proceedings taken before winding-up commenced by the dissentient shareholder himself;

If before the commencement of the winding-up [or the stoppage of the company (*q*)] the shareholder have dissolved, so far as he can, all connection with the company, and have taken proceedings to have his name removed from the register, and to rescind the contract, he will, on a proper case being made, be entitled to relief, although between the date of his bringing his action and the judgment of the Court upon it an order has been obtained to wind up the company; for the rescission, when effected by the order of the Court, dates, not from the order, but relates to the period when, by bringing his action, the shareholder has taken proper steps to rescind the contract (*r*).

In the *Reese River Case*, last referred to, the bill was filed before the petition for a winding-up order was presented. Lord Westbury, however, seems in his judgment, as reported, to have laid great stress, not upon the point that the bill was filed before the winding-up petition was presented, but that it was filed before the winding-up *order* was made. It is conceived that the language of his Lordship's judgment must not in this respect be strained beyond its strict meaning; but it may be observed that its literal import would seem to throw a doubt upon the point decided by Lord Cairns in *Kent* v. *Freehold Land Co.* (*s*), where it was held that a shareholder cannot be relieved, on the ground of misrepresentation, upon action brought after the presentation of a winding-up petition, on which an order is subsequently made; that is to say, that it is the date of the presentation of the winding-up petition, not the date of the order upon it, which determines the shareholder's position.

or by a representative case by which he elects to be bound.

To fall within the principle of the decision in the *Reese River Case* (*v. supra*) it is not necessary that, if there are a number of shareholders in a similar position in respect of the repudiation of their shares, there should be a separate proceeding by each one of them. But if, proceedings having been taken by one such shareholder, another shareholder promptly informs the company that he intends to be bound by the decision in that case, or takes such steps as will bind him thereby, he can claim the benefit of the decision, although he does not himself take an active part in obtaining it.

A mere lying by and professing to join in proceedings without taking any active part, leaving it open to the party so professing to join to adopt a contrary course at a subsequent time, would, of course, not be a conclusive proceeding.

(*p*) *London Celluloid Co.*, 39 Ch. Div. 190.

(*q*) *Tennent* v. *Glasgow Bank*, 4 App. Cas. 615.

(*r*) *Reese River Silver Mining Co.* v. *Smith*, 2 Ch. 604; L. R. 4 H. L. 64; and see *Henderson* v. *Lacon*, 5 Eq. 249, 263.

(*s*) 3 Ch. 493.

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The true test, it is conceived, would be whether the party claiming the benefit of the decision had, from the commencement of the proceedings, elected to be bound by the decision, or whether he had reserved to himself any liberty to refuse to be bound if the decision were adverse to him. In the former case he would be within the principle of the *Reese River Case* (*v. supra*); in the latter he would not.

Thus, in *Ross* v. *Estates Investment Co.* (*t*), Ross had acted in conjunction with several other shareholders, of whom Pawle was one. These shareholders had formed themselves into a committee of "dissentient allottees," had employed the same solicitor, and contributed to the costs of the suit; and it had been agreed between their solicitor and the solicitors of the company that the "dissentient allottees" other than Ross should not be prejudiced by their not taking proceedings pending the suit. A decree was ultimately made in Ross's favour, and affirmed on appeal, but pending the appeal the company was wound up. It was held, however, in *Pawle's Case* (*u*) that Pawle was not a contributory, for that he was entitled to the benefit of the decision in *Ross* v. *Estates Investment Co.*, having substantially made himself a party to those proceedings.

McNiell's Case (*x*) related to the same company (the Estates Investment Co.), but McNiell was not one of the committee of "dissentient allottees." He repudiated his shares, however, both privately in an interview with the secretary, and publicly at a meeting of shareholders on the 18th of July, 1865. In August, 1865, he received a circular from the company, stating that the directors had, at the request of the dissentient shareholders, consented to stay further legal proceedings for the recovery of unpaid calls until the following November, with a view to the amicable adjustment of their differences; and in November, 1866, received another circular stating that the company intended to appeal from the Vice-Chancellor's decision in *Ross* v. *Estates Investment Co.* The company was wound up by an order dated the 16th of March, 1867, and McNiell had, under the circumstances above stated, taken no further proceedings before the winding-up to rescind his contract for shares; but he was held not to be a contributory, for that he had repudiated his connection with the company, and could not at any time have insisted on his being a shareholder.

But Ashley, another shareholder, not having repudiated his shares before the decision of Vice-Chancellor Wood in November, 1866 (*y*), was held liable as a contributory, for he had not put himself at arm's length with the company, but could have insisted, had the decision been against Ross in the suit, on remaining a shareholder (*z*).

What is a sufficient repudiation of the contract.

It must not, however, be inferred from *McNiell's Case* (*v. supra*) that a mere repudiation of shares, followed by no further proceedings, is, in the absence of the peculiar circumstances of that case, sufficient. The rule as stated by the Court of Appeal (a), is that the repudiating shareholder must not only repudiate but also get his name removed or commence proceedings to have it removed; but subject to the qualification that if one repudiating shareholder takes proceedings the others will have the benefit of them if, but only if, there is an agreement between them and the company that they shall stand or fall by the result of those proceedings.

Thus, in *Hare's Case* (*b*) a letter "to require the shareholder's name to be

(*t*) 3 Eq. 122; 3 Ch. 682.
(*u*) 4 Ch. 497.
(*x*) 10 Eq. 503.
(*y*) 3 Eq. 122.
(*z*) *Ashley's Case*, 9 Eq. 263.

(a) *Scottish Petroleum Co.*, 23 Ch. Div. 413, 436.
(*b*) 4 Ch. 503; *cf. Burgess' Case*, 15 Ch. D. 507; *Scottish Petroleum Co.*, 23 Ch. Div. 413.

at once removed from the register of members," after which no proceedings were taken to have the name removed, was considered, as against the creditors, to be insufficient to raise any title to relief, for that there was, at the date of the winding-up, no binding agreement between him and the company that his name should be removed.

So, in *Kent* v. *Freehold Land Co.* (c), Cairns, L.C., said that the fact that the shareholder had, before the winding-up, written intimating his repudiation of the shares, when coupled with the fact of his delay to file his bill for two months from that time, put his case in a worse position than it would have otherwise been in.

In *Fox's Case* (*d*), Fox, being in a position to file a bill to remove his name from the register, wrote to the secretary declining to have anything further to do with the company, and requesting that his deposit might be returned. The deposit was returned, but his name was not taken off the register. The company was wound up eighteen months afterwards, and Fox was held not to be a contributory, for that the company was in default in not taking off his name (*e*): but there had been no default on the part of Fox, who had established the fact that he ought never to have been a shareholder at all. It is conceived, however, that after the decision in *Scottish Petroleum Co.* (*f*), this case cannot be relied on.

Walker's Case (*g*) was distinguished by Romilly, M.R., from *Fox's Case* (*d*) by the fact that in *Walker's Case* there was a compromise between Walker and the company, under which Walker transferred his shares; but not having taken care to get the transfer registered, his name was on the register at the time of the winding-up. Under these circumstances he was held to be a contributory; for although the company was in default, yet Walker, in not procuring the registration of the transfer, was in default also; and where there is default on both sides no relief will be given.

His Lordship in this case appears to have spoken of *Fox's Case* as if Fox's name had been removed by the company from the register upon his demanding the return of his deposit; but this was not so. *Quære*, whether the report in *Walker's Case* is correct in this respect.

In *Briggs' Case* (*h*) the shareholder repudiated, on the 31st of October, 1867, within sixteen days after learning the facts, but owing to his ill-health nothing further was done, and he died on the 4th of January, 1868. A winding-up order was made on the 27th of November, 1867, but it was held that having set the company at arm's length, his name must be taken off the list of contributories.

Where, to an action for calls, a shareholder has pleaded that he was induced to take the shares by fraud, and where by such defence he has obtained a verdict in his favour, this is not such a proceeding as will, if taken before the winding-up, bring him within the principle of the *Reese River Case* (*v. supra*), and he will not in consequence of such a proceeding be entitled, after the winding-up has commenced, to be relieved from his shares (*i*).

If the name of a shareholder, who was in fact entitled, on account of fraud, Contract *de facto* rescinded on other grounds.

(*c*) 3 Ch. 493.

(*d*) 5 Eq. 118; and see *Blake's Case*, 34 Beav. 639; 5 N. R. 352; where the name was removed.

(*e*) If a person have legally ceased to be a shareholder, and the company only is in default in not taking his name off the register, it is immaterial that the name so remains: *Lyster's Case*, 4 Eq. 233; *Marshall* v. *Glamorgan Iron Co.*, 7 Eq. 129, 138; and see *infra*, pp. 122, 132, 134.

(*f*) 23 Ch. Div. 413.

(*g*) 6 Eq. 30.

(*h*) *Re Western Insurance Co.*, 19 L. T. 758.

(*i*) *Cleveland Iron Co.*, 16 W. R. 95.

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to rescind his contract in respect of shares, have been removed from the register by the directors on grounds other than those on which he was so entitled to rescind, the directors being aware, but the shareholders being ignorant that he was so entitled, the shareholder can claim the benefit of the removal of his name.

Thus, in *Wright's Case* (*k*), W. having applied to the directors for the return of his deposit in respect of shares allotted to him in the company, on account of the committee of the Stock Exchange having refused to grant a settling-day, the directors being aware that W. was entitled to rescind the contract in respect of the shares on account of material misrepresentations, of which, however, W. was ignorant, returned the deposit and cancelled the shares. The company being subsequently wound up, W. was held not liable as a contributory either as a present (*l*) or a past (*m*) member; for the contract having been induced by fraud, was, according to the decision in *Oakes* v. *Turquand* (*n*), voidable by him; and the directors, being conscious of the fraud they had committed, gave him the relief which, had he known the facts, he might have demanded as a right; and it could not prejudice him that he was in fact ignorant of his rights. The contract having been conclusively annulled on the part both of W. and the directors, so that W. could not afterwards replace himself as a shareholder, he was entitled to be relieved from liability; and as respects creditors, the principle of *Oakes* v. *Turquand* had no application, for W.'s name was not on the register at the time of the winding-up.

Contract void; winding-up immaterial.

If the transaction in consequence of which a name has been entered on the register of shareholders is not voidable but *void*, the decision in *Oakes* v. *Turquand* (*n*) has no application. If the transaction be void there can be no contract; and under such circumstances the fact that a winding-up has commenced is no ground for retaining the name on the list of contributories (*o*).

For the liquidator for the purpose of enforcing a contract stands only in the place of the company, and cannot enlarge the engagement of the alleged shareholder beyond that which he has entered into (*p*).

If, therefore, it be shown that the alleged member has never agreed to become a shareholder (*q*), if, that is, there is no contract at all (*r*), it is immaterial that the name is found on the register at the commencement of the winding-up.

And, for a similar reason, if the shareholder has effectually ceased to be a member, and the company only are in default in not removing his name, he is not to be prejudiced thereby (*s*).

So, in a going company, an allottee who has within a reasonable time repudiated his shares for misrepresentation, and has taken no advantage of the allotment, may successfully resist an action for calls (*t*).

Damages after winding-up.

Where a shareholder has been induced to take his shares by fraud, his only remedy as against the company is rescission and *restitutio in integrum*.

(*k*) 7 Ch. 55; Hatherley, L.C., reversing the decision of Wickens, V.C., 12 Eq. 331; and see *London and Suburban Bank, Walmesley's Case*, 15 Eq. 274.

(*l*) 12 Eq. 334, n.

(*m*) 12 Eq. 331; 7 Ch. 55.

(*n*) L. R. 2 H. L. 325; and *v. supra*.

(*o*) *Alabaster's Case*, 7 Eq. 273.

(*p*) *Waterhouse* v. *Jamieson*, L. R. 2 H. L., Sc. 29.

(*q*) *Gorrissen's Case*, 8 Ch. 507; *E. p. White*, 16 L. T. 276.

(*r*) *Wynne's Case*, 8 Ch. 1002; *Beck's Case*, 9 Ch. 392; *Nelson's Case*, W. N. 1874, 196.

(*s*) *Lyster's Case*, 4 Eq. 233; *Fox's Case*, 5 Eq. 118; *Marshall* v. *Glamorgan Iron Co.*, 7 Eq. 129; *Fyfe's Case*, 4 Ch. 768.

(*t*) *Glamorgan Iron Co.* v. *Irvine*, 15 L. T. 52.

He cannot retain his shares and bring an action for damages against the corporation of which he himself is a member. And if the company has gone into liquidation, and rescission has therefore become impossible, he can have no remedy as against the company at all. His action for damages is as irrelevant against the company in liquidation as it would be against the going company (*u*).

Where a shareholder commenced his action claiming rescission, leave to amend by claiming damages was refused (*x*).

In *Hall* v. *Old Talargoch Co.* (*y*), Bacon, V.C., refused to stay an action brought after the commencement of a voluntary winding-up against the company and the directors for rescission, repayment, and indemnity. The ground of the judgment would appear to be, that the plaintiff was entitled at any rate to go on against the directors, but it is not easy to understand why the action was not stayed as against the company. The plaintiff had repudiated his shares before the winding-up, and in *Stone* v. *City and County Bank* (*z*), Lindley, J., distinguished the case on that ground. It is noticeable that the plaintiff received a significant hint on the question of costs, and it may possibly be said that the action was allowed to go on to try the question whether there was before winding-up such a repudiation as to entitle him to rescind (a).

In *Mudford's Claim* (*b*) and *E. p. Appleyard* (*c*), Hall, V.C., held that where an intended allottee of fully paid shares has by reason of default in registering a contract under Companies Act, 1867, s. 25, become in fact the holder of unpaid shares he is entitled in the winding-up to prove for damages to the amount of the calls made or which may be made upon him. In the latter of these two cases the V.C. commented upon and distinguished *Houldsworth* v. *Glasgow Bank* (*d*); but it is difficult to understand how they can be reconciled with it. And they must now be considered as over-ruled (*e*). In the case of the shareholder induced by fraud the other contributories have, innocently so far as they individually are concerned, acquired the benefit of having another person a co-contributory with them (*f*): the decision of the House of Lords is that, whether in the going company or in the winding-up, the defrauded shareholder cannot have damages against the corporation of which he himself is a member, that his only remedy is rescission, and that if by winding-up rescission has become impossible he has no remedy against the company at all. In the case of the allottee of unpaid instead of fully paid shares, the other contributories have equally innocently acquired the benefit of a co-contributory, and there seems no principle on which damages against the corporation of which the allottee is himself a member should be any more possible in this case than in the other. In the case of a vendor one can understand that he might be entitled to set aside the sale altogether, or to a lien for unpaid purchase-money, but to retain the shares and prove for damages is, it is submitted, inconsistent with *Houldsworth* v. *Glasgow Bank* (*d*). And the decision seems equally in conflict with the decision of the M.R. in *Burgess' Case* (*g*). A share taken

(*u*) *Houldsworth* v. *Glasgow Bank*, 5 App. Cas. 317; and see *Burgess' Case*, 15 Ch. D. 507.

(*x*) *Stone* v. *City and County Bank*, 3 C. P. Div. 282.

(*y*) 3 Ch. D. 749.

(*z*) 3 C. P. D. 295.

(a) Having regard, however, to the decisions cited, *ante*, p. 120, he could scarcely expect to succeed upon this.

(*b*) 14 Ch. D. 634.

(*c*) 18 Ch. D. 587.

(*d*) 5 App. Cas. 317.

(*e*) *Addlestone Linoleum Co.*, 37 Ch. Div. 191.

(*f*) *Burgess' Case*, 15 Ch. D. 507; *Houldsworth* v. *Glasgow Bank*, 5 App. Cas. 317, 329.

(*g*) 15 Ch. D. 507.

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from a company is not like an ordinary chattel in respect of which the purchaser may have a choice of remedies (*h*).

A claim for damages to be worked out as between the contributories after the creditors have been satisfied is not a possibility under the Act of Parliament. There is no such deferred or secondary right of action against the company. The provisions for the adjustment of the rights of the contributories amongst themselves are quite a different matter (*i*).

(iv.) Remedy as against the company.

Where misrepresentations have been made on behalf of a company by its directors or agents, the company may be made responsible for the frauds of those agents to the extent to which the company has profited from the frauds; but it cannot be sued as a wrongdoer by imputing to it the misconduct of those whom it has employed. A person defrauded by directors must, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, seek his remedy against the directors personally (*k*).

The shareholder will, as against the company, be entitled to be repaid by the company the amount that he has paid to them under the misapprehension; that is to say, if the company is wound up he will be entitled to prove as a creditor (*l*), or if the company is a going concern he can bring an action for the amount: but, *semble*, his remedy is at law (*m*).

The shareholder has no equity against the company on the ground of their being trustees of the money in their hands (*n*).

Remedy as against the directors:—

The Directors Liability Act, 1890, has added to the existing law a new statutory liability in respect of the truth of the statements in a prospectus inviting applications for shares, debentures, or debenture stock. That Act is to be looked at to find what persons must shew in order to relieve themselves from their *primâ facie* responsibility for any untrue statement.

The Act is not declaratory of the existing law, and does not repeal any existing law so as to relieve from responsibility any persons who under the existing law would be responsible. The Act is, therefore, not exhaustive of the circumstances under which liability may attach. After the Act a person may be responsible either under the Act, or under the general law apart from the Act or under any other statutory law.

before the Directors Liability Act, 1890.

The law treated in the next few pages is the law before the Directors Liability Act, 1890. For the future there must be added to the law as here stated the provisions of that Act.

To enable the shareholder to make the directors personally and individually liable to indemnify him in respect of the shares, it must be established that there was, by the prospectus, a fraudulent misrepresentation made by the persons sought to be made answerable; and that such misrepresentation deceived the shareholder (*o*).

It is not necessary to prove that the misrepresentation was the sole inducement. The question is whether the plaintiff acted on the misrepresentation, not whether he acted on the misrepresentation alone (*p*).

(*h*) *Houldsworth* v. *Glasgow Bank*, 5 App. Cas. 317, 324; *Addlestone Linoleum Co.*, 37 Ch. D. 191, 200.

(*i*) *Houldsworth* v. *Glasgow Bank*, 5 App. Cas. 317, 323, 334; *Burgess' Case*, 15 Ch. D. 507, 513.

(*k*) *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L., Sc. 145; *Houldsworth* v. *Glasgow Bank*, 5 App. Cas. 317, 328, 331, 340.

(*l*) *Alison's Case*, 15 Eq. 394; 9 Ch. 1; *Askew's Case*, 9 Ch. 664.

(*m*) *Ship* v. *Crosskill*, 10 Eq. 73, 83.

(*n*) *Stewart* v. *Austin*, 3 Eq. 299.

(*o*) *Derry* v. *Peek*, 14 App. Cas. 337 reviews the law.

(*p*) *Edgington v. Fitzmaurice*, 29 Ch. Div. 459; *London and Leeds Bank*, W. N. 1887, 31; 56 L. T. 115; 56 L. J. Ch. 321; *Arnison* v. *Smith*, 41 Ch. Div. 348, 359, 369; *Peek* v. *Derry*, 37 Ch. Div. 541, 574.

Action of deceit.

To shew such misrepresentation or concealment as would entitle the shareholder to repudiate his shares is not sufficient (*q*). An action of deceit differs essentially from an action for rescission. Where rescission is claimed it is sufficient that there was misrepresentation which induced the contract: it is immaterial that the misrepresentation was innocent. It would be fraudulent to retain an advantage obtained by misrepresentation however innocent. But in an action of deceit it is essential that there shall have been deceit (*r*). What constitutes deceit appears from what follows.

Mere non-disclosure of material facts, however morally censurable, is not a ground for a proceeding in the nature of an action for misrepresentation; there must be shewn some active mis-statement of fact, or such a partial and fragmentary statement of fact as to make that which is stated absolutely false (*s*).

Mere silence will not ground an action for deceit. There must be misrepresentation made either with knowledge of its being false, or with a reckless disregard of whether it is true or not (*t*).

An action of deceit is a common law action, and must be decided on the same principles whether it be brought in the Chancery or the Queen's Bench Division; there is no such thing as an equitable action of deceit (*u*).

The law before the Directors Liability Act, 1890, in respect of actions for deceit will best be stated by giving verbatim the following passages from the words of Lord Herschell in *Derry* v. *Peek* (*x*):—

"First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made" (*y*).

"Making a false statement through want of care falls far short of, and is a very different thing from, fraud (*z*), and the same may be said of a false representation honestly believed though on insufficient grounds" (a).

"When a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most

(*q*) If, therefore, upon the misrepresentation shewn the shareholder fail as against the company, he must fail as against the directors: *Heymann* v. *European Central Railway Co.*, 7 Eq. 154, 168. *Quære*, this is what was meant in *Ogilvie* v. *Currie*, 37 L. J. (Ch.) 541, 547; see *infra*, p. 128, note (*l*).

(*r*) *Derry* v. *Peek*, 14 App. Cas. 337, 359; *Arkwright* v. *Newbold*, 17 Ch. Div. 301.

(*s*) *Peek* v. *Gurney*, L. R. 6 H. L. 377, 403; S. C. 13 Eq. 79; *Arkwright* v. *Newbold*, 17 Ch. Div. 301; *Derry* v. *Peek*, 14 App. Cas. 337, 359.

(*t*) *Arkwright* v. *Newbold*, 17 Ch. Div. 301, 318, 320; *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459.

(*u*) *Arkwright* v. *Newbold*, 17 Ch. Div. 301, 320; *Smith* v. *Chadwick*, 9 App. Cas. 187, 193; *Derry* v. *Peek*, 14 App. Cas. 337, 360.

(*x*) 14 App. Cas. 337.

(*y*) 14 App. Cas. 374.

(*z*) See also 14 App. Cas. 361.

(a) 14 App. Cas. 375.

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important test of its reality. . . . If I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false" (*b*).

Actual fraud must be established (*c*); there must be the *mens rea* (*d*); it is not enough that a false statement has been made through carelessness which ought to have been known to be untrue (*e*). The absence of reasonable grounds for the belief may be most material as evidence upon the question whether the belief was really entertained: but if it be found as a fact that the belief was really entertained, the absence of reasonable grounds will not constitute a fraud where having regard to the belief fraud in fact there was none (*f*).

But if it be established that a false representation was made knowingly or without belief in its truth, the motive is immaterial—it matters not whether there was or not a design to mislead or defraud (*g*).

The matter may perhaps be summed up by saying that to tell the truth consists in saying not that which is true, but that which the speaker honestly believes to be true. To state that which is, but which the speaker believes is not, the fact is to tell a falsehood. To state that which the speaker believes to be, but which is not, the fact is to tell the truth. There is not in a person who receives a statement any right "to have true statements only made to him" (*h*); his right is that the speaker shall tell him the truth, that is, should state only matters of whose truth he has a real belief (*i*). If he states that which he knows to be false, he is of course fraudulent: if he states that as to which he has no honest belief, he is fraudulent because he asserts belief without such belief existing.

A man who through carelessness makes statements which are not true, and as to whose truth he has no real belief, is liable in an action for deceit, although he did not actually know of their untruth. For it is an untruth to affirm that he knows the truth of something as to which he has not knowledge. "An untrue statement as to the truth or falsity of which the man who makes it has no belief, is fraudulent: for in making it he affirms he believes it, which is false" (*k*). But on the other hand, though the statement be untrue, yet if he had reasonable ground for believing, and if taking into consideration among other evidence such reasonable grounds (*l*) you determine as a fact that he did believe it to be true, he is not liable (*m*). Neither is he liable if the mis-statement is so trivial that it could not have affected the applicant (*m*).

Materiality of statement.

The untrue statement may be of such a character as to be clearly material and such as to induce the contract: in such case no evidence of materiality or of its having in fact been an inducement is wanted. It is an inference of

(*b*) 14 App. Cas. 375, 376.

(*c*) *Per* Lord Selborne, *Smith* v. *Chadwick*, 9 App. Cas. 187, 190; *per* Lindley, L.J., S. C. 20 Ch. Div. 27, 75; *Derry* v. *Peek*, 14 App. Cas. 337.

(*d*) *Per* Halsbury, L.C., *Arnison* v. *Smith*, 41 Ch. Div. 348; *Derry* v. *Peek*, 14 App. Cas. 337, 344.

(*e*) *Derry* v. *Peek*, 14 App. Cas. 337, 373; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L., Sc. 145, 168.

(*f*) *Derry* v. *Peek*, 14 App. Cas. 337, 344, 345, 350, 352, 358, 360, 363, 369; referring to *Western Bank of Scotland* v. *Addie*, 1 H. L., Sc. 145, 168.

(*g*) *Peek* v. *Gurney*, L. R. 6 H. L. 377, 409; *Derry* v. *Peek*, 14 App. Cas. 337, 371; *Arnison* v. *Smith*, 41 Ch. Div. 348, 372.

(*h*) These are the words of Cotton, L.J., in *Peek* v. *Derry*, 37 Ch. Div. p. 568.

(*i*) See *Derry* v. *Peek*, 14 App. Cas. 344, 345, 350, 362.

(*k*) Lord Bramwell, *Smith* v. *Chadwick*, 9 App. Cas. 203.

(*l*) See *Derry* v. *Peek*, 14 App. Cas. 337.

(*m*) *Smith* v. *Chadwick*, 20 Ch. Div. 27, 44, 45; 9 App. Cas. 187; *Cann* v. *Wilson*, 39 Ch. D. 39.

fact (*n*) [not of law (*o*)] that the representation was the inducement. The defence, if any, in such case must be either (1) that the applicant knew the true facts, or (2) that he avowedly did not rely upon the facts stated, or (3) that he contracted (*p*) to take the matter at his own risk (*q*).

It is not sufficient to prove that the party deceived made some investigation into the facts, or that he had the means of discovering the truth and did not sufficiently avail himself of them. In the case of false representation, negligence, or laches afford no answer unless there is such delay as to bring in the Statute of Limitations (*r*).

But if the statement be not obviously material, or if it be ambiguous, the applicant must in the former case prove it to be material, and in the latter prove the sense in which he understood it, and must in either case prove that he was induced by it (*s*).

As regards the meaning of the language, the defendants cannot be heard to say that they did not know the popular meaning of the words they used (*t*). If a man uses language which taken in its natural sense conveys a wrong impression, he cannot be heard to say that he did not intend to deceive (*t*). But *quære* whether *Derry* v. *Peek* (*u*) does not render it necessary to modify the last foregoing statements.

A statement that the consideration paid by the company for property is £36,000, when the fact is that £6000 part of that sum is to be paid to another person, not a part-owner, for his services in floating the company, is a material untruth for which the directors who issue the prospectus are responsible (*x*).

Liability for personal fraud.

Apart from the Directors Liability Act, 1890, the director can be rendered liable only for his own personal fraud, or for fraud of his co-directors or of other agents of the company which he has either expressly authorized or has connived at (*y*). As a general rule one agent is not responsible for the acts of another agent unless he does something by which he makes himself a principal in the fraud (*z*). The doctrine that the principal is in any event liable for his agent's fraud to the extent to which the principal has profited by the fraud does not apply to directors employing sub-agents (such as brokers to place debentures) to transact business of the company in the transaction of which the sub-agents are guilty of fraud: for in such a case the company, not the directors, are the principals (a). If the director have really acted as principal and only colourably as the company's agent, no doubt he might be rendered liable as principal (*b*).

The Court of Appeal however were, in *Weir* v. *Bell* (*c*), by no means unanimous in their opinions; Cotton, L.J., holding that the directors were liable for the fraud of the sub-agents the brokers, and Cockburn, C.J., that they were so liable to the extent of the benefit they had derived.

In *Henderson* v. *Lacon* (*d*) the directors knowingly made a representation

(*n*) *Smith* v. *Chadwick*, 9 App. Cas. 187, 196; *Arnison* v. *Smith*, 41 Ch. Div. 348, 369.

(*o*) As said in *Redgrave* v. *Hurd*, 20 Ch. Div. 1, 21.

(*p*) As in *Brownlie* v. *Campbell*, 5 App. Cas. 925.

(*q*) *Smith* v. *Chadwick*, 20 Ch. Div. 27, 44, 45; *Redgrave* v. *Hurd*, 20 Ch. Div. 1, 21.

(*r*) *Redgrave* v. *Hurd*, 20 Ch. Div. 1, 13, 22, 24.

(*s*) *Smith* v. *Chadwick*, 20 Ch. Div. 27, 45, 64; 9 App. Cas. 187.

(*t*) *Arnison* v. *Smith*, 41 Ch. Div. 348, 368, 373.

(*u*) 14 App. Cas. 337; and see *Glasier* v. *Rolls*, 42 Ch. Div. 436.

(*x*) *Capel* v. *Sim's Co.*, 58 L. T. 807.

(*y*) *Weir* v. *Barnett*, 3 Exc. D. 32; *Weir* v. *Bell*, 3 Exc. Div. 238; *Cargill* v. *Bower*, 10 Ch. D. 502; but see judgment of Cotton, L.J., 3 Exc. Div. 240.

(*z*) *Cargill* v. *Bower*, 10 Ch. D. 502, 514.

(a) *Weir* v. *Barnett*, *Weir* v. *Bell*, *l.c.*

(*b*) 3 Exc. D. 41.

(*c*) 3 Exc. Div. 238.

(*d*) 5 Eq. 249; *cf. Moore and De La Torre's Case*, 18 Eq. 661.

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to the public that they and their friends had subscribed a large portion of the capital, knowing well that the fact was not so; and it was there held that, as the statement related to the directors' own acts, they must be fixed with a guilty knowledge of the misrepresentation.

"Subscribe" for shares presumably means agree to take shares with the liability to pay upon them (*e*).

Which directors are liable.

Primâ facie (before the Directors Liability Act, 1890) the persons whose names appear as directors upon the prospectus are responsible for its contents; even if they were not present at the meetings of the Board at which the prospectus was approved and ordered to be issued they may be bound by ratification (*f*). But evidence, of course, may be given to shew that their names were inserted without their authority, or that they in fact never knew the contents of the prospectus, or approved, or ratified it.

In *Glasier* v. *Rolls* (*g*) the defendant was named in the prospectus as managing director, but with a note that he would not join the board until after the transfer of the business to the company. He furnished materials for the prospectus, saw early drafts of it, and made alterations in them. He never saw the final prospectus and did not issue it, but he was held liable for it on the ground that those who did issue the prospectus were his agents to do so.

In *Peek* v. *Derry* (*h*) a director who was not present at the meeting which issued the prospectus, but who a few days after received and circulated some copies of it, was held responsible for the prospectus to the plaintiff, although the copy seen by the plaintiff had not been supplied to him by the defendant.

Under the Directors Liability Act, 1890, it is unnecessary (except in the case mentioned in s. 3, subs. 3) for the plaintiff to shew that the director authorized the prospectus. The liability follows from his position.

The mere fact that the company has been extended to objects larger than those specified in the prospectus does not entitle the shareholder to go against the directors themselves, and say that they are trustees for him of the money which the company has received from him.

For it is not fraud in the view of the Court for an agent, not attempting to apply your money to his own use, to apply it to larger and more extensive purposes which you have not authorized; the relief in such a case, if any, is at law (*i*).

Unless the directors have been guilty of fraud, there is no equity against them (*k*).

But if fraud was alleged a bill would lie, and the plaintiff would not have been sent to his remedy at law (*l*).

And it is conceived that the directors are severally as well as jointly liable, and that the plaintiff is entitled to relief against any of them without making the others parties to the suit (*m*).

Directors are further criminally liable for certain fraudulent actions under 24 & 25 Vict. c. 96, ss. 81–84, and may also be prosecuted under some later sections of this Act (*n*).

(*e*) *Arnison* v. *Smith*, 41 Ch. D. 348, 357; *Henderson* v. *Lacon*, 5 Eq. 249, 257.

(*f*) See *Denham & Co.*, 25 Ch. D. 765.

(*g*) 42 Ch. Div. 436.

(*h*) 37 Ch. Div. 541.

(*i*) *Stewart* v. *Austin*, 3 Eq. 299.

(*k*) *Ship* v. *Crosskill*, 10 Eq. 73; see also *Turquand* v. *Marshall*, 6 Eq. 112; 4 Ch. 376; *Overend & Gurney Co.* v. *Gibb*, 4 Ch. 701; L. R. 5 H. L. 480; *Grimwade* v. *Mutual Soc.*, 52 L. T. 409.

(*l*) *Hill* v. *Lane*, 11 Eq. 215; commenting on *Ogilvie* v. *Currie*, 37 L. J. (Ch.) 541.

(*m*) *Attorney-General* v. *Wilson*, Cr. & Ph. 1; *Parker* v. *M'Kenna*, 10 Ch. 96; see *Parker* v. *Lewis*, 8 Ch. 1035.

(*n*) See *infra*, ss. 165–168, and notes.

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Their liability is also the subject of further consideration hereafter (*o*).

Liability of executors of deceased directors.

In an action brought against directors seeking compensation for losses in a case of misrepresentation, the proceeding is like an action at law for deceit (the same principle being applicable in such a matter both at law and in equity), and is therefore of a personal character; and, the estate of a deceased director not being alleged and proved to have received benefit from the deceit, his executors cannot be made liable to compensate the person who asserts he has been injured by it (*p*).

In *Walsham* v. *Stainton* (*q*), however (a decision which was not impugned by the House of Lords in *Peek* v. *Gurney* (*p*)), where two agents of a partnership had combined fraudulently to depreciate the value of the shares and all the profit of the fraud had accrued to the one, the estate of the other was held liable for the benefit so derived. The principle is stated (*r*) to be that both stood in a fiduciary relation to the partnership, that both concurred in a breach of duty, and that although only one derived benefit from the fraud the other was liable in equity for the benefit as if his own estate had been benefited.

Measure of damages.

In an action of deceit against directors in respect of shares taken under a false prospectus the amount of damage is the difference between the price paid by the plaintiff for the shares and the real value of the shares at the time of allotment; and such value is to be ascertained not by the market value of the shares at the time, but by the light of subsequent events, including (if the company be in liquidation) the result of the winding-up (*s*).

Laches in application.

Lord Romilly, M.R., in *Peek* v. *Gurney* (*t*), held that where a shareholder proceeds against the directors for an indemnity, he ought to come promptly for the purpose without watching for the success or failure of the company. In the case of an application to rescind the contract in respect of the shares the commencement of the winding-up is, as we have seen, an absolute bar to relief; and though no technical rule in that respect applied as regards the liability of directors, yet morally, and as far as equity was concerned, his Lordship said the same principle applied to both cases: and at any rate, after the winding-up had commenced the burden of proof fell on the shareholder to shew that it was not the failure of the company which had suggested the proceeding.

This view was not adopted by the House of Lords on appeal, and it was there laid down that equity in such a case will follow by analogy the rule at law, and that the only amount of delay which could be a bar to relief is that fixed by the Statute of Limitations (*u*).

Acts done after knowledge.

Where a party induced by misrepresentation has after knowledge of the facts so acted as that he could not claim rescission it does not necessarily follow that he could not claim damages in an action for deceit. In *Arnison* v. *Smith* (*x*) the untrue statement in the prospectus was corrected by a circular sent out after allotment with the stock certificates. The circular stated the truth, but did not admit the misrepresentation nor inform the allottees that they could retire and get back their money. The allottees who paid in full

(*o*) See Table A., (55)—(56), note.

(*p*) *Peek* v. *Gurney*, L. R. 6 H. L. 377. See further, s. 165, n. *Secus* in case of death of plaintiff, *Twycross* v. *Grant*, 4 C. P. Div. 40.

(*q*) 1 D. J. & S. 678; and see *Imp. Merc. Credit* v. *Coleman*, L. R. 6 H. L. 189.

(*r*) L. R. 6 H. L. 394.

(*s*) *Peek* v. *Derry*, 37 Ch. Div. 541, 590; *Arkwright* v. *Newbold*, 17 Ch. D. 301; *Twycross* v. *Grant*, 2 C. P. D. 469; *Arnison* v. *Smith*, 41 Ch. D. 348, 363.

(*t*) 13 Eq. 79, 119. As to the application of this principle as against the company, see *Gregory* v. *Patchett*, 33 Beav. 595.

(*u*) *Peek* v. *Gurney*, L. R. 6 H. L. 377, 384, 402.

(*x*) 41 Ch. Div. 348.

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after receiving the circular were held entitled to recover in an action of deceit damages for the loss of the money paid as well after as before the circular.

Misrepresentation raises no equity as against third parties.

Misrepresentations on the part of the company or its agents raise no equity for avoiding a contract entered into for the purchase of shares from a third party (*y*).

The proper purpose of a prospectus is to invite persons to become allottees of the shares, or original shareholders in the company, and when it has performed this purpose its office is exhausted. The responsibility, therefore, of directors who issue a prospectus containing misrepresentations does not, as of course, follow the shares on their transfer from an allottee to his vendee. To fasten them with responsibility the vendee must show some direct communication between them and himself in the communication of the prospectus, and its influence upon his conduct in becoming a transferee (*z*).

Action for deceit, form of.

A shareholder may bring an action to be relieved of his shares on the ground of misrepresentation without making other persons similarly deceived parties (a); and an action on behalf of himself and other shareholders is not properly constituted, for the injury is not general to all, the misrepresentation would or might affect some more than others, and would require investigation in each particular case (*b*). In *Croskey* v. *Bank of Wales* (*c*) a demurrer was allowed to a bill filed by one member on behalf of himself and others for a return of deposits on shares subscribed for under misrepresentation and suppression; but in *Hallows* v. *Fernie* (*b*) the case was, on the authority of *Clements* v. *Bowes* (*d*), held to be within the 15 & 16 Vict. c. 86, s. 49, and the misjoinder was not fatal to the suit (*e*).

Under the new practice the point is of course of much diminished importance. In *Arnison* v. *Smith* (*f*) fifty-four plaintiffs concurred in one action. Forty of them appeared and gave evidence and obtained a judgment. Twelve did not appear, and as against them the defendants obtained judgment for the costs occasioned by these twelve being joined as plaintiffs, but without prejudice to their bringing a fresh action. The other two were dead.

II. Default or unnecessary Delay.

A transfer, to which no objection is or can be made on the part of the company, ought to be confirmed by the directors at the first meeting at which in the ordinary course of business it can be confirmed, and thereupon registered. If not so confirmed at the first meeting at which, in the ordinary course of business, it can be done, there is "unnecessary delay" within the meaning of the section.

Thus a transfer of shares, executed by the transferor and transferee, having been left at the office of the company for registration, was approved by the director whose duty it was to inspect transfers on the 28th Feb., 1866, and ought, according to the ordinary practice of the company, to have been confirmed at the next meeting of the directors on the 1st March. It was not confirmed at that meeting, and on the 3rd March, the company being insolvent, the directors resolved that no transfers lying at the office should be registered without their express sanction. On the 7th March a petition to wind up the company was presented, on which an order was made on

(*y*) *Duranty's Case*, 26 Beav. 268; *E. p. Worth*, 4 Drew. 529; *Nicol's Case*, 3 De G. & J. 387; *Croom's Case*, 16 Eq. 417, 431.

(*z*) *Peek* v. *Gurney*, L. R. 6 H. L. 377.

(a) *Ross* v. *Estates Investment Co.*, 3 Eq. 122; 3 Ch. 682; *Smith* v. *Reese River Silver Mining Co.*, 2 Eq. 264; 2 Ch. 604; L. R. 4 H. L. 64; and others, *supra*, are examples. *Macbride* v. *Lindsay*, 9 Hare, 574, seems to stand alone.

(*b*) *Hallows* v. *Fernie*, 3 Ch. 467, 471; and *Turquand* v. *Marshall*, 6 Eq. 112, 131.

(*c*) 4 Giff. 314; 9 Jur. (N.S.) 595. But see *Beeching* v. *Lloyd*, 3 Drew. 227.

(*d*) 1 Drew. 684.

(*e*) Misjoinder coupled with multifariousness was held fatal in *Ward* v. *Sittingbourne and Sheerness Railway Co.*, 9 Ch. 488.

(*f*) 41 Ch. Div. 348.

the 17th March. The transfer was never registered. It was held that the neglect to register the transfer on the 1st March constituted "unnecessary delay" on the part of the company, and in the winding-up the name of the transferor was, on his application, removed from the list of contributories (*g*).

So in *Hill's Case* (*h*), in the same company, the transfer was left for registration on Feb. 24th, and ought, in the ordinary course of business, to have been approved on Feb. 28th, and confirmed on March 1st; but owing to arrears of work in the office, the inspecting director did not inspect it on Feb. 28th, and it was, therefore, not registered before the winding-up. In this case, also, the register was rectified.

But in the same company, a transfer which had been executed in December, 1865, not having been left for approval until the 3rd March, 1866, it was held that there was no unnecessary delay; and an application by the transferor, to which the transferee consented, to substitute the name of the latter for that of the former in the list of contributories, was refused (*i*).

In *Lowe's Case* (*k*) the transfer, duly executed, was sent in for registration on the 5th January, at which time three petitions had been presented for winding up the company. A resolution for a voluntary winding-up was passed on the 18th January and confirmed on the 3rd February, and on the 23rd February a supervision order was made. The commencement of the winding-up, therefore, dated from the 3rd February (see sect. 130, *post*). The weekly board meeting of the directors, at which the transfer ought, in the ordinary course of business, to have been confirmed, was held on the 8th January, but the transfer was not at that meeting, or subsequently, registered. The directors had ordered the transfer books to be closed on the 6th January, but had not passed any resolution as to making no more transfers. It was held that there had been unnecessary delay, and the register was ordered to be rectified.

In these cases the principle is, that the contract would have been carried into effect but for the default of the directors, and the order goes only to do that which ought to have been done in the ordinary course of business before the winding-up (*l*).

But a shareholder is not entitled as of course on the eve of liquidation to send in a transfer and insist on registration: the directors are entitled and even bound to refuse registration if the facts are such as that the rights of creditors have in fact intervened although a winding-up has not commenced. If directors, in the fair and *bonâ fide* exercise of their powers and in circumstances which make it a reasonable act of management, resolve not to record future transfers, which may seriously affect and alter the liability of the members, the resolution will be effectual (*m*). Thus in the Glasgow Bank cases, in which the material dates will be found given *ante*, p. 117, it was held that the directors rightly refused registration of transfers as from the time when the bank stopped payment on Oct. 2 and the circular of Oct. 5 convening the meeting to pass voluntary resolutions had been

(*g*) *Joint Stock Discount Co., Nation's Case*, 3 Eq. 77; *Read's Case*, 15 W. R. 631; 36 L. J. (Ch.) 422; 16 L. T. 111; *Manchester and Oldham Bank*, W. N. 1885, 169.

(*h*) *Joint Stock Discount Co.*, 4 Ch. 769, n.

(*i*) *Joint Stock Discount Co., Shepherd's Case*, 2 Eq. 564; 2 Ch. 16; and see *Marzetti's Case*, W. N. 1866, 399; 15 W. R. 220.

(*k*) *Hercules Insurance Co.*, 9 Eq. 589.

(*l*) *Bentinck's Case* (Eur. Arb.), L. T. 99; 18 Sol. J. 224. And see *Joshua Murgatroyd's Case* (Eur. Arb.), L. T. 115; 18 Sol. J. 28.

(*m*) *Alex. Mitchell's Case*, 4 App. Cas. 548; *Rutherfurd's Case*, Ibid.; *Nelson Mitchell's Case*, Ibid. 624.

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issued (*n*), and that the shareholders themselves were under the circumstances precluded from making transfers (*o*).

And a shareholder who on Sept. 28 and 30 sold his shares in the market in the usual way for the settling day of Oct. 16, and who on Oct. 19 presented his petition for rectification of the register, was held not entitled to rectification (*p*). In this case the company itself was the purchaser; it had power under its deed to buy its own stock.

Laches on part of shareholder.

In *Fyfe's Case* (*q*), in the matter of the same company as *Nation's Case* and the other cases mentioned with it, a transfer from F. to S. was lodged for registration on the 15th February, 1866, but never registered, and therefore, according to the decisions in those cases, F. was entitled to have the register rectified by the removal of his name. In June, 1866, F. appeared in person at chambers on a summons to place him on the list of contributories; but no order was made on the summons. F.'s name, however, remained on the register. In June, 1867, S. died, and had no legal personal representative. F. took no steps to have his name removed from the register, and in May, 1869, received notice from the official liquidator that his name was placed on the list of contributories. On his application to have it removed, it was held that he was not barred by laches (*r*), but was entitled to be relieved as if the application had been made immediately after the winding-up order; and that the fact that there was no person who could be put on the list in his place, S. having no legal representative, was not material (*s*).

The transfer to be registered must be free from objection.

In any question, however, of unnecessary delay on the part of the company, it is a condition precedent that no objection exists to the registration of the transfer.

Thus, if the articles of association of the company require (*t*), or even although the articles do not require it, yet if it have been the uniform practice of the company to require (*u*) that shares shall be transferred by deed executed by both transferor and transferee, there will have been no unnecessary delay on the part of the company if they have refused or neglected to register a transfer which has not been so executed.

And if the articles provide that the directors may decline to register a transfer to a person whom they consider irresponsible, it is a condition precedent, in any question of delay, that there is no real objection to the transferee. In such a case, the directors will not, by not declaring their objection within a reasonable time, be held to have waived it. The transferor may call upon them to register the transfer or to say why they do not register it. But if he do not so call upon them, they will not lose the benefit of the objection by delay, but may bring it forward at any time (*x*).

But if, before the winding-up, the transfer has been duly executed and left at the office for registration, and the directors have neglected to exercise their discretion either in approving or disapproving it, and if there is no reason why the transfer should have been disapproved, the Court will rectify the register, and put the parties in the same position as if it had been approved (*y*).

(*n*) *Alex. Mitchell's Case*, 4 App. Cas. 548; *Rutherfurd's Case*, Ibid.; *Nelson Mitchell's Case*, Ibid. 624.

(*o*) See 4 App. Cas. 574.

(*p*) *Nelson Mitchell's Case*, 4 App. Cas. 624.

(*q*) *Joint Stock Discount Co.*, 4 Ch. 768.

(*r*) See *Shewell's Case*, 2 Ch. 387; *Hart's Case*, 6 Eq. 512; *Ex p. Little*, 17 W. R. 461; 20 L. T. 162, and see *supra*, pp. 120, 121.

(*s*) *Cf. W. H. Bentinck's Case* (Eur. Arb.), L. T. 143; 18 Sol. J. 224; and see *infra*, s. 98, note.

(*t*) *Musgrave and Hart's Case*, 5 Eq. 193.

(*u*) *Marino's Case*, 2 Ch. 596.

(*x*) *Shipman's Case*, 5 Eq. 219; and see *Gustard's Case*, 8 Eq. 438; and s. 22.

(*y*) *Hill's Case*, 4 Ch. 769, n.; and other cases, *v. supra*.

In the absence of evidence that any objection to the transferee exists, the Court will presume that the directors would have registered the transfer (*z*).

The cases in the European Arbitration in which these points arose have been already noticed (a).

If conditions of articles not complied with, Court cannot interfere.

But if the conditions of the articles in respect of transfer have not been complied with by the transferor and transferee before the winding-up, the Court cannot interfere to dispense with that which the articles require, or to exercise a discretion which rests with the directors.

Thus if the articles require that the transfer shall be executed by both transferor and transferee, and it have not been so executed, the Court has no power, in the winding-up, to rectify the register (*b*); [although if received and registered it may be incapable of being impeached (*c*)]. So if the articles give the directors a discretion whether they will accept a transferee or not, and they have never had an opportunity of exercising that discretion, the Court cannot substitute its discretion for theirs (*d*).

The rule was simply stated by Giffard, V.C., in *Marshall* v. *Glamorgan Iron and Coal Co.* (*e*). If a man being a shareholder has sold his shares, he is not relieved from being a contributory if, owing either to his own neglect or that of his transferee, or if, in fact, owing to any cause except the neglect of the company, his transferee's name has not been substituted for his at the date of the winding-up. If the omission to substitute the name of the transferee is owing entirely to the neglect and default of the company he will be relieved (*f*).

Transferor remains liable, until transferee's liability complete.

To escape liability as against the official liquidator in the winding-up it is incumbent upon the transferor to shew that at some time or other there was (or but for the default of the company there could have been (*g*)) upon the register a transferee of his who could be made liable at law in respect of the shares (*h*).

"A person who is once a shareholder must remain a shareholder unless he can shew that he has in some lawful way got rid of his liability" (*i*).

"Every one who has at any time become a shareholder, and is unable to shew that at the date of the order he had ceased to belong to the company either by the forfeiture or transfer of his shares, or in some other authorized manner (*k*), must be placed upon the list" (*l*).

And therefore, even though a transfer be complete and registered, yet if it be not a valid transfer (as if the transfer have not been executed by the transferee, and he be held not to have accepted the shares (*m*), or if the transfer have been to an infant (*n*)), the transferor will remain liable in respect of the shares (*o*).

B. list.

Suppose transfer executed and left for registration at such a date as that if it had been registered without default or unnecessary delay on the part of the company the registration would have been complete more than a year before winding-up commenced; *semble*, that after winding-up it may be possible to rectify the date of registration so as to escape liability as a B. contributory (*p*).

(*z*) *Evans* v. *Wood*, 5 Eq. 9; and see *Paine* v. *Hutchinson*, 3 Ch. 388, 393.
(a) *Supra*, p. 34.
(*b*) *Marino's Case*, 2 Ch. 596; *Musgrave and Hart's Case*, 5 Eq. 195.
(*c*) *Taurine Co.*, 25 Ch. Div. 118.
(*d*) *Walker's Case*, 2 Eq. 554.
(*e*) 7 Eq. 129, 137.
(*f*) And see cases *supra*, pp. 120, 121.
(*g*) See cases *supra*.
(*h*) *Curtis' Case*, 6 Eq. 455.
(*i*) *Per* Giffard, L.J., *Addison's Case*, 5 Ch. 294, 297.
(*k*) *Brown's Case*, 18 Ch. D. 639.
(*l*) *Per* Lord Chelmsford, *Spackman* v. *Evans*, L. R. 3 H. L. 171, 238.
(*m*) *Heritage's Case*, 9 Eq. 5.
(*n*) *Mann's Case*, 3 Ch. 459, n.
(*o*) See also cases under s. 22.
(*p*) Consider *Anglo-Indian Co.*, *Grey's Case*, W. N. 1888, 137, 211.

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Laches on part of shareholder.

A person whose name has been wrongly placed on the list of contributories does not by delaying in making application to have it removed thereby raise an equity against his right to relief where no loss is occasioned to the estate by the delay; and, *quære*, whether even if such loss were occasioned, any equity would arise (*q*). But if the matter has been the subject of judicial decision an appeal may be precluded by the rules as to time (*r*).

An infant shareholder who attained her majority six months after the commencement of the winding-up, and who more than a year after the certificate of the settlement of the list of contributories, and nearly three years after she attained her majority, applied to have her name removed from the list, was held not to be precluded by delay, but was not allowed her costs (*s*).

And if the person have even acquiesced in being made a contributory by paying a call in the winding-up, and then, on the authority of subsequent decisions, if he apply to the Court to be removed from the list, he may be held entitled to relief and to repayment of the call (*t*).

But this is not so with respect to the register of *shareholders*, in respect of which delay in application is most material. So that where a shareholder executed a transfer of his shares two years before a winding-up order was made, but neglected to see that the transfer was registered before the winding-up, he was retained as a contributory; for although the company was in default in delaying to register the transfer, yet the shareholder was in default too, and was therefore not entitled to relief (*u*).

The vendor ought to compel the purchaser to register the transfer, and if he neglect to do so he must suffer for his own default, and his name being on the register at the date of the winding-up must remain there (*x*).

By the Companies Act, 1867, s. 26 (*v. infra*), the company is to register a transfer on the application of the transferor (*y*).

On the question of laches in applying for rectification of the register of shareholders, however, it is essential to distinguish clearly cases in which a shareholder tries to shew that he has effectually parted with his shares from cases where a person says he never was a shareholder at all.

Of cases of the former class there are two subdivisions:—

(i.) When the shareholder is in default, and the company is or not in default too. In this case laches will bar the shareholder's right to relief (*z*).

(ii.) When the shareholder is not, but the company alone is in default. Laches, then, will not avail as against the shareholder (a), although it may as against the company (*b*).

In cases of the latter class, if the alleged shareholder is successful in shewing that he never agreed to take shares at all, and that he repudiated the shares which were endeavoured to be forced upon him, manifestly his name never ought to have been on the register at all, and it is no laches on his part not to apply for an order to make the directors cancel a registration which was *ab initio* a wholly void act (*c*).

(*q*) *Shewell's Case*, 2 Ch. 387; and *Fyfe's Case*, 4 Ch. 768.

(*r*) *Elham Valley Co., Dickson's Case*, 12 Ch. D. 298.

(*s*) *Hart's Case*, 6 Eq. 512; *Delmar's Case*, 38 L. J. (Ch.) 85; 19 L. T. 304; 17 W. R. 21; *Sassoon's Case*, 20 L. T. 161, 424; see now The Infants Relief Act, 1874, 37 & 38 Vict. c. 62.

(*t*) *Nelson's Case*, W. N. 1874, 196.

(*u*) *Walker's Case*, 6 Eq. 30; and see cases, *supra*, p. 111, *et seq.*

(*x*) *Head's Case, White's Case*, 3 Eq. 84; and see *supra*, p. 38.

(*y*) *Ward* v. *Dowling*, 19 L. T. 277, is an instance of bill filed for this purpose.

(*z*) *Walker's Case*, 6 Eq. 30; *Head's Case*, 3 Eq. 84; *Gower's Case*, 6 Eq. 77.

(a) *Fox's Case*, 5 Eq. 118; *Lyster's Case*, 4 Eq. 233; *Marshall* v. *Glamorgan Iron Co.*, 7 Eq. 129, 138; *Fyfe's Case*, 4 Ch. 768.

(*b*) *Siehell's Case*, 3 Ch. 119; *Taurine Co.*, 25 Ch. Div. 118.

(*c*) *Gorrissen's Case*, 8 Ch. 507; *E. p.*

As laches are not attributable to an application to get off the list of contributories, so neither are they attributable to an application to put a member on it (*d*).

Laches on part of liquidator.

In *Shepherd* v. *Gillespie* (*e*) a suggestion was thrown out by Stuart, V.C., whether unnecessary delay on the part of the transferee does not give the right to have the register rectified under this section, and whether the section was not "intended rather to give relief in the case of unnecessary delay on the part of the transferee than on the part of the directors."

Quære, section applicable to "unnecessary delay" on part of transferee.

But although a vendor of shares may not, under the circumstances above considered, be in a position to claim as against the company or the creditors of the company to have his name removed from the list of shareholders or contributories, he may nevertheless be entitled to be indemnified in respect of the shares by the person who has under the contract for sale become the equitable owner (*f*).

INDEMNITY in respect of incompleted contract,

With regard to this question of indemnity, a large number of cases have been decided as to who is the person liable to be called upon for an indemnity in respect of a contract entered into according to the usages and rules of the Stock Exchange, and as to the privity of contract between the original seller and ultimate buyer of shares; for, as is well known, a contract for the sale of shares is but seldom made directly between buyer and seller, or the respective brokers of buyer and seller, but is effected by a transaction whereby, after passing through the hands of perhaps several jobbers (*g*) in succession, the name of the ultimate purchaser is on the "name-day," the day preceding the "settling-day," handed to the broker of the original seller, and a transfer then effected directly between these two parties (*h*).

It is not proposed to enter here into the rules and usages of the Stock Exchange (*i*) under which these transactions are effected; but only, inasmuch as the decisions referred to deal directly with the question of the vendor's right to indemnity, to cite very shortly cases which otherwise do not properly fall within the scope of this work.

incorporating rules of the Stock Exchange;

Where a contract for the purchase and sale of shares has been entered into between individuals through their respective brokers, or with the intervention of jobbers, the lawful usages and rules of the Stock Exchange are incorporated into the contract, and the rights and liabilities of the parties to such contract are determined by the operation upon the contract of those rules and usages (*k*).

What those rules and usages are is a question of fact to be left to the jury (*l*).

It is proposed to consider first the cases in which the ultimate seller has sought to obtain an indemnity from the ultimate buyer; and, secondly, those in which he has sought to obtain it from one or other of the intermediate jobbers.

The following notation is used for convenience:—S. the original seller; P. the ultimate purchaser; A. and B. their respective brokers; X., Y., Z., intermediate jobbers.

White, 16 L. T. 276; *Wynne's Case*, 8 Ch. 1002; *Beck's Case*, 9 Ch. 392; *Nelson's Case*, W. N. 1874, 196. See also *Railway Tables Co., E. p. Sandys*, 42 Ch. D. 98, 106.

(*d*) *Sand's Case*, 32 L. T. 299.

(*e*) 5 Eq. 293, 298.

(*f*) See cases cited below, and *Shepherd* v. *Gillespie*, 3 Ch. 764.

(*g*) As to the business of a jobber, see L. R. 3 C. P. 137.

(*h*) See L. R. 7 H. L. 539.

(*i*) As to these, see L. R. 4 C. P. 53; and *Grissell* v. *Bristowe*, L. R. 3 C. P. 112; Ibid. 4 C. P. 36; *Bowring* v. *Shepherd*, 6 Q. B. 309; and other cases cited *infra*.

(*k*) *Coles* v. *Bristowe*, 4 Ch. 3; *Grissell* v. *Bristowe*, L. R. 4 C. P. (Ex. Ch.) 36; *Nickalls* v. *Merry*, L. R. 7 H. L. 530; and numerous other cases cited below.

(*l*) *Dent* v. *Nickalls*, 29 L. T. 536; 30 L. T. 644; 22 W. R. 218.

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from ultimate buyer;

If S., through A., sell to X., and P., through B., purchase from Z. shares in a company, and by virtue of intermediate dealings between X., Y., and Z., the name of P. is on the "name-day" passed to A. as the name of the ultimate purchaser; and S. accept P. as the purchaser, and execute and deliver to him a transfer of the shares, and the price of the shares is paid to S., a contract is thus by implication created between S. and P. (*m*), of which S. may enforce specific performance (*n*), or in respect of which he may call upon P. for an indemnity if, in consequence of the winding-up of the company, P.'s name cannot be substituted for his on the list of shareholders. In the latter case S. might under the old practice have proceeded either by suit in equity for repayment of calls and indemnity in respect of future calls (*o*), or by action at law (*p*).

From the cases cited in the last two notes it will be seen that the price paid by P. and received by S. may be, and generally is, different, the balance being settled between the intermediate parties; that S. may be called upon to transfer his shares to several purchasers, buyers of a smaller number of shares than S. sells, and that on the other hand (*q*) if P. be the purchaser of a larger number of shares than S. sells, P.'s ticket may be "split" (*r*) and S. become his transferor in respect of a portion of the shares P. has bought.

In *Fenwick* v. *Buck* (*s*) S. did not sell until fourteen days after the settling-day for which P. bought. S., however, sold not for the account but for cash, and it was held that, although a broker cannot carry over from one settling-day to another without his principal's consent, this was not such a carrying over, but was only a delay in completion.

If the broker carry over without the principal's consent, the contract is at an end so far as the principal is concerned (*t*).

from concealed principal;

If P. give the name of a person of no substance as transferee, and the shares are accordingly transferred to him as a mere nominee for P., S. can in equity pass over the nominee and enforce his right to indemnity against P., the real purchaser and equitable owner of the shares for whom S. has, in fact, become a trustee (*u*).

It was held in *Torrington* v. *Lowe* (*x*) that S. could not in such a case make P. liable at law; but, *quære*, whether this case was rightly decided (*y*).

The same principle applies where P. gives the name of a person under legal disability, as an infant, and the shares are in consequence thrown back upon S.'s hands. S. may in such a case enforce his right to indemnity against P. (*z*).

(*m*) *Coles* v. *Bristowe*, 4 Ch. 3, 11.

(*n*) *Sheppard* v. *Murphy*, I. R. 1 Eq. 490; Ibid. 2 Eq. 544; 16 W. R. 948; *Paine* v. *Hutchinson*, 3 Eq. 257; 3 Ch. 388; *Musgrave and Hart's Case*, 5 Eq. 193. There is an implied contract that the purchasing broker shall furnish the name of a responsible transferee, and if he do not do so, as, *e.g.*, by giving the name of a foreigner domiciled abroad, a Court of Equity will not enforce a transfer: *Goldschmidt* v. *Jones*, 22 L. T. 220; and see *Allen* v. *Graves*, L. R. 5 Q. B. 478.

(*o*) *Evans* v. *Wood*, 5 Eq. 9; *Hawkins* v. *Maltby*, 4 Eq. 572; 3 Ch. 188; 6 Eq. 505; 4 Ch. 200; *Hodgkinson* v. *Kelly*, 6 Eq. 496; *Fenwick* v. *Buck*, 19 W. R. 597; 24 L. T. 274; *Pender* v. *Fox*, W. N. 1872, 151; *Crabb* v. *Miller*, 24 L. T. 219, 892.

(*p*) *Davis* v. *Haycock*, L. R. 4 Ex. 373; *Bowring* v. *Shepherd*, L. R. 6 Q. B. (Ex. Ch.) 309; *Street* v. *Morgan*, 21 L. T. 432, where the ultimate purchaser sued was a country broker whose customer could not take the shares.

(*q*) See *Bowring* v. *Shepherd*, L. R. 6 Q. B. 309.

(*r*) See L. R. 6 Q. B. 314.

(*s*) 19 W. R. 597; 24 L. T. 274; and see on the same point *Sheppard* v. *Murphy*, I. R. 1 Eq. 490; Ibid. 2 Eq. 544; 16 W. R. 948; *Crabb* v. *Miller*, 24 L. T. 219, 892.

(*t*) *Maxted* v. *Morris*, 21 L. T. 535.

(*u*) *Castellan* v. *Hobson*, 10 Eq. 47; *Nickalls* v. *Furneaux*, W. N. 1869, 118.

(*x*) L. R. 4 C. P. 26.

(*y*) See L. R. 6 Ex. 167.

(*z*) *Brown* v. *Black*, 15 Eq. 363; 8 Ch. 939; *Maynard* v. *Eaton*, 9 Ch. 414.

In *Brown* v. *Black* (a) S. sold fifteen shares, and three persons, $P._1$, $P._2$, and $P._3$, gave separate instructions to the same broker to purchase for them thirty shares each. The ninety shares purchased (S.'s fifteen shares being a part of them) were all transferred together into an infant's name, and never appropriated between $P._1$, $P._2$, and $P._3$. Upon S.'s bill for indemnity, the other sellers not being parties, it was held that the defendants $P._1$, $P._2$, $P._3$, must each indemnify in respect of five shares.

from bankrupt buyer;

Where the buyer has become bankrupt after the commencement of the winding-up, his liability to the seller is not, by virtue of sects. 75 and 76, provable in the bankruptcy, and the bankruptcy is therefore no bar to the seller's claim for indemnity in respect of calls (*b*).

from jobber;

If S. through A. sell to X., a jobber, shares in a company for the account, "the contract of the jobber is, that at the settling-day he will either take the shares himself, in which case he would, of course, be bound to accept and register a transfer and to indemnify, or he will give the name of one or more transferees, [being persons able and willing to contract (*c*),] names to which no reasonable objection can be made, who will accept and pay for the shares. The jobber may perform either alternative; and if, electing to perform the latter alternative, he sends in names [of persons able and willing to contract (*c*)] which are accepted, and to which transfers are executed, and those transfers are taken and paid for by the transferees or their brokers, the jobber is then and at that stage relieved from further liability, and the liability to register and indemnify is shifted to the transferees" (*d*).

This shifting of the liability from the jobber to the transferee does not arise from the voluntary act of S. in accepting the substituted liability of a third party in accord and satisfaction of the contract, but is a consequence and a part of the contract itself; the contract being, that, where the price has been paid and the transfers executed by the transferor and delivered, the jobber passing the ticket with the transferee's name is free from further responsibility (*e*).

Accordingly it has been held, both in equity (*f*) and at law (*g*), that the jobber, having performed his contract in the manner above described, cannot be made liable to indemnify the seller, although the transferees have not executed or registered the transfers.

So if the name given be such as the seller might perhaps have reasonably objected to, yet if objection is not taken within the ten days which by the custom of the Stock Exchange are allowed for inquiry, the jobber is discharged at the expiration of that time.

Thus in *Maxted* v. *Paine* (second action) (*h*) B., on the instructions of P. the ultimate buyer, passed as transferee the name of G., a person of no means, who had consented, in consideration of a sum of money paid to him by P., to allow his name to be given. Both A. and X. were ignorant of the arrangement, and no objection was taken to the name within the time limited

(a) *Brown* v. *Black*, 15 Eq. 363; 8 Ch. 939; *Maynard* v. *Eaton*, 9 Ch. 414.

(*b*) *Holmes* v. *Symons*, 13 Eq. 66; but see s. 75, *infra*, as to B. A. 1869 and 1883.

(*c*) *Nickalls* v. *Merry*, 7 Ch. 733; L. R. 7 H. L. 530.

(*d*) *Coles* v. *Bristowe*, 4 Ch. 3, 11; and see *Grissell* v. *Bristowe*, L. R. 4 C. P. (Ex. Ch.) 36, 45. The principle it seems extends to the case of a country broker instructing a London broker to buy shares for him; his instructions imply an authority to the London broker to give his name as purchaser, if he do not supply the name of his customer: *Street* v. *Morgan*, 21 L. T. 432, 436.

(*e*) See *Coles* v. *Bristowe*, where Coles had given his broker instructions to complete with the jobber direct, 6 Eq. 151; 4 Ch. 14; and *Maxted* v. *Paine* (2), L. R. 6 Ex. 132, 173.

(*f*) *Coles* v. *Bristowe*, 4 Ch. 3.

(*g*) *Grissell* v. *Bristowe*, L. R. 4 C. P. 36.

(*h*) L. R. 4 Ex. 203; Ibid. 6 Ex. 132.

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by the usage. Under these circumstances it was held that X. had fulfilled his contract and was relieved from liability. It is conceived that S.'s remedy in this case was by suit in equity against P., as real purchaser and equitable owner of the shares, as in *Castellan* v. *Hobson* (*i*).

But if the jobber gives the name of a non-existent person, or of a person who is incompetent to contract, as an infant, lunatic or married woman, or of a person who has not authorized the use of his name, he is not discharged, although the name be accepted. For the jobber has contracted to purchase the shares, and all that the custom of the Stock Exchange allows him to do is to shift this contract to another, to find some one who will perform his contract for him. If he gives the name of a person who from disability cannot perform, or who being able has never agreed to perform the contract, or who does not exist at all, he has not substituted any one for himself, and therefore necessarily remains liable (*k*).

It is immaterial whether the ten days have elapsed or not before objection is taken. That interval is given for inquiry into the responsibility and not into the capacity and willingness of the name given (*l*).

In *Maxted* v. *Paine* (first action) (*m*), therefore, where X. on the name-day passed to A. the name of a person as purchaser who had not agreed, and was not bound, to purchase shares in the company, X. had not by passing such a name relieved himself from liability, although he was quite innocent in the matter, and did not know that any objection could be made to the purchaser, and although objection was not taken within the ten days allowed for that purpose by the rules of the Stock Exchange.

And so where X. without fraud handed on to A. the broker of S. the name which X. had received and the transfer was executed and the consideration paid, X. remained liable to indemnify S. upon its subsequently turning out that the name given was that of an infant (*n*).

While S. is thus entitled to indemnity from X., *semble* that X. is in turn entitled to indemnity from P. who passed him the name which brought him into trouble (*o*). In the case referred to the plaintiffs were P.'s brokers, who had been ordered by the Stock Exchange under their rules to indemnify S., and the defendant was P.

This, however, will not be allowed to deprive S. of his right of establishing his claim against X. And, therefore, where S. had commenced an action against X., and X. then filed a bill against S. and P., an injunction to stay S.'s action was dissolved on appeal (*p*).

from broker of ultimate purchaser;

It is conceived that the broker acts throughout only as agent and does not offer to make a contract on his own account (*q*): from which it would follow that the broker can never be liable upon the contract as a purchaser, although he might be liable on the ground of misrepresentation if he have put forward a principal non-existent or under disability.

It does not appear that a seller of shares has ever yet in such a case sought to render the broker of the ultimate buyer liable to indemnify him (*r*),

(*i*) 10 Eq. 47. And see *Nickalls* v. *Merry*, L. R. 7 H. L. 530, 546.

(*k*) *Nickalls* v. *Merry*, 7 Ch. 733; L. R. 7 H. L. 530.

(*l*) *Nickalls* v. *Merry*, L. R. 7 H. L. 530, 542.

(*m*) L. R. 4 Ex. 81; *Maxted* v. *Morris*, 21 L. T. 535.

(*n*) *Nickalls* v. *Merry*, 7 Ch. 733; L. R. 7 H. L. 530 (overruling *Rennie* v. *Morris*, 13 Eq. 203); *Dent* v. *Nickalls*, 29 L. T. 536; 30 L. T. 644; 22 W. R. 218; *Watson* v. *Miller*, W. N. 1876, 18; *Heritage* v. *Paine*, 2 Ch. D. 594.

(*o*) *Peppercorne* v. *Clench*, 26 L. T. 656.

(*p*) *Nickalls* v. *Eaton*, 23 L. T. 689.

(*q*) See *Coles* v. *Bristowe*, 4 Ch. 3; *Grissell* v. *Bristowe*, L. R. 4 C. P. 36; and judgment of Mellish, L.J., in *Merry* v. *Nickalls*, 7 Ch. 733, 755.

(*r*) In *Brown* v. *Black*, 15 Eq. 363; 8 Ch. 939; the bill as originally filed was

although it seems that the Stock Exchange will under their rules order a broker who has passed an improper name to indemnify the vendor (*s*). It might, perhaps, be gathered from the judgment of Blackburn, J., in *Maxted* v. *Paine* (2), *v. supra* (*t*), and from the judgment of Romilly, M.R., in *Rennie* v. *Morris* (*u*), that an action might in such a case be successful; but *quære* whether in any case in which *Nickalls* v. *Merry* (*x*) would apply any party to the transaction subsequent to X., the original jobber, would be liable to S. For the ground of the decision in *Nickalls* v. *Merry* is that the contract with X. remains undisturbed and that there is no contract between S. and any one standing behind X. It would seem to follow that neither on the ground of contract nor of fraud could S. have any claim against B.

Allen v. *Graves* (*y*) was a case in which S., through A., contracted with X. for the sale to him of shares for the account, and X. contracted with Y. that Y. should "take in" shares for him for that account. A "taker-in" of shares becomes the purchaser for that account, with a concurrent obligation to deliver back a like number of shares on the ensuing account. Y. did not pass to X. on the name day, as he ought to have done, the name of a transferee, but passed an informal memorandum to X., which X. passed to A., and it was arranged between A. and Y. that the delivery of the name should stand over till required by A. On the settling-day S. executed a transfer of the shares, leaving the name of the transferee blank, the transfers were paid for, and A. handed Y. the certificates, but retained the transfer. Subsequently Y. handed to A. the name of a transferee, to whom objection was taken. It was held, that there was a contract between S. and Y. which Y. had not fulfilled, and that he was liable to S.

Registration guaranteed.

If a jobber enter into a contract for the purchase of shares "with registration guaranteed," his contract is not only to find a purchaser who will make payment and accept a transfer, but one who will also register the transfer: and until that has been done the jobber is not discharged (*z*).

Costs.

It will be observed that by the section the Court is authorized to visit the applicant with costs, and is further empowered, if it rectifies the register, to order costs and damages to be paid by the company, but that there is no authority to order payment of costs by any person other than the company against whom the motion may be directed. This has been held to be an indication that the section is not applicable to cases of specific performance of contracts for the purchase and sale of shares (a).

If an application be brought within the section by shewing that the applicant has a legal title, and it be shewn that the company were in the wrong in siding with the wrong party, then the Court, being unable to make that wrong party pay the costs, will give them against the company (*b*).

But if the application to the Court be made as part of the proceedings in the winding-up, the Court has jurisdiction, under sect. 170 and the 74th rule of the Gen. Order of the 11th of November, 1862, to order the person against whom the application is made to pay costs (*c*).

It does not appear upon what authority Malins, V.C., ordered the respondent shareholder to pay costs in *Davies' Case* (*d*).

against brokers, but they were purchasing *semble* as principals through a London broker. So in *Street* v. *Morgan*, 21 L. T. 432.

(*s*) *Peppercorne* v. *Clench*, 26 L. T. 656.

(*t*) See L. R. 6 Ex. 179, 180.

(*u*) 13 Eq. 203, 209; which was, however, overruled in *Nickalls* v. *Merry*, 7 Ch. 733; L. R. 7 H. L. 530.

(*x*) 7 Ch. 733.

(*y*) L. R. 5 Q. B. 478.

(*z*) *Cruse* v. *Paine*, 6 Eq. 641; 4 Ch. 441; and see *Coles* v. *Bristowe*, 4 Ch. at p. 13.

(a) *Ward and Henry's Case*, 2 Ch. 431, 442; *Musgrave and Hart's Case*, 5 Eq. 123, 199; *E. p. Sargent*, 17 Eq. 273, 276.

(*b*) *E. p. Sargent*, 17 Eq. 273.

(*c*) *Bank of Hindustan, China, and Japan, E. p. Kintrea*, 5 Ch. 95; see further, s. 98.

(*d*) 33 L. T. 834.

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In *E. p. Shaw* (*e*) the shareholder who was respondent to a summons at chambers, appealed first to the Court, and then to the Appeal Court. In both instances he failed and was ordered to pay the costs both of the applicant and of the company, the Court holding that the section did not apply to the costs of an appeal.

Damages.

Where an allottee of shares obtains as against the company rectification of the register in respect of shares upon which payments have been made to the company, an order may be made for payment as "damages" of the amount paid upon the shares (*f*) and interest upon it (*g*). This is certainly a convenient view, for otherwise, after a motion for rectification has succeeded, it would be necessary to bring an action to recover the money paid.

Where the transfer tendered for registration was in consideration of 5*s.*, but there was a special agreement between transferor and transferee of which the company had not notice, the company was liable only for nominal damages (*h*).

Solicitor and client costs.

Where a person's name had been unjustifiably placed on the register, Malins, V.C., assuming that he had no power to give costs as between solicitor and client, allowed in more than one instance, by way of "damages," the additional costs as between solicitor and client (*i*).

This is beyond the jurisdiction of the Court, and *Cockburn* v. *Edwards* (*k*) in the Court of Appeal must be taken to have overruled the decisions referred to. The law gives a successful litigant his costs as between party and party, and he cannot be said to sustain damage by not getting them as between solicitor and client (*k*). A judge has no power to order any party to pay a sum by way of penalty beyond the costs (*l*).

Practice—Service on official liquidator.

Where notice of motion under this section has been served on the company, and before the motion comes on for hearing, a winding-up order is made and an official liquidator appointed, the notice of motion must be served on the official liquidator (*m*).

Special examiner.

A special examiner may be appointed for the purpose of taking evidence to be used on a motion under this section (*n*).

Stannaries.

In the case of companies subject to the jurisdiction of the Vice-warden of the Stannaries there was an alternative right to apply for rectification of the register, either to the Vice-warden or to the High Court (*o*); a construction of the section which, it is conceived, holds good also with regard to an inspection of the register of members under sect. 32, or of the register of mortgages under sect. 43, sections in which the wording is similar to that here employed.

Jurisdiction in the winding-up was, by sect. 81 of this Act, and further by sect. 28 of the Stannaries Act, 1887, given primarily to the Stannaries Court; but it is not difficult to find a reason for the difference in that case, for the rectification of the register is a matter requiring no local knowledge, and is a remedy for a wrong of a peculiar kind, and for whose redress the Legislature has wished to open as many doors as possible; whereas in the winding-up questions may arise in which local knowledge may be of much value, and

(*e*) 2 Q. B. Div. 463.

(*f*) *Railway Time Tables Co., E. p. Sandys*, 42 Ch. D. 98, 108; citing *Addlestone Linoleum Co.*, 37 Ch. Div. 191, 205; *Almada and Tirito Co.*, 38 Ch. Div. 415, 424.

(*g*) *Metr. Coal Ass., E. p. Wainwright*, W. N. 1890, 3.

(*h*) *Skinner v. City of London Marine Corp.*, 14 Q. B. Div. 882.

(*i*) *Pontifex's Case, New Quebrada Co.*, 15 W. R. 955; 36 L. J. (Ch.) 903; *Wood's Case*, 15 Eq. 236; *Anderson's Case*, 17 Ch. D. 373.

(*k*) 18 Ch. Div. 449, 459.

(*l*) *Willmott* v. *Barber*, 17 Ch. Div. 772.

(*m*) *E. p. Trenchard*, 19 W. R. 96.

(*n*) *Cashar Co.*, 15 L. T. 274.

(*o*) *Penhale and Lomax Consolidated Silver Lead Mining Co.*, 2 Ch. 398.

which may render it very proper that the case should be placed under the jurisdiction of the Stannaries Court (*p*). See now Comp. (W. Up.) Act, 1890.

Form of rectification.

The register should be rectified in the case of the removal of a name by striking through the name with pen and ink, adding, "By order of the Court of , dated, &c., this name has been erased" (*q*).

Where the name of "William Webb" without any further description appeared on the register, and was put on the list of contributories, and a person of that name established that he was not a shareholder, the Court made a declaration that he was not a shareholder, and struck his name out of the list of contributories, but directed that the register should be left untouched (*r*).

Notice to registrar of rectification of register.

36. Whenever any order has been made rectifying the register, in the case of a company hereby required to send a list of its members to the registrar, the Court shall, by its order, direct that due notice of such rectification be given to the registrar.

Register to be evidence.

37. The register of members shall be *primâ facie* evidence of any matters by this Act directed or authorized to be inserted therein (*a*).

(*a*) s. 25.

The register is only *primâ facie* evidence. Even in proceedings, therefore, in which the register cannot be rectified, *e.g.*, proceedings before a magistrate under sect. 27 for penalties, evidence may be received to prove entries in the register to be untrue (*s*).

Liability of Members (*a*).

Liability of present and past members of company.

38. In the event of a company formed under this Act (β) being wound up, every present and past member (γ) of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves (δ), with the qualifications following; (that is to say,)

(1.) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up (ϵ):

(2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member:

(3.) No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act:

(*p*) *Penhale and Lomax Consolidated Silver Lead Mining Co.*, 2 Ch. 398.

(*q*) *Iron Ship Building Co.*, 34 Beav. 597.

(*r*) *Southampton Steamboat Co., E. p. Webb*, 8 L. T. 478.

(*s*) *Briton Medical Association*, 39 Ch. D. 61.

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(4.) In the case of a company limited by shares, no contribution shall be required from any member exceeding (ζ) the amount, if any, unpaid (η) on the shares in respect of which he is liable as a present or past member:

(5.) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding (ζ) the amount of the undertaking entered into on his behalf by the memorandum of association (θ):

(6.) Nothing in this Act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract (ι):

(7.) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves (κ).

(α) As to directors with unlimited liability, *v.* Comp. Act, 1867, s. 5.

(β) Or an existing company registered compulsorily or voluntarily under this Act. *Ramsay's Case*, 3 Ch. Div. 388.

(γ) s. 23.

(δ) s. 109.

(ε) ss. 84, 130.

(ζ) Notwithstanding these words, a contract contained in the articles extending the member's liability beyond the liability under the memorandum for satisfaction of particular debts may be enforced: *Maxwell's Case*, 20 Eq. 585; *McKewan's Case*, 6 Ch. Div. 447; *Lion Insurance Co.* v. *Tucker*, 12 Q. B. Div. 176.

(η) See note to s. 26, *supra*, p. 84, as to returned capital, &c.

(θ) ss. 9, 90, 134.

(ι) This enables the liability of members of an unlimited company to be limited by special contract. As to such a limitation see *Lethbridge* v. *Adams*, 13 Eq. 547; *Accidental Death Insurance Co.*, 7 Ch. D. 568; *Great Britain Mutual Life Assurance Soc.*, 16 Ch. Div. 247; and as to the limit of liability being implied as against a person —*e.g.*, a solicitor—standing in a fiduciary relation to the company, *Sadler's Case* (Alb. Arb.), 16 Sol. J. 571.

(κ) See *ante*, p. 122; *post*, s. 101, n. and Table A. (73), n. Where the articles required the directors to be members, it was held that their unpaid fees as directors were debts due to them in the character of members and were to be postponed: *E. p. Cannon*, 30 Ch. D. 629. This decision has, it is believed, been generally followed in the Judges' Chambers, but *quære* whether it was well decided. At any rate, payment to a person for special skill and attention is none the less a provable debt because the person is a director, and under the articles a director must be a member (*t*).

If a member could prove for damages in respect of the issue to him of shares not fully paid when he contracted to take fully paid, such a proof would fall within the words "or otherwise." *Addlestone Linoleum Co.*, 37 Ch. D. 191, 198.

New liabilities.

This section imposes new liabilities on the members: the winding-up order entirely alters the position of the parties and makes the shareholders contributories, and contributories in a totally different way in some respects

(*t*) *Dale and Mant*, 43 Ch. D. 255.

as regards the debts and liabilities of the concern from what they were before (*u*).

Who is a contributory.

By sect. 74, a "contributory" is a "person liable to contribute to the assets of a company under this Act, in the event of the same being wound up." The persons so liable are defined by sect. 38, and it is to the description in that section that the 74th section must be taken to refer (*x*).

The "contributories" therefore are "every present and past member of such company" subject to the qualifications specified in this section. The question, therefore, whether or not a person is a "contributory" resolves itself to a great extent into the question whether or not he is a present or past member, and in this form will be found discussed under the several sections of the Act to which the particular circumstances of the case may be referred: as *e.g.*, whether or not he has agreed to become a member under sect. 23; whether or not a transfer in which he is named as transferor or transferee is valid and effectual under sect. 22; whether or not he is entitled to the removal of his name by rectification of the register under sect. 35; how his liability is affected by his bankruptcy under sect. 75.

Classes of contributories.

There may be one or more than one class of contributories, according as under the constitution of the company the members are not, or are as between themselves, liable in a different degree or a different order to the payment of debts.

Thus in an unlimited life insurance company founded upon the mutual principle and having a capital divided into shares, where the articles provided for two classes of members, namely, shareholders, so long as there should be any shareholders, and assurance members, defined to mean policy-holders with participation in profits and registered as members of the company, and when the shareholders should be paid off under a scheme in the articles, then the company was to consist of assurance members only, it was held that assurance members were contributories (*y*), but that they could not be called upon to contribute until the shareholders had been exhausted (*z*).

So, if in the articles of association and in the policies issued by a mutual society there be proper provisions excluding liability, the policy-holders, though members, may be under no liability at all (a), and if in such a company there were shareholders or other members who were liable there would be a class of members liable as contributories and another class not so liable.

In the *Norwich Provident Insurance Society* (*b*) a life insurance company established fire insurance business as a separate department, and issued separate capital to provide for it. If this company had gone into liquidation with a life capital and a fire capital devoted by the articles to separate objects, and restricted by the company's policies to liability in respect of losses in the several departments, it is conceived that there would have been two classes of contributories, viz. life contributories and fire contributories, and that not as between present members only but also in the matter of the liability of the B. contributories or past members those two classes must

(*u*) *Burgess' Case*, 15 Ch. D. 507, 511, referring to *Webb* v. *Whiffin*, L. R. 5 H. L. 711; and see *Whitehouse & Co.*, 9 Ch. D. 595, 599; *National Funds Assurance Co.*, 10 Ch. D. 118, 125; *West of England Bk.*, *E. p. Hatcher*, 12 Ch. D. 284; *Gill's Case*, 12 Ch. D. 755.

(*x*) *Anglesea Colliery Co.*, 1 Ch. 555, 559; *National Savings Bank Association*, 1 Ch. 547, 551; see further as to contributories, ss. 74–78.

(*y*) *Winstone's Case*, 12 Ch. D. 239.

(*z*) *Albion Life Assurance Soc.*, 15 Ch. D. 79; 16 Ch. Div. 83.

(a) *Great Britain Life Assurance Soc.*, 16 Ch. Div. 247.

(*b*) 8 Ch. Div. 334; 11 Ch. D. 386; 13 Ch. Div. 693.

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have been worked out separately. What took place, however, was this; the company were advised (erroneously as it turned out (*c*)) that the creation of the fire capital was *ultra vires*, and a new company was formed which took over the fire business. The holders of the fire shares accepted in exchange for them shares in the new company, and their fire shares in the old company were cancelled. It was held in *Bath's Case* (*d*) that under these circumstances the holder of fire shares in the old company ceased, upon the cancellation, to be a member of the old company in respect of them, with the result (*e*) that as between the old company on the one hand and the fire shareholder on the other the company was liable to indemnify him in respect of his shares. The question then arose whether after present fire shareholders in the old company had been exhausted past fire shareholders were to be called upon before the life shareholders were called upon in respect of fire debts. Bacon, V.C., held that they ought (*f*). The Appeal Court reversed his decision on the ground that the liability to indemnify the past fire shareholder was a general liability of the old company not limited to any particular funds, and that, therefore, every existing shareholder must be called upon before any past fire shareholder could be made to contribute (*g*).

Forfeited shares.

It may be convenient to add here the result of the decisions in respect of forfeiture of shares, and of compromises made by the liquidators with individual contributories.

The liability of a past member is entirely created by this Act, and is the same whether the shares have been parted with by transfer or have been extinguished by forfeiture. And therefore if A., being a member of a company, forfeit his shares within a year before the winding-up (*h*), or if A. transfer to B. within the year, and B. forfeit the shares (*i*), A. is liable as a contributory as a past member.

A clause in the articles of the company that "the forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against the company in respect of the share, and *all other rights incident to the share*," is not inconsistent with, and certainly cannot bar the effect of the statute in respect of the past member's liability (*k*).

The fourth placitum of this section does not relieve the former holder of forfeited shares from his liability. He is liable to pay "the amount, if any, unpaid," and forfeiture is not payment (*l*).

Calls due at time of forfeiture.

The former owner of forfeited shares cannot be placed on the list of contributories as a present member (*m*); nor, even where the articles provide that, notwithstanding forfeiture, the member shall "be liable to pay to the company all calls owing on such shares at the time of such forfeiture," can he be placed on the list of present members as a contributory in respect of such calls (*n*). In the absence of such a provision, *semble*, he could not after forfeiture be sued at law for past calls (*o*).

Compromises.

A compromise with a present member made by the liquidators under sect. 160, with the sanction of the Court, whether made with a reservation

(*c*) See 8 Ch. Div. 334, 341.
(*d*) 8 Ch. Div. 334.
(*e*) See 13 Ch. Div. 695.
(*f*) *Bath's Case*, 11 Ch. D. 386.
(*g*) *Hesketh's Case*, 13 Ch. Div. 693.
(*h*) *Creyke's Case*, 5 Ch. 63; *Marshall* v. *Glamorgan Co.*, 7 Eq. 129.
(*i*) *Bridger's and Neill's Cases*, 4 Ch. 266.
(*k*) *Creyke's Case*, 5 Ch. 63.
(*l*) *Bridger's and Neill's Cases*, 4 Ch. 266.
(*m*) *Knight's Case*, 2 Ch. 321; *Bath's Case*, 8 Ch. Div. 334; and see *Webster's Case*, 11 W. R. 226; 7 L. T. 618; 32 L. J. (Ch.) 135.
(*n*) *Needham's Case*, 4 Eq. 135.
(*o*) *Stocken's Case*, 3 Ch. 412, 415.

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of rights as against any other contributories (*p*), or without any such reservation (*q*), does not operate to discharge the past member from liability as a contributory in respect of the shares in regard to which the compromise is made.

But neither does such a compromise operate to release the present member from liability to indemnify the past member for what the latter may be called upon to pay (*r*).

And the same rule as to indemnity holds good as between a past member of earlier date and a past member of later date (*s*).

Thus, if within the year X. transfer to Y. and Y. to Z.; and Z. failing in his payment of calls as present member, X. and Y. are made contributories as past members, X. may obtain indemnity from Y. for anything which X. has been compelled to pay (*s*).

Present and past members do not stand to each other in the relation of principal and surety (*t*); their relation is one of primary and secondary liability (*u*).

Cancellation of allotment.

If a person have become a shareholder by virtue of a contract, which was *ab initio* voidable by him, and which he has avoided before the winding-up, and the allotment of shares has been thereupon cancelled, he is not liable as a past member (*x*). For in such a case the voidable contract being avoided it is as if he had never been a member at all (*y*).

But this does not apply to a cancellation or forfeiture of a member's shares under a power in the articles. In that case "no cancellation can affect a past liability" (*z*). For the person is one who has legally been a member and has ceased to be one. He is "a past member."

And so where a question whether certain shares were legally created or not was compromised by cancellation of the shares, the compromise and cancellation were upheld, but inasmuch as the Court found the shares to have been legally created, the former holder was held liable as a past member (a).

In these cases of forfeiture or cancellation there is or may be no person liable as a present member for the shares, but this makes no difference in the nature of the past member's liability. In *Bath's Case* (a) a curious attempt was made to make out that the member whose shares had been forfeited was liable as an A. contributory for debts incurred down to the date of the ferfeiture. This would appear to be wholly inconsistent with the section.

Unregistered company.

A past member of an unregistered company, which, subsequent to his ceasing to be a member, is registered, is not a contributory in the winding-up of the registered company, but remains liable in respect of the obligations attaching on the common law partnership (*b*).

A. and B. contributories.

It is next proposed to consider in detail the questions which more properly fall under this section, respecting, that is, the extent and nature of the liability of the contributories, and the manner and order in which their contributions are to be applied.

The list of contributories will consist of two parts:—first, the list of

(*p*) *Nevill's Case*, 6 Ch. 43.
(*q*) *Helbert* v. *Banner*, L. R. 5 H. L. 28; *Hudson's Case*, 12 Eq. 1.
(*r*) *Roberts* v. *Crowe*, L. R. 7 C. P. 629.
(*s*) *Kellock* v. *Enthoven*, L. R. 8 Q. B. 458; 9 Q. B. 241; *Murton* v. *Bigham*, W. N. 1873, 226.
(*t*) *Helbert* v. *Banner*, L. R. 5 H. L. 28; *Hudson's Case*, 12 Eq. 1.
(*u*) *Roberts* v. *Crowe*, L. R. 7 C. P. 629.
(*x*) *Wright's Case*, L. R. 7 Ch. 55; and *v. supra*, s. 35.
(*y*) *Cf.* the cases, *supra*, p. 122.
(*z*) *Marshall* v. *Glamorgan Iron Co.*, 7 Eq. 129, 138.
(a) *Bath's Case*, 8 Ch. Div. 334.
(*b*) *Lanyon* v. *Smith*, 2 N. R. 118; 3 B. & S. 938; *Harvey* v. *Clough*, 2 N. R. 204; and see ss. 194, 195.

Sect. 38. present members, *i.e.*, of those who are members of the company at the commencement of the winding-up, commonly called the A. list; secondly, the list of past members who have ceased to be members within a year before the commencement of the winding-up (see sub-section (1)), commonly called the B. list.

Sect. 98. By sect. 98 "as soon as may be after making an order for winding-up the company, the Court shall settle a list of contributories."

B. list, when settled. The A. list will therefore be settled as soon as may be, but as respects the B. list, the third *placitum* leaves the period at which the Court will enter into the inquiry whether the existing members are able to satisfy the debts of the company entirely in the discretion of the Court; and it is the settled practice of the Court not to settle the B. list until it has become necessary to inquire and it has been shewn that the present members are unable to satisfy the debts (*c*).

Thus, in *Needham's Case* (*d*), Romilly, M.R., refused to settle the B. list until it was ascertained that the contributions of past members would be required.

What evidence required. Before a past member can be made liable two things are requisite. First, there must be debts due at the winding-up which were contracted anterior to the time of his ceasing to be a member (for in respect of debts contracted after he ceased to be a member he is not in any respect liable (*e*)); secondly, it must appear to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act (*f*).

Sect. 102. The words "it appears" in sub-sect. 3 must be taken in connection with the language of the 102nd section, which distinctly refers to the Court acting when certain things are probable, and therefore the settlement of the B. list, and the making a call upon the B. contributories, is a matter which is left to some extent in the discretion of the Court, and all that the Court has to be satisfied of before calling upon the B. contributories is that there is an improbability of assets being otherwise obtained in such a manner, and within such a reasonable time, as to be sufficient for the payment of the debts of the creditors of the company. It must appear satisfactorily to the Court that the existing members are not able to contribute sufficient for the purpose; but the Court is not bound to allow delay for an indefinite time in getting in the assets. The creditors are by the statute precluded from prosecuting their ordinary remedies, and ought to be paid within a reasonable time after the winding-up. And if, after the B. list has been settled and a call made, it should ultimately appear that the contributions of the A. contributories are sufficient to satisfy the debts, the past members will be exonerated, and will be entitled to the return of any money they have paid (*g*).

Again, if it be ascertained that the calls which can be enforced and realized against the members on the A. list will not satisfy the liabilities of the company, and there be debts in respect of which the B. contributories are liable, the B. list will be settled, and the name of each past member placed thereon, without stopping to consider in every case whether the present holder of the shares in respect of which the past holder is put on the list will ultimately pay the amount, if any, unpaid, and so leave the past holder after all liable to contribute nothing.

(*c*) See *per* Selwyn, L.J., in *Wright's Case*, 12 Eq. 335, n., 345, n.; *McEwen's Case*, 6 Ch. 582, 586; although *contra*, *Andrews' Case*, 3 Ch. 161.

(*d*) 4 Eq. 135.

(*e*) sub-s. (2).

(*f*) sub-s. (3).

(*g*) *Helbert* v. *Banner*, L. R. 5 H. L. 28; see also *Barned's Banking Co.*, 36 L. J. (Ch.) 215; *Contract Corporation*, 2 Ch. 95, and s. 102.

For putting a man's name on the list does not conclusively determine that he will ultimately have something to contribute (*h*).

It is true that, in settling the list, stricter evidence was required by Romilly, M.R., in *Weston's Case* (*i*). His Lordship there said: "Before I can place a past member on the list I must have evidence, in each individual case, that . . . the person to whom he transferred his shares has not paid up the full amount of the shares." But there is an obvious distinction between a past member whose shares are, and one whose shares may hereafter be, paid up. And in any case the divergence between *Andrews' Case* and *Weston's Case* is not, perhaps, greater than this, that while *Andrews' Case* would throw upon the shareholder the *onus* of proving that his name ought not to be put on the list (*k*), *Weston's Case* throws upon the liquidator the *onus* of shewing that it ought to be put on.

The evidence upon which the Court will be satisfied that the B. contributories ought to be resorted to need not enter into minute details to shew that such a course is necessary. The liquidators are the officers of the Court, and must be presumed to do their duty, and the Court will, therefore, be satisfied if they state reasonable grounds for their opinion (*l*).

Extent of liability.

B. contributories, although not liable for debts contracted after they ceased to be members, are of course liable in respect of debts contracted *before* they became members (*m*).

Successive transferors of same shares.

If X. have transferred to Y. and Y. to Z., both transfers having been made within a year before the winding-up, on the settling of the B. list both X. and Y. will be placed on it at the same time (*n*): and although as between themselves X. cannot be called upon to contribute anything until Y. has been exhausted, yet it seems there is nothing to prevent the liquidator from calling upon both X. and Y. simultaneously, or calling upon X. and passing over Y. (*o*).

In either case, however, X. has his remedy over against Y., and can call upon him for indemnity (*p*).

Infant transferee.

Where W. transferred to X., an infant, on the 14th of January, 1865; X. transferred to Y., an infant, on the 16th of August, 1865; Y. transferred to Z., a person of full age, on the 5th of December, 1865; and the winding-up commenced on the 20th of March, 1866; W. was held not to be liable as a B. contributory, for after the company had once obtained an adult shareholder the intermediate transfers could not be avoided, and W. *de facto* ceased to be a shareholder when he made the transfer to X. (*q*).

Successive transferors of different shares.

But although, as appears above, in the case of successive transferors of the same shares, each transferor has a right to be indemnified by his transferee, and if called upon to contribute may in turn call upon his transferee to indemnify him, yet no transferor has any equity against the holder of other shares. If, therefore, W. and X. being holders of different shares have, within a year before the winding-up, transferred them to Y. and Z. respectively, W.'s transfer being earlier in date than X.'s, W. cannot require that X.'s liability shall be exhausted before he, W., is called upon. In other words, there is no rule that one class of B. contributories must be exhausted before going back to an earlier class of B. contributories (*r*).

(*h*) *Andrews' Case*, 4 Eq. 458; 3 Ch. 161.
(*i*) 6 Eq. 17.
(*k*) See 3 Ch. 165.
(*l*) *Helbert* v. *Banner*, L. R. 5 H. L. 28.
(*m*) *Helbert's Case*, 6 Eq. 509.
(*n*) *Humby's Case*, 26 L. T. 936; 20 W. R. 718; W. N. 1872, 126.
(*o*) See *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241, 247. See, however, *Humby's Case*, 26 L. T. 936; W. N. 1872, 126.
(*p*) *Kellock* v. *Enthoven*, L. R. 8 Q. B. 458; 9 Q. B. 241; *Murton* v. *Bigham*, W. N. 1873, 226; *et v. supra*, pp. 144, 145.
(*q*) *Gooch's Case*, 14 Eq. 454; 8 Ch. 266. As to infant transferees, see *supra*, p. 42.
(*r*) *Morris's Case*, 7 Ch. 200; S. C. 8 Ch. 800.

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Liability and contributions of B. contributories.

Thus far two questions have been considered; first, who are the persons liable to be called upon to contribute in the winding-up of a company; and secondly, at what time and under what circumstances will the B. list of contributories be settled, and the B. contributories be called upon to contribute.

Assuming, then, that the company with which we have to deal is a company limited by shares (*s*), that the contributions of the existing members have proved insufficient to satisfy the debts and liabilities and the costs of the winding-up, and that it has become necessary to resort to the B. contributories, the points which remain to be considered may conveniently be discussed under the following heads:

Questions to be discussed.

1. What is the measure of the liability of the B. contributories, and what the *quantum* of contribution that can be demanded from them.
2. At what time does this liability attach upon the ex-members, and can such liability, when once attached, be diminished or affected by any subsequent acts of the persons liable.
3. How are the contributions of the B. contributories to be applied.
4. What is the position and what the liability of the B. contributories in respect of the costs, charges, and expenses of the winding-up.

Of the questions thus stated the third, and the third only, was definitively concluded by the decision in the House of Lords in the case of *Webb* v. *Whiffin* in the matter of the *Accidental and Marine Insurance Corporation* (*t*). But the opinions there expressed by some of their Lordships bear materially upon other points here proposed to be considered.

1. Measure of the liability of B. contributories.

1. As to the measure of the liability of the B. contributories.

It will be observed that the effect of this section is, as respects the B. contributories, to create two measures of liability.

As regards the A. contributories, the measure of liability to contribute to the payment of the debts is one only, viz., the full amount unpaid on their shares. But, as regards the B. contributories, the measure is twofold; the first limit being the amount left unpaid on their shares by the corresponding A. contributories respectively; the second being the amount of the debts or liabilities contracted before the time that each B. contributory ceased to be a member, and remaining unpaid or unsatisfied.

This will be seen to be the effect of the 2nd and 4th sub-sections.

Further, it is clear that no B. contributory can be called upon at all until every individual A. contributory has been exhausted (*u*). The A. contributories are primarily liable for everything, and it is only upon the failure of the A. contributories to fulfil their measure of liability, leaving the debts and costs unsatisfied, that the liability of the B. contributories arises at all. This will be seen to be the effect of the 3rd sub-section.

If the above be accepted as a fair statement of the effect of these three sub-sections, the only point which under this head appears to present any difficulty is as to the meaning of the words "remaining unpaid." "Remaining unpaid" at what time? The answer is twofold:—

(i.) Remaining unpaid after the assets of the company, including the contributions of the A. contributories, have been applied *pari passu* towards the payment of all the debts of the company irrespective of the time at which such debts were contracted;

(*s*) It is in such companies only that the following questions have been the subject of decision. But it is conceived that the same principles are, *mutatis mutandis*, applicable to other companies.

(*t*) L. R. 5 H. L. 711.

(*u*) This is subject of course to *Helbert* v. *Banner*, L. R. 5 H. L. 28, and the observations *supra*, p. 146.

(ii.) Remaining unpaid at the time the contribution is called for, or is payable. Sect. 38.

It will be seen that (i.) is established by *Morris' Case* (*x*), a case which was upon this point confirmed by the judgments delivered in *Webb* v. *Whiffin* (*y*); and, on rehearing after the decision in *Webb* v. *Whiffin* (*y*), was affirmed by the full Court of Appeal (*z*).

The decision in *Morris' Case* (a) was that in estimating the debts for which the B. contributories are liable the assets of the company, including the contributions of the A. contributories, are to be treated as having been applied in payment *pari passu* of all the debts. It is only in respect of so much of the debts, in respect of which he is liable having regard to sub-sect. 2, as remain unpaid after such application of the assets, that a B. contributory is liable to contribute.

The following, bearing upon this point, may be quoted from the judgment of Lord Westbury in *Webb* v. *Whiffin* (*b*):

"The direction (of the section) is this: You will apply all that you can get from the existing members in payment of the existing debts, no matter of what date. If, after you have done that, there remain debts unsatisfied, so that you have to resort to the members who have passed away from the company within a year, then you will be compelled to classify the *residuum* of the debts so remaining, and ascertain what part of that *residuum* is to be attributed to past debts; that is, to debts which pre-existed the transfer made by past members, and what portion is to be attributed to the new debts which have arisen subsequently to the date of the last transfer. When you have ascertained the proportion which is attributable to debts which existed when the transfers were made, then, if there have been several transfers within the year, you will be compelled of necessity to subdivide that portion of the *residuum* into several portions, according as you find that transfers have been made within the past year." The inference is obvious that his Lordship's meaning was that the *residuum* so determined is in each case the measure of the past member's liability.

(ii.) The second head of the answer leads to the discussion of that which was given above as the second point for consideration, viz.:

2. At what time does the liability to contribute attach upon the past members, and can such liability, when once attached, be diminished or affected by any subsequent acts of the parties liable.

2. Whether liability once attached can be diminished by subsequent acts of the party liable.

In *Brett's Case* (*c*) a winding-up order having been made in July, 1866, and B.'s name placed on the B. list of contributories, he, in October, 1870, anticipating a call on the B. list, bought up and caused to be released to the company all the debts which were due by the company when he ceased to be a shareholder, and which remained due at the winding-up. It was held that, the debts in respect of which alone he could have been called upon to contribute having been thus extinguished, no call could be made upon B., although the money raiseable from the A. list would be insufficient to pay the debts.

That is to say, if the debts, or any of them, in respect of which a B. contributory might at the date of the winding-up be rendered liable, cease to exist before he is actually called upon to contribute in respect of them (*d*),

(*x*) 7 Ch. 200.
(*y*) L. R. 5 H. L. 711.
(*z*) 8 Ch. 800.
(a) 7 Ch. 200; 8 Ch. 200.
(*b*) L. R. 5 H. L. 728.
(*c*) 6 Ch. 800; S. C. 8 Ch. 800.

(*d*) *Marsh's Case*, 13 Eq. 388, goes even further than this, for in that case *the call had been made* before the debts were bought up. See, however, *Brett's Case*, 8 Ch. at p. 810.

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his liability is to that extent proportionally reduced, or, in case of a total extinction of such debts, is released altogether.

In the first edition of this work, written after the decision in *Webb.* v. *Whiffin* (*e*), but before the re-hearing of *Brett's Case* and *Morris' Case* (*f*), the writer, thinking that the decision on the first hearing of those cases (*g*) could not stand with *Webb* v. *Whiffin* (*e*), called attention to the fact that all the three judges who decided those cases on the first hearing had disapproved of the principle which was in *Webb* v. *Whiffin* (*e*) decided to be the true one.

For it will be seen that the judgment of Lord Hatherley, in which the Lords Justices concurred, proceeded (*h*) upon a disapproval of that decision of Lord Justice Giffard (*i*), which was, in *Webb* v. *Whiffin* (*e*), affirmed. His Lordship prefaces his judgment with the statement that "the observations made by the Lord Justice in his judgment, and the reasoning on which he relied, would be such as certainly to render [the decision which was then given in *Brett's Case*] inconsistent with that of Lord Justice Giffard." And, again, from a remark which dropped from the Lords Justices during the first argument of *Morris' Case* (*k*), it will be seen that their Lordships thought that the Lord Justice Giffard's decision was opposed in principle to that which they had decided in *Brett's Case* (*l*).

However, in *Webb* v. *Whiffin* (*e*) Lord Hatherley, while adhering to the opinion which he had expressed in *Brett's Case* (*l*), concurred in the judgment of the House; and upon the re-hearing of *Brett's Case* and *Morris' Case* (*f*) the Lords Justices found that there was nothing in *Webb* v. *Whiffin* (*e*) to affect their previous decision.

The following may be quoted from Lord Hatherley's judgment in *Webb* v. *Whiffin* as being that which, notwithstanding the decision then arrived at by the House, was in his Lordship's opinion the true principle in the circumstances of *Brett's Case*, and which was upon the re-hearing of that case (*f*), affirmed as the true principle by the full Court of Appeal:—"You have only to consider the debts that existed at the time of their being members, and if those debts are paid then there is no liability upon them whatever, except as to any possible question that may arise as to the costs. And if they guarantee or secure the company against the debts owing when they ceased to be members by purchase or otherwise, then they remove out of the way the whole matter (subject to the question of costs) in respect of which they have at all to contribute" (*m*).

The result of the foregoing decisions will be seen to be this, that in arriving at the amount of the debts by which the liability of a B. contributory is to be limited, there are to be taken into account not only payments made in respect of those debts by way of dividend in the winding-up, but also payments in whatever manner made by any one, whether a stranger to the liquidation or not, whereby those debts or any parts of them are discharged.

It is with great diffidence, after the affirmance of *Brett's Case* on the re-hearing, that the writer ventures again to submit arguments addressed to the correctness of that decision. It is, however, submitted that there is in principle a distinction between the two classes of payments above mentioned, the one class internal, made in the course of the collection and distribution among the persons entitled of the assets in respect of which both creditors

(*e*) L. R. 5 H. L. 711.
(*f*) 8 Ch. 800.
(*g*) 6 Ch. 800; 7 Ch. 200.
(*h*) 6 Ch. 800, 803.
(*i*) 5 Ch. 428.
(*k*) 7 Ch. 200, 203.
(*l*) 6 Ch. 800.
(*m*) L. R. 5 H. L. 720.

and contributories have certain rights and liabilities defined by statute: the other external, wholly outside the common fund, which the statute forms and with which it deals. This distinction, it is submitted, is substantial, but it is one which *Brett's Case* fails to recognise (*n*).

Is not the right of the creditor a right to the contribution of a certain amount, to be ascertained in a certain way defined by the statute, and to be paid into a common fund, which is then to be distributed among the persons entitled; and are not the rights of all parties the same as if the whole state of the company and its members were known at the date of the winding-up, and every contributory were then and there called upon to pay that amount which in the course of the working out of the accounts in the winding-up it is ultimately found will fall to his share?

The difficulty which is felt in this respect will be best illustrated by placing in juxtaposition two passages from judgments delivered in the above-mentioned cases:—

Lord Justice James, in delivering judgment in *Morris' Case* (*o*), said of *Brett's Case* (*p*): "It was there held that the liabilities of the ex-shareholders, and the rights of the creditors who were creditors at the time when they ceased to be shareholders, concerned only those two classes; and that there was no right or equity whatever, either in the company, the existing shareholders, or the subsequent creditors, to interfere in any arrangement they might make between themselves for the satisfaction or release of those liabilities."

The other passage referred to is found in the judgment of Lord Cairns in *Webb* v. *Whiffin* (*q*). His Lordship there said: "The appellants proceed upon the assumption that they are entitled to establish a direct relation of creditor and debtor between themselves and certain members of the company. Now I understand the whole scheme of the Act of 1862 to be entirely at variance with any theory of that kind. As I understand that Act the relation of creditor and debtor which is established by the Act is established only with regard to that which is the common fund or capital of the company. It was always the habit in ordinary partnerships, and it was the habit in previous Acts, or in almost all previous Acts of Parliament, to constitute more or less of a direct relation between the creditor and the debtor, between the creditor and the particular individual shareholder in the company. . . . But by the Act of 1862 that state of things is entirely swept away. A capital is created, sometimes limited, sometimes without a limit; but that capital is to be made good in the shape of a common fund, and that common fund it is which is to be the source of the payment of every creditor of the company. And although it is quite true that members and ex-members of the company are placed by the Act under liability, that liability is a liability, not to make payments to creditors, but it is a liability to contribute to and make good what should be the proper amount of the common fund. Then having got into that common fund every sum which ought to be contributed to it by every person whomsoever, the Legislature takes possession of that common fund, and proceeds to distribute it amongst the creditors of the company" (*r*).

If, then, the liability to contribute is a liability not to the creditor, but to the company, a liability with which the creditor has no concern whatever,

(*n*) See 8 Ch. pp. 810, 811, where Selborne, L.C., seems to infer from the fact that account is to be taken of the first class, that account ought also to be taken of the second.

(*o*) 7 Ch. 200, 204.

(*p*) 6 Ch. 800.

(*q*) L. R. 5 H. L. 711, 734.

(*r*) See also the same judgment, *passim*, and the judgment of Lord Cairns in *Reese River Silver Mining Co., Smith's Case*, 2 Ch. 604, 616.

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except through the medium of the company; and assuming (*s*) that it is a liability which accrues at the date of the commencement of the winding-up, it is not easy to see how any subsequent arrangement between the contributory and the creditor can avail to effect a liability to contribute to the assets of the company which has previously attached upon the contributory.

"When once upon the list of contributories upon the ground of the existence of unsatisfied debts and liabilities which were contracted while he was a member, I confess that I am unable to see how any dealing with those debts and liabilities, even to the extent of extinguishing them, can discharge a liability to contribute to the assets of the company which had already attached upon him" (*t*).

Upon this point Lord Cairns added, in *Webb* v. *Whiffin*, in commenting upon *Brett's Case*: "The other matter to which I think sufficient attention was not paid (in *Brett's Case*) was the question whether the debts in respect of which contributions could be called for from ex-members are not what I have called 'old debts' subsisting at the date of the winding-up, and whether anything done with regard to those debts after the date of the winding-up could affect or diminish the liability which had once accrued upon the ex-members" (*u*).

Moreover, as regards that which was said in *Brett's Case* (*x*) that to swell the amount of indebtedness by fictitiously treating as unpaid debts, or any part of debts which had been previously released or extinguished would be a violation both of the letter and the spirit of the second sub-section, and that, in case of debts voluntarily released by a creditor or paid off by a stranger, a call in respect of such debts would be unjustifiable, it is submitted that there is a *hiatus* in the reasoning. If the B. creditor have not come upon the common fund at all for dividends in the winding-up; if he have been paid off before the payment of a dividend; perhaps no one would be prejudiced by, or at any rate could complain of, his being paid off. But this is not the question (*y*). The B. creditor takes dividends on his debt, and in so doing diminishes the common fund, and then, making an arrangement with the B. contributory behind the backs of the other parties, removes from the sphere of the liquidation that balance of his debt which, if left undischarged, would have benefited the rest of the creditors by bringing into the common fund a sum which would then have been divisible among others as well as himself. He first takes the benefit of the common fund, and then acts to its prejudice. This surely is not consistent with "reason, justice, and equity."

Moreover the consequences of the decision appear to be serious. For although, as was pointed out by Lord Hatherley in *Brett's Case* (*z*), the B. contributories might in fact, by buying up the whole debt, have paid more than they were obliged to pay (for they could only have been called upon to contribute to the assets of the company to the extent of so much of that debt as remained unpaid by the A. contributories), yet it seems clear that the joint effect of *Brett's Case*, *Morris'* Case, and *Webb* v. *Whiffin* is to enable the B. contributories to secure to the B. creditors the payment of their debts in full without increasing their own payments beyond those which they might have been called upon to make towards the assets of the company.

For suppose that, when the A. contributories have been exhausted, divi-

(*s*) See *infra*, p. 153.
(*t*) *Per* Lord Chelmsford in *Webb* v. *Whiffin*, L. R. 5 H. L. 711, 725.
(*u*) L. R. 5 H. L. 739.
(*x*) 8 Ch. 800, 809, 811.
(*y*) Dividends had been paid on the debts in *Brett's Case*; see 8 Ch. 802.
(*z*) 6 Ch. 800, 806.

dends have been paid *pari passu* to all the creditors to the amount of 15*s.* in the pound, the B. contributories are then liable to the extent of 5*s.* in the pound on the debts of the B. creditors. What is there, then, to prevent the B. contributories, before a call is made upon them (for according to *Brett's Case* it is not until the call is made, or even, as would appear from *Marsh's Case* (a), until the call is actually paid, that the position of the parties is fixed), from paying to the B. creditors the remaining 5*s.* in the pound on their debts, and thus standing released from all liability to contribute to the assets of the company?

And this is not all. The benefit would not in practice be left so one-sided. Apart from arrangement and collusion, the 5*s.* in the pound would go to the common fund, and the B. creditors might get perhaps 1*s.* in the pound out of it. The B. contributories offer them, say, 2*s.* in the pound for an immediate release of their debt to the company. This, of course, is accepted. The B. contributories get off on payment of 2*s.* instead of 5*s.* in the pound, the B. creditors receive double what the statute would have given them, and the only sufferers are the A. creditors who have been allowed no voice in the matter.

The result, it is submitted, is to put a premium upon collusion between the B. contributories and B. creditors, to enable them to evade by a side-wind that which *Webb* v. *Whiffin* decides to be the right destination of the B. contributions, and to authorize in fact that which may be termed a fraudulent preference on the part of the B. contributories in favour of the B. creditors.

Upon the question of the date at which the liability of the B. contributory ought to be considered to attach, one suggestion of an analogy most forcibly presents itself.

The principle upon which *Oakes* v. *Turquand* (*b*) was determined may be said to be this: a man who is *de facto* a shareholder at the date of the winding-up is liable as a contributory. The date of the winding-up is the date with respect to which his liability or non-liability must be determined. Why should not the same principle be applicable to a past as to a present member? Why should not the date of the winding-up be the date with respect to which the liability of the ex-member, and the debts in respect of which he is liable to be called upon for contribution, should be determined?

And the rule, that it is only in respect of the *residuum* of the debts after the A. contributions have been applied that the B. contributories are liable, does not seem on principle antagonistic to this, if it be considered that the case is as if the position of all the parties were ascertained immediately upon the commencement of the winding-up. Suppose it could then be known what dividend the sums realized from the property of the company and the A. contributions would pay, then the liability of the B. contributory would be a liability to pay to the common fund an ascertained sum, which sum, assuming the foregoing reasoning to hold good, ought not to be diminished by any subsequent dealing on his part with a third party, viz., the B. creditor, to whom Lord Cairns' judgments seem to shew he does not stand in the relation of debtor at all.

But, whatever weight may be thought to attach to these considerations, the rule in *Brett's Case* (*c*) can no longer be disputed, and it must be taken to be the law, that if, before call made on a B. contributory, or (on the authority of *Marsh's Case* (*d*)) after call made, before it is payable, the

(a) 13 Eq. 388.
(*b*) L. R. 2 H. L. 325.
(*c*) 6 Ch. 800; 8 Ch. 800.
(*d*) 13 Eq. 388.

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debts in respect of which he is liable, or any of them, are in any manner released or discharged in whole or in part, the common fund is to that extent a loser.

3. How are the B. contributions to be applied.

3. With regard to the third head, viz., the rule of distribution of the B. contributions, it is settled by *In re Accidental and Marine Assurance Corporation* (*e*), affirmed by the House of Lords under the name of *Webb* v. *Whiffin* (*f*), that these contributions are not to be divided exclusively among the old creditors in respect of whose debts they are paid, but form part of the general assets of the company for the payment of all the creditors.

This decision reversed one part of the decision in *Morris' Case* (*g*) on the first hearing, and that part was accordingly altered on the re-hearing (*h*).

The whole of this section deals with the liability of members, not the rights of creditors, and the second sub-section is a rule of contribution, not a direction as to distribution (*i*).

4. The position of the B. contributories as regards the costs of winding-up.

4. The provisions of the Act with respect to the payment of the costs, charges, and expenses of the winding-up are contained in sect. 110 as regards a winding-up by the Court; and in sect. 144 as regards a voluntary winding-up. It will be seen that, in the former case, the order of priority of payment of the costs is, in case of a deficiency in the assets, in the discretion of the Court, while in the latter, the costs are to be paid in priority to all other claims.

Upon this point, again quoting from the judgment of Lord Cairns in *Webb* v. *Whiffin*, his Lordship said: "It has been thought important (in the Act) in the case of voluntary windings-up to make specific provisions and to give specific directions as to matters which were supposed to be so plain and so necessarily consequential upon the general scheme of the Act, that in a winding-up under the order of the Court it was not thought necessary to give express directions upon these matters of detail," and then, after commenting upon the provision as to costs in a voluntary winding-up, his Lordship continues: "In the case of a winding-up under the order of the Court there is no such provision, it being, I suppose, presumed that the Court would see that the justice of the case required that in the first instance the costs of winding-up ought to be paid" (*k*).

It is conceived, therefore, that no difference of principle exists with regard to these costs in a voluntary and a compulsory winding-up.

It will be observed that the provision of this section is that "every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves," with the qualification introduced by sub-sect. (2), that "no past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member."

Upon this Lord Hatherley said in *Brett's Case* (*l*):—"With regard to the costs of the winding-up, a difficulty arises, because the Act speaks of contributions being made by past and present members. They are all put in one sentence, in which the Act speaks of the costs of the winding-up, and

(*e*) 5 Ch. 428.
(*f*) L. R. 5 H. L. 711.
(*g*) 7 Ch. 200.
(*h*) 8 Ch. 800.
(*i*) See *per* Lord Westbury, *Webb* v. *Whiffin*, L. R. 5 H. L. at pp. 727, 729; *per* Lord Cairns, at p. 736.
(*k*) L. R. 5 H. L. 735.
(*l*) 6 Ch. 800, 807.

also of adjusting the rights *inter se* of the contributories. I am inclined to think that the proper construction would be, *reddendo singula singulis*, to take the contribution for costs as applicable to the present members, and not to the past members; but I do not wish to give a clear and decisive opinion upon that, because one can conceive a case in which the whole costs of the winding-up may have been incurred in respect of past debts, the partners having all backed out, and no business having been done since that time."

There seem to be two possible constructions of the section, according as the words "debt or liability of the company" in sub-sect. (2) are or are not held to include the costs of the winding-up.

If they do not include these costs, the preliminary enactment of the section is, as respects the costs, unqualified by the sub-section, and the result is (subject to the foregoing observations) to make the past member liable to make payments until the costs are satisfied.

If, on the other hand, they do include the costs, then there arises for determination the question, what costs are to be considered a debt or liability of the company contracted before the past member ceased to be a member.

The latter appears upon the authorities, so far as they go, to be the right construction: and the true principle, to be collected with difficulty from cases in which the point has never yet been clearly raised, is believed to be this: that the liability to the costs of its winding-up is a liability which attaches upon an incorporated company from the very time of its incorporation; that the costs, therefore, so far as they have been occasioned by, or are attributable to, the necessity of calling upon the B. contributories in respect of what may be called the "old debts," are of the character of old debts (*m*).

This is a view which receives confirmation from a later section of the Act, from which it appears that the Legislature did contemplate a distribution of costs of winding-up between the debts in respect of which such costs were incurred. For the 196th section, which has reference to a company, existing previous to the Act, which is registered under the Act, provides by sub-sect. (5) that every person shall be a contributory in respect of the debts contracted prior to registration who is liable to contribute to the costs so far as relates to such debts.

But it is only for costs as connected with debts that a past member can be rendered liable.

Thus *Brett's Case* (*n*) is a distinct authority for this: that if the B. debts have been extinguished, the B. contributory cannot be put upon the list with a view to making him liable for the costs.

"If, indeed, there were any debts contracted before the past members left the company, in respect of which they ought to be called upon to contribute, it might possibly happen that this might involve some costs . . . in respect of which it might be just and reasonable to call on them for further contributions. But this could be no ground for including in the measure of their total liability any costs to which they were not justly liable to contribute" (*o*).

Again, it was said by Lord Cairns in *Clarke's Case* (*p*) that "in order to

(*m*) The liability to the costs is not, however, so attached to the shares before the winding-up as to survive the forfeiture of the shares as a payment due on the shares at the time of forfeiture: *Michael Brown's Case* (Eur. Arb.), Reil. 32; L. T. 21; 17 Sol. J. 310.

(*n*) 6 Ch. 800; 8 Ch. 800.

(*o*) *Per* Selborne, L.C., *Brett's Case*, 8 Ch. 800, 809.

(*p*) Alb. Arb., 16 Sol. J. 554, and see *Michael Brown's Case* (Eur. Arb.), Reil. 32; L. T. 21; 17 Sol. J. 310.

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create a liability for the costs of the winding-up, you must have good reason for putting the retiring shareholder on the list in order to make some payment in respect of debt. It is only because he is found on the list as a person liable to pay some of the debts that a jurisdiction to make him contribute to the costs would arise."

There is a case in the European Arbitration (*q*) in which a shareholder not liable for calls was kept upon the list as liable in respect of the costs, but the circumstances were very peculiar. In the interval between the presentation of the petition and the winding-up order he presented a petition for liquidation, under which his creditors, including the company, accepted a composition. The company's proof was for calls and prospective calls, and it was held that the liability for the costs being a thing incapable of proof was not discharged, and that though it was not a liability for which he could be put on the list, yet that being there he would be left there, adding that he was a contributory in respect of the liability to costs.

In *Marsh's Case* (*r*), the point came before the Court in this way :—M., being liable as a B. contributory, bought up the debts in respect of which he was liable, after the B. list had been settled and after a call had been made upon the past members. Bacon, V.C., there held that the B. contributories must pay the cost of settling the B. list unless the liquidator had money in his hands sufficient to pay them. "The costs," his Lordship said, "so far as they have been occasioned by the B. contributories, I think the B. contributories are bound to pay, that is, they are bound to pay those costs if not already paid."

This ruling, that the B. contributories are liable even for such costs as are above described, only if there are not otherwise forthcoming funds sufficient for their payment, is in some respects borne out by the provision of sect. 144.

That section provides that the costs are to be paid out of the assets in priority to all other claims, whence it might be inferred that the A. contributories are to be solely responsible for their payment, except in what it is hoped would be the extremely rare event of the A. contributions proving insufficient to defray even the costs without payment of any of the debts. This will be better explained in the words used by Lord Chelmsford in *Webb* v. *Whiffin* : "With respect to the costs, charges, and expenses of the winding-up of the company, there appears to me to be no difficulty. These costs, charges, and expenses are to be payable out of the assets of the company in priority to all other claims. The official liquidator must make calls upon both classes of shareholders to an amount in his judgment sufficient for payment of all the liabilities. The calls upon the existing shareholders are to be first applied in payment of the costs, charges, and expenses of the winding-up. If the amount called for to the whole extent of the liability of this class of shareholders, or their ability to satisfy the calls, is insufficient for this purpose, then, and then only, the past members can be required to contribute, so that there can be no apportionment between these two classes of shareholders with respect to their liability upon this ground. In this case, and also with respect to the payment of the debts and liabilities, the past members of the company are liable only in the event of the existing members being unable to satisfy the contributions required to be made by them in pursuance of the Act" (*s*).

These words are not, however, as has been seen, borne out by the cases to such an extent as to relieve the B. contributories of costs altogether; and as regards what was done in *Marsh's Case* (*r*), that decision scarcely seems

(*q*) *Davies' Case* (Eur. Arb.), L. T. 80 ; 17 Sol. J. 670.

(*r*) 13 Eq. 388.

(*s*) L. R. 5 H. L. 726.

satisfactory, if what was meant was, that the liability to the costs was to depend on the accident of whether the liquidator had or not distributed all his funds in dividends and in payment of A. costs. If the B. contributory is liable to costs, it would seem that they ought to be paid by him, and not out of the fund available for dividends.

The questions falling under this fourth head, however, are, as has been seen, by no means clearly determined, and must still await further elucidation by future decisions.

Rules as to contribution and distribution.

The rules, then, which have been established with respect to the contributories of a company in liquidation and the application of their contributions may be briefly stated in some such form as the following:—

I. The A. contributories are primarily liable for everything, and must be first individually exhausted before any B. contributory can be called upon (*t*).

II. The assets of the company, including the A. contributions, are first (subject to the question of costs) to be applied in payment *pari passu* of all the debts of the company, irrespective of the time at which such debts where contracted (*u*).

III. The liability of a B. contributory is limited by

(i.) The amount left unpaid on his shares by the corresponding A. contributory (*x*).

(ii.) Such *residuum* of the debts contracted before he ceased to be a member as remains undischarged when Rule II. has been complied with (*y*).

IV. The contributions of B. contributories form part of the general assets of the company for payment of all the debts of the company, irrespective of the time at which such debts were contracted (*z*).

V. If, before a call is made upon the B. list (a), or before payment of such call (*b*), the debts in respect of which a B. contributory was, having regard to sub-section (2), liable to contribute, or any of them, are in any manner released or extinguished in whole or in part, his liability to contribute to the assets of the company is (subject to any question as to the costs of the winding-up) thereby *pro tanto* discharged.

VI. The liability of a B. contributory to contribute to the costs of the winding-up is confined to such costs as have been occasioned by the necessity of calling upon him for contributions in respect of debts (*c*).

VII. There is no rule that a later class of B. contributories must be exhausted before going back to an earlier class of B. contributories. Upon the failure of the A. contributories to satisfy their measure of liability, leaving B. debts unsatisfied, all the past members liable under sub.-sects. (1), (2), become simultaneously liable to contribute (*d*). Successive transferors of the same shares may also, it seems, be called upon simultaneously (*e*), but in this case each transferor will have a right to be indemnified by his transferee (*f*).

Effect as regards B. creditors.

A somewhat singular result of the operation of the rule as to the applica-

(*t*) See *pl.* (3); *Morris' Case*, 7 Ch. 200.

(*u*) *Morris' Case*, 7 Ch. 200; 8 Ch. 800; *Webb* v. *Whiffin*, L. R. 5 H. L. 711, s. 133.

(*x*) See *pl.* (4).

(*y*) *Morris' Case*, *Webb* v. *Whiffin*, *ubi supra*.

(*z*) *Accidental and Marine Insurance Co.*, 5 Ch. 428; affirmed *sub. nom. Webb v. Whiffin*, *ubi supra*.

(a) *Brett's Case*, 6 Ch. 800; 8 Ch. 800.

(*b*) *Marsh's Case*, 13 Eq. 388.

(*c*) *Brett's Case*, 6 Ch. 800; 8 Ch. 800; *Marsh's Case*, 13 Eq. 388. See, further, the observations *supra*, p. 154, *et seq.*

(*d*) *Morris' Case*, 7 Ch. 200; S. C. 8 Ch. 800.

(*e*) *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241, 247. See, however, *Humby's Case*, 26 L. T. 936; 20 W. R. 718; W. N. 1872, 126; and *supra*, p. 147.

(*f*) *Supra*, p. 147.

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tion of B. contributions, coupled with the rule limiting the amount of those contributions by the twofold limit given above, may be noticed, and for simplicity of explanation may be given in figures. Suppose the B. contributories to have all left the company at the same time; suppose the B. debts unpaid at the date of the winding-up to be £4000, and the debts contracted since the B. contributories ceased to be members and unpaid at the date of the winding-up (which we will call for simplicity the A. debts) to be £16,000. Suppose the assets of the company, including the A. contributions, suffice to pay 15*s.* in the pound. Then after Rule II. has been complied with the B. debts remaining unpaid will amount to £1000, and the A. debts to £4000. The liability then of the B. contributories will, by Rule III. (ii.), be limited to £1000. The amount, however, left unpaid on their shares (*i.e.*, the limit given by Rule III. (i.)) may be, and we will suppose it is, a larger sum, say £3000. No more, however, can be required than the contribution of the £1000, and this being applied according to Rule IV. will reduce the B. debts to £800 and the A. debts to £3200. No further contributions can then be required. We thus have this singular result, that although there are B. debts left unsatisfied, and B. contributories whose liability, as measured by the limit of their shares, is unexhausted, the creditors can obtain no further dividend.

PART III.

Management and Administration of Companies and Associations under this Act.

Provisions for Protection of Creditors.

Registered office of company.

39. Every company under this Act shall have a registered office to which all communications and notices may be addressed (*a*). If any company under this Act carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day during which business is so carried on (*β*).

(*a*) s. 62.

(*β*) As to companies engaged in or formed for working mines in the Stannaries, see further Stannaries Act, 1887, s. 31.

Where a company has no registered office, a creditor may serve his demand under sect. 80 at the company's unregistered office (*g*).

Where the registered office of a company had been demolished in the course of some alterations, and its business was being carried on at an office which had not been registered, service on directors at such unregistered office was held sufficient (*h*).

Where a company, previous to this Act, though not formally dissolved, had practically ceased to exist, and had no office or officers, it was ordered that service of the bill in a suit to which the company were defendants on the late deputy-chairman and late secretary should be good service (*i*).

(*g*) *British and Foreign Gas, &c., Co.*, 13 W.R. 649; 12 L. T. 368; 11 Jur. (N.S.) 559.

(*h*) *Fortune Copper Mining Co.*, 10 Eq. 390.

(*i*) *Gaskell* v. *Chambers*, 26 Beav. 252.

See further, cases cited under General Order, November, 1862, Rule 3, *infra*.

A company incorporated for the manufacture and sale of goods "dwells" within the meaning of 9 & 10 Vict. c. 95, s. 128, at the place of manufacture and sale, and not at the registered office (*k*).

Income tax;

The place of registration of a company is not conclusive as to its "residence" within the Income Tax Acts, any more than the birthplace of an individual necessarily determines his residence. But if a company registered here, has its registered office here, and is managed by a Board which meets here, it resides here and is liable to pay income tax on all its profits wherever earned, and even though only a small portion of them actually come to this country for payment to the English shareholders (*l*).

In *Colquhoun* v. *Brooks* (*m*), however, it was held (diss. Fry, L.J.) that "arising or accruing to" does not mean "received by" in Sch. D. of the Income Tax Act, and that a partner resident in England in a firm carrying on business in Melbourne, of whose share of profits part only was remitted to England, was not chargeable with income tax on that part which did not reach him in England. Whether this case is reconcilable with the other authorities, and whether an answer can be given to the judgment of Fry, L.J., would seem worthy of consideration.

It has been held that an English company carrying on business and earning its profits abroad cannot deduct for purposes of income tax debenture interest payable to debenture holders resident abroad (*n*).

The fact that a company has agencies and a chief office here does not make it domiciled or ordinarily resident here (*o*), when its registered office and secretary are out of the jurisdiction (*p*).

in case of company buying business of partnership;

Where a mining partnership, after working coal mines for more than five years, was incorporated as a limited company, and the question was whether the company in the first year of its existence was to pay income tax on the average of the five preceding years (*q*), or on the profits of the current year; it was held that the company (although the former partners were originally the only shareholders) was for no legal purpose the same as the old partnership, and, but for other considerations, would pay on the profits of the current year; but that the trade it was carrying on was not a trade "set up and commenced" within three years (*r*), but was an old trade to which a new association had "succeeded" (*s*), and that consequently the five-year rule would have applied had not the case been shewn to be within the exception of the 4th rule, viz. where the profits have fallen short from specific cause, in which case the 6th case of Sch. D. is to be applied, and the assessment made "according to an average of such period greater or less than one year as the case require" (*t*).

in case of foreign company.

A foreign telegraph company which has cables starting from this country, and offices in this country, and which receives and transmits messages from this country, "exercises a trade" in the United Kingdom, and is chargeable with income tax on the profits accruing from the trade (*u*).

(*k*) *Keynsham Co.* v. *Baker*, 2 H. & C. 729; but see *Aberystwith Pier Co.* v. *Cooper*, 12 Jur. (N.S.) 995.

(*l*) *Cesena Co.* v. *Nicholson*, *Calcutta Jute Co.* v. *Nicholson*, 1 Exc. D. 428.

(*m*) 19 Q. B. D. 400; 21 Q. B. Div. 52.

(*n*) *Alexandria Water Co.* v. *Musgrave*, 11 Q. B. Div. 174.

(*o*) Order XI. r. 1.

(*p*) *Jones* v. *Scottish Insurance Co.*, 17 Q. B. D. 421.

(*q*) 5 & 6 Vict. c. 35, Sch. A. No. III. parag. 2.

(*r*) 5 & 6 Vict. c. 35, Sch. D. first case, par. 1.

(*s*) Sch. D. Rule 4, to first and second cases.

(*t*) *Ryhope Coal Co.* v. *Fryer*, 7 Q. B. D. 485.

(*u*) *Erichsen* v. *Last*, 7 Q. B. D. 12; 8 Q. B. Div. 414.

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The London agency of a foreign company which earns profits abroad and profits in England is chargeable with income tax upon (1) the whole of the profits earned in England; and (2) so much of the profits earned abroad as is paid to English shareholders, treating the dividends of the English shareholders for this purpose as composed rateably of so much of the English profits and so much of the foreign profits (*x*).

Notice of situation of registered office.

40. Notice of the situation of such registered office, and of any change therein, shall be given to the registrar, and recorded by him: Until such notice is given, the company shall not be deemed to have complied with the provisions of this Act with respect to having a registered office.

As to companies engaged in or formed for working mines in the Stannaries, see further Stannaries Act, 1887, s. 31.

Publication of name by a limited company.

41. Every limited company under this Act, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

Penalties on non-publication of name.

42. If any limited company under this Act does not paint or affix, and keep painted or affixed, its name in manner directed by this Act (*a*) it shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall be liable to the like penalty; and if any director, manager, or officer of such company, or any person on its behalf, uses or authorizes the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid (*a*), or issues or authorizes the issue of any notice, advertisement, or other official publication of such company, or signs or authorizes to be signed on behalf of such company, any bill of exchange, promissory note, indorsement, cheque, order for money or goods, or issues or authorizes to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid (*a*), he shall be liable to a penalty of fifty pounds, and shall further be personally

(*x*) *Gilbertson* v. *Fergusson*, 5 Exc. D. 57; 7 Q. B. Div. 562.

liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company. Sect. 43.

(*a*) s. 41.

The secretary of a limited company having accepted on behalf of the company a bill directed to the company, in which the word "limited," as part of its name, was omitted, was held personally liable on the bill, the same not having been paid by the company (*y*).

Register of mortgages.

43. Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge: If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding fifty pounds: The register of mortgages required by this section shall be open to inspection by any creditor or member of the company (*a*) at all reasonable times; and if such inspection is refused any officer of the company refusing the same, and every director and manager of the company authorizing or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding five pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in England and Ireland, any Judge sitting in Chambers, or the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction (*β*), may by order compel an immediate inspection of the register.

(*a*) Or his solicitor or agent: *Credit Co.*, 11 Ch. D. 256.
(*β*) *v.* s. 35, *sub* tit. "Stannaries."

Effect of non-registration;

This section is directory only, and a mortgage is not rendered void by want of registration (*z*).

as regards officers of the company.

And after a long series of cases to the effect that persons standing in a fiduciary position towards the company and owing under the statute the duty of seeing that the charge is registered cannot avail themselves as against creditors of a charge which is not registered, it has at last been finally decided by the House of Lords that this is not so; that the statute imposes a pecuniary penalty, and does not impose the further penalty of forfeiting the security; and that there is no equitable principle or rule by which

(*y*) *Penrose* v. *Martyr*, E. B. & E. 499, under 19 & 20 Vict. c. 47, s. 31, the wording of which is identically the same as that of this section on this point; *Athins & Co.* v. *Wardle*, 58 L. J. (Q. B.), 377.

(*z*) *E. p. Valpy and Chaplin*, 7 Ch. 289; *Wright* v. *Horton*, 12 App. Cas. 371.

Sect. 43. the mortgagee can be precluded from holding the security on the ground that he has not complied with the statute (a).

Whether an intending creditor who was induced by a director to become a creditor by the concealment through non-registration of the director's security might set up a personal disability in the director to avail himself of his security in competition with him is another matter (a). In such a case the director would be guilty of a fraud, and would no doubt not be allowed in equity to take advantage of his security as against him (*b*). But mere non-registration cannot be a representation that there is no incumbrance, for *ex concessis* unregistered mortgages in favour of persons not directors are valid, and therefore the creditor cannot say that because there was no mortgage on the register he was entitled to believe there was no incumbrance (*b*). Moreover he cannot search the register until he has become a creditor (*c*).

Again (1) the registration cannot in the nature of things be made until after execution, and the security therefore cannot be void *ab initio*, but if void at all, must be avoided by relation. But a contract cannot be avoided by relation: if void it must be for illegality; the section, however, does not render the unregistered charge illegal, and in the hands of persons other than officers of the company it is valid. And (2) the Act imposes a certain penalty for non-registration. According to principle, this penalty should be the only penalty, but the decisions referred to imported another, viz., the total loss of the security (*d*).

The reasons against the existence of any such equitable principle or rule as had been set up are elaborately discussed by Jessel, M.R., in *Globe Iron Company* (*e*), and his reasoning was adopted by the House of Lords in *Wright* v. *Horton* (*f*).

The earlier cases were as follows:—

Directors. In the winding-up of a company directors were not allowed to set up against the general creditors an unregistered charge on the property of the company (*g*).

And where the charge was registered, but insufficiently, inasmuch as there was no description of the property charged, directors were not allowed to avail themselves of it as against creditors (*h*).

Solicitors. Again, where a solicitor not usually employed by a company was employed by them to act in a particular matter, and, having required security for costs, they gave him a charge on certain debts due to them, but the charge was not registered, the solicitor was not allowed to avail himself of the charge in the winding-up; for it was his duty, so far as this particular transaction was concerned, to see that the register was properly kept (*i*). But *quære* was this his duty? (*k*).

Bankers. Bankers were held, however, not to be in the position of officers of the company for this purpose (*l*).

Shareholders. And so with shareholders, since they have not the control of the books, a

(a) *Wright* v. *Horton*, 12 App. Cas. 371.
(*b*) *Globe Iron Co.*, 48 L. J. (Ch.) 295; 27 W. R. 424; 40 L. T. 380.
(*c*) *Wright* v. *Horton*, 12 App. Cas. 371; *Globe Iron Co.*, 48 L. J. (Ch.) 295; 27 W. R. 424; 40 L. T. 380.
(*d*) *Knowles' Mortgage*, 6 Ch. D. 556; *Globe Iron Co.*, 48 L. J. (Ch.) 295; 27 W. R. 424; 40 L. T. 380.
(*e*) 48 L. J. (Ch.) 295; 27 W. R. 424; 40 L. T. 380.
(*f*) 12 App. Cas. 371.
(*g*) *Wynn Hall Coal Co., E. p. North and South Wales Bank*, 10 Eq. 515.
(*h*) *Native Iron Ore Co.*, 2 Ch. Div. 345.
(*i*) *Patent Bread Co., E. p. Valpy and Chaplin*, 7 Ch. 289; see also *General Provident Assurance Co.*, 17 W. R. 514; 38 L. J. (Ch.) 320, noticed *infra*.
(*k*) *Per* Jessel, M.R., *Knowles' Mortgage*, 6 Ch. D. 556; *Globe Iron Co.*, 48 L. J. (Ch.) 295; 27 W. R. 424; 40 L. T. 380.
(*l*) *General Provident Assurance Co., E. p. National Bank*, 14 Eq. 507, 515.

registration which was defective by omitting a description of the property charged was held not to render their security invalid (*m*).

Jessel, M.R., however always refused to extend the supposed principle to any case not actually covered by the then existing decisions in the Appeal Court. Thus his Lordship held that the sub-mortgagee of a charge in favour of a director did not lose his security by the fact that neither the mortgage nor the sub-mortgage was registered (*n*). For the supposed equity would not attach against a person claiming under the director.

And so where a company issued debentures secured by a debenture trust deed, and some of the debentures were held by directors, and neither the trust deed nor the debentures were registered, his Lordship held that the directors were entitled to retain their security (*o*).

Again, the omission to register must have been "knowingly and wilfully" authorized or permitted. Where, therefore, directors gave the secretary particulars of a charge executed in their favour, and told him to register it, but he omitted to do so, and they had before the commencement of the winding-up realized their security, his Lordship held that the liquidator could not make them refund the proceeds (*p*).

The whole question was again discussed in the Court of Appeal in *Smith's Case* (*q*), where Baggallay, L.J., adhered to *E. p. Valpy and Chaplin* (*r*) and *Native Iron Ore Co.* (*s*), but Jessel, M.R., and Bramwell, L.J., while treating themselves as bound by those decisions, did not approve them, and succeeded in distinguishing them from the case before the Court. That was a case where one of three partners was a director, the loan was a partnership loan, the security was unregistered. The Court held that the firm could hold the security (*t*).

The question so much debated in these cases has now been set at rest by *Wright* v. *Horton* (*u*). The debentures there were issued to a director: they were not registered: their validity was contested by unsecured creditors and also by debenture holders: but it was not shewn that they had made any inquiry as to the charges or as to the existence of a register. The House of Lords held the debentures to be an effectual security as between the director and such creditors.

What is to be registered.

The Act requires registration, not of the instrument creating the charge, but of the property charged. It extends therefore to the case where there is no instrument, *e.g.*, where the security is created by deposit (*x*).

Quære, does it extend to vendor's lien?

Mining companies in the Stanneries.

By s. 19 of the Stannaries Act, 1887, mortgages and mortgage debentures of companies engaged in or formed for working mines within the Stannaries (s. 2) must also be registered within twenty-eight days from their date at the office of the registrar of the Stannaries Court, and unless registered they confer no title as against claims for work and labour done, or services, or goods and materials. Moreover, certain wages are entitled to priority over even registered mortgages (ss. 4, 9).

Securities to bearer.

It is now a very common practice for limited companies to issue debentures to bearer. Where such debentures carry a security upon the property

(*m*) *General South American Co.*, 2 Ch. Div. 337.

(*n*) *International Pulp Co., Knowles' Mortgage*, 6 Ch. D. 556; and see *Globe Iron Co.*, 48 L. J. (Ch.) 295; 27 W. R. 424; 40 L. T. 380.

(*o*) *Globe Iron Co.*, 48 L. J. (Ch.) 295; 27 W. R. 424; 40 L. T. 380.

(*p*) *Boro' of Hackney Newspaper Co.*, 3 Ch. D. 669.

(*q*) 11 Ch. Div. 579.

(*r*) 7 Ch. 289.

(*s*) 2 Ch. Div. 345.

(*t*) *Cf. Underbank Mills Co.*, 31 Ch. D. 226.

(*u*) 12 App. Cas. 371.

(*x*) *Smith's Case*, 11 Ch. Div. 579, 585.

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of the company, the security is sometimes given by the execution to trustees of a debenture trust deed, but more commonly by giving a charge by the debentures themselves. A debenture trust deed need not be executed unless there be special reason. Where a trust deed is executed, the trustees are commonly registered under this section as the persons entitled to the charge, and this is probably a compliance with the section, although the names of their *cestuis que trust*, viz., the bearers of the debentures, are not disclosed. But where there is no trust deed, how is the section to be complied with? The bearers of the debentures of course are not known, and although for the purpose of the security this is of little importance since any bearer who is not a director does not want to register, and any bearer who is can of course register himself, yet it may affect the directors very much, for if they do not comply with the section they are exposed to penalties. But *quære* can you "knowingly and wilfully" omit to register a name which you do not know? and *quære* further, does the penalty apply except in the case of the first entry to be made at the time when the property is mortgaged or charged; and is it for this purpose therefore sufficient that the directors shall have registered the first person to whom the debenture to bearer is issued?

As to the stamp duties on securities to bearer, see 48 & 49 Vict. c. 51, s. 21, and 51 Vict. c. 8, s. 12.

Power of companies to mortgage.

The question whether a company incorporated under these Acts can mortgage must, it is conceived, be answered by determining whether upon the true construction of the memorandum of association, including the "incidental and conducive" clause, mortgaging is within its objects as defined. The distinctions between companies incorporated by charter and companies incorporated by statute have already been pointed out, and the limits within which companies incorporated under this Act are confined have been discussed (*y*). The principles applicable to a company incorporated by Special Act are, it is conceived, *mutatis mutandis* to be applied to companies incorporated under this Act (*z*).

As regards companies incorporated by Special Act, it has been held that in determining whether such a company has by implication power to borrow, you must look first whether it is to carry on an undertaking requiring the expenditure of money, and secondly, whether means are provided for putting the company in funds for the purpose. If there are no such means, then you may infer a power to obtain funds, and this may infer a power to borrow. But if means are provided, *e.g.*, by raising capital or by calling up more capital, or by a limited power of borrowing which may be within reason sufficient for the purpose, then the Court will not seek to measure whether in the event those means will be sufficient or not. Those means being provided, you cannot infer at the same time a power to borrow (a).

"There is no doubt that where [*quære*, meaning "even where"] there is not an express prohibition against borrowing in a case of a company or a society constituted for special purposes, no borrowing can be permitted without express authority unless it be properly incident to the course and conduct of the business for its proper purposes" (*b*).

If the company has property and is by the memorandum of association

(*y*) *Supra*, p. 15.

(*z*) As the principles of *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653, as to companies incorporated under this Act are applicable to companies incorporated by any statute, *Wenlock* v. *River Dee Co.*, 10 App. Cas. 354, 360.

(*a*) *Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675, n., 677, n., 682, n.

(*b*) *Per* Lord Selborne, *Blackburn Soc.* v. *Brooks*, 22 Ch. Div. 61, 70.

authorized to dispose of it, it may well be that the company can mortgage it unless expressly prohibited from doing so (*c*), but this decision goes not to power to borrow, but power to give security for debt.

A company, as a body corporate, can in furtherance of its objects deal with its property as freely as an individual can (*d*), subject to any regulations contained in its articles, and can therefore, in the absence of a prohibition express or implied (*e*), effect mortgages of its property. This power extends to a mortgage by deposit, and to the giving such a security as well for a past debt as for a future one (*f*).

An authority to borrow to a limited amount on certain terms implies a veto to borrow to a larger amount or on different terms (*g*).

But a power to borrow and mortgage, although readily implied in the case of a trading company, is not incident to every company's objects. Thus a building society in the absence of a borrowing power cannot borrow at all.

In the case of a company whose deed of settlement required that mortgages should be executed with certain prescribed formalities, a security given to the solicitors of the company, and not so executed, was held not binding on the company. In the case referred to, the deed required that mortgages should be sealed with the company's seal, be signed by two directors, and countersigned by the secretary or actuary; a deposit of title deeds with the company's solicitors, accompanied by a memorandum signed by the general manager, but not under the seal of the company, was held not to create a valid security, although there was evidence that the manager had been authorized by the directors to effect the loan and sign the memorandum (*h*).

The fiduciary relation between the company and the mortgagees does not seem to have been much dwelt upon in the decision of this case, but it is in this fiduciary relation (*i*) that the distinction must be found between this case and another case in the same company, and decided by the same learned judge, in which it was held that the formalities required by the company's deed for legal mortgages did not apply to equitable mortgages by deposit, and that such a security was therefore valid (*k*). The mortgage in this case was given to the bankers as a collateral security for bills under discount.

If there be power to charge, and there be shewn an intention to create a charge, a valid charge may be created, although the legal security given may be incomplete (*l*).

Limited borrowing power.

If the directors, having under the articles power to borrow to a limited amount, borrow money on debentures at a time when the liabilities already exceed the limit, the debentures are void (*m*). In such a case the directors

(*c*) *Patent File Co.*, L. R. 6 Ch. 83.

(*d*) *Cf. Bath's Case*, 8 Ch. Div. 334, as to power to compromise.

(*e*) *Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675, n.; 10 App. Cas. 354.

(*f*) *Patent File Co.*, *E. p. Birmingham Banking Co.*, 6 Ch. 83; and see *Riche* v. *Ashbury Railway Carriage Co*, 9 Ex. at pp. 264, 292; *Gibbs and West's Case*, 10 Eq. 312; *Hamilton's Windsor Iron Works*, *E. p. Pitman*, 12 Ch. D. 707; *Athenæum Life Assurance Society*, 4 K. & J. 549, 562; *E. p. National Bank*, 14 Eq. 507.

(*g*) *Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675, n.; 10 App. Cas. 354; 36 Ch. D.

(*h*) *General Provident Assurance Co.*, 38 L. J. (Ch.) 320; W. N. 1869, 58; 17 W. R. 514.

(*i*) See 14 Eq. 513.

(*k*) *General Provident Assurance Co.*, *E. p. National Bank*, 14 Eq. 507.

(*l*) *Strand Music Hall Co.*, 3 D. J. & S. 147; *Ross v. Army and Navy Hotel Co.*, 34 Ch. Div. 43.

(*m*) *Pooley Hall Colliery Co.*, 21 L. T. 690; 18 W. R. 201; *English Channel Steamship Co.* v. *Rolt*, 17 Ch. D. 715; *Fountaine* v. *Carmarthen Co.*, 5 Eq. 316; *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156, 170; *Bansha Mills Co.*, 21 L. R. Irish, 181.

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may be personally liable in damages for their implied representation that they had authority to issue debentures (*n*).

And if the borrowing power of the company itself as distinguished from that of the directors is limited, the lender cannot rely upon the principle of *Royal British Bank* v. *Turquand* (*o*), and say that he was entitled to presume that the limit was not being exceeded. Thus in the case of a benefit building society with a limited borrowing power, the person who deals with the society is bound to ascertain whether the limit has been exceeded or not (*p*), and if he advances when the limit has been exceeded, he is lending to a society which cannot borrow, and there is therefore no debt, and the society is not liable (*p*). Bramwell, L.J., indeed, even went farther, and said (*q*) that a person dealing with the agents of a society which has given a limited authority is bound to inquire whether that authority has been exceeded or not, and if it has been exceeded the principals are not bound. But it is to be observed that for the purposes of the decision in that case it was not necessary to determine whether a borrowing in excess of the powers of the directors as distinguished from those of the society, could be supported upon the principles of *Royal British Bank* v. *Turquand* (*r*), upon the footing that the lender did not know that the limit had been exceeded, and was entitled to presume that it had not (*s*).

If money be borrowed by a company which cannot borrow (as a building society without a borrowing power) there is no debt, and if subsequently the society acquires power to borrow and then issues deposit notes for the money previously borrowed, the notes are not binding on the society, for as before there is no debt (*t*). This decision and the decision in *Blackburn Soc.* v. *Brooks* (No. 2) (*u*) seem to involve that a society which has borrowed when it has no power to do so has no means of honestly repaying that which it has received.

If the borrowing be not *ultra vires* of the company, but only of the directors' powers under the articles, the case is one of those in which the act done is *ultra vires* the articles only (*x*), and which may therefore be ratified by the company, and if ratified is valid (*y*).

Again, suppose the borrowing power of the directors limited to £10,000, and sums of £5000 and £8000 borrowed successively from A. and B. without disclosing to B. the advance already made by A., *quære* what would be the rights of B. In *Irvine* v. *Union Bank of Australia* (*z*) the point did not arise, as A. and B. were the same person.

Where the power was to borrow to an amount "not exceeding two-thirds of the capital of the company for the time being not called up," it was held that this was not confined to capital uncalled upon issued shares, but included share capital remaining unissued (a).

In *Yorkshire Railway Co.* v. *Maclure* (*b*), a railway company which had not power to borrow successfully raised money by selling part of its rolling stock

(*n*) *Firbank* v. *Humphreys*, 18 Q. B. Div. 54.

(*o*) 5 E. & B. 248; 6 E. & B. 327.

(*p*) *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. Div. 712, 713, 715; *Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675, n.; 10 App. Cas. 354.

(*q*) *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. Div. 705.

(*r*) 5 E. & B. 248; 6 E. & B. 327.

(*s*) See as to this *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366.

(*t*) *E. p. Watson*, 21 Q. B. D. 301.

(*u*) 29 Ch. Div. 902.

(*x*) See *ante*, p. 14.

(*y*) *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366; *Grant* v. *United Kingdom Switchback Co.*, 40 Ch. Div. 135.

(*z*) 2 App. Cas. 366, 380.

(a) *English Channel Steamship Co.* v. *Rolt*, 17 Ch. D. 715.

(*b*) 21 Ch. Div. 309; *cf. North Central Wagon Co.* v. *Manchester Railway Co.*, 35 Ch. Div. 191; 13 App. Cas. 554.

to a wagon company, and at the same time contracting with the wagon company for the hire of the rolling stock at a rent which would repay the money with interest in five years, and then for its repurchase at a nominal price.

A power to borrow does not necessarily include a power to undertake further liability to protect the security given for the money lent. Thus where directors of a building society advanced on second mortgage, a bond of corroboration guaranteeing the first mortgage debt was held *ultra vires* (*c*). But a redemption of the first mortgage may be legitimate (*d*).

Mortgage of calls.

Under a power to mortgage, a mortgage of arrears of a call already made is valid (*e*), and so is a mortgage of the proceeds of a call not yet made, but already determined upon, although so determined upon with a view to giving a charge upon it (*f*).

And where the deed of settlement gave no express power of borrowing, but gave the directors large general powers, a charge upon the proceeds of a call already made, but not immediately payable, given to the bankers of the company as a security for moneys advanced to meet pressing demands, was valid (*g*).

But in the absence of express power to mortgage future calls, a mortgage of the proceeds of a future call is invalid, for such a charge would prevent the directors from freely exercising the discretion given them as to calling up capital (*h*).

But book-debts not yet accrued due do not stand on the same footing. Book-debts are property of the company, and they may be validly charged (*i*).

It has, however, been held that debentures charging all the lands, property, and effects of the company of what nature or kind soever, which the company should then hold or be possessed of, were, in the liquidation of the company, effectual to charge calls made in the winding-up (*k*). But this decision must be taken to be overruled (*l*).

Power to mortgage future calls is valid.

But if under its memorandum and articles the company has power to charge future calls such a charge is valid (*m*), and the power need not necessarily be given by the memorandum: it will be sufficient if it is contained in the contemporaneous articles (*n*).

A power to charge "property" or "property and funds" does not authorize a mortgage of uncalled capital (*o*), and a charge upon "real and personal estate" does not charge the uncalled capital (*p*). Capital uncalled is only *sub modo* the property of the company, and the right of the company to it is rather in the nature of power than property. A power may be charged, no

(*c*) *Small* v. *Smith*, 10 App. Cas. 119.

(*d*) *Sheffield Building Soc.* v. *Aizlewood*, 44 Ch. D. 412.

(*e*) *Humber Ironworks Co.*, 16 W. R. 474, 667.

(*f*) *Sankey Brook Coal Co.*, 9 Eq. 721; *Pickering* v. *Ilfracombe Railway Co.*, L. R. 3 C. P. 235, 247.

(*g*) *Gibbs and West's Case*, 10 Eq. 312.

(*h*) *E. p. Stanley*, 4 D. J. & S. 407; 33 L. J. (Ch.) 535; 10 L. T. 674; 4 N. R. 255; 12 W. R. 894; 10 Jur. (N.S.) 713; *Sankey Brook Coal Co.* (No. 2), 10 Eq. 381; *Bank of South Australia* v. *Abrahams*, L. R. 6 P. C. 265; and see *King* v. *Marshall*, 33 Beav. 565; *Marine Mansions Co.*, 4 Eq. 601, 609.

(*i*) *Bloomer* v. *Union Coal Co.*, 16 Eq. 383.

(*k*) *Lishman's Claim*, 19 W. R. 344; 23 L. T. 759; *cf. Panama Mail Co.*, 5 Ch. 318.

(*l*) *Bank of South Australia* v. *Abrahams*, L. R. 6 P. C. 265.

(*m*) *Phœnix Bessemer Steel Co.*, 32 L. T. 854; 44 L. J. (Ch.) 683; *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156; and see *Bank of South Australia* v. *Abrahams*, L. R. 6 P. C. 265, 271.

(*n*) *Phœnix Bessemer Steel Co.*, 32 L. T. 854; 44 L. J. (Ch.) 683; *Pyle Works*, 44 Ch. Div. 534.

(*o*) *Bank of South Australia* v. *Abrahams*, L. R. 6 P. C. 265, 271; *Bower* v. *Foreign Gas Co.*, W. N. 1877, 222.

(*p*) *Colonial Trusts Corp., E. p. Bradshaw*, 15 Ch. D. 465. It does not appear from the report how this company had power to charge uncalled capital.

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doubt, but apt words or a sufficient context must be found to authorize it (*q*). An authority to mortgage the company's "properties and rights" gives power to mortgage uncalled capital (*r*).

Debentures;

Debentures issued by a company under a general power of borrowing in part discharge of existing debts, are valid (*s*).

And if a company have not by virtue of its articles any power of borrowing, yet a special resolution is a sufficient authority for borrowing on debentures (*t*); and general powers given by the articles to directors may be sufficient to authorize their borrowing (*u*).

charging the "undertaking;"

A debenture purporting to give a charge on or to be an assignment of "the undertaking," may, according to the language employed, charge all the property of the company (*x*), or the property in existence at the date of the debenture only, and not subsequently acquired property (*y*).

The cases relating to railway companies' debentures (*z*) are not generally *in pari materiâ*, for they relate to a peculiar subject-matter, viz., a permanent railway (a).

An instrument headed "obligation," by which the company "bind themselves, their successors, assigns, and all their estate property and effects," constitutes, at any rate when read with reference to articles of association which assist such a construction, a charge upon the property of the company (*b*). And an instrument headed "debenture," by which the company "bind themselves and their successors and their real and personal estate," and which provides for payment of the debenture holders *pari passu*, constitutes a charge (*c*).

effect of;

The effect of a debenture charging "the undertaking" (*d*), or the "undertaking and property" (*e*), or "all the estate property and effects" (*f*), of the company, is to create a charge of which the debenture holders may, no doubt, as against the going company, avail themselves by the appointment of a receiver (*d*) (*g*), and which upon the winding-up of the company attaches upon the property of the company as it exists at that date (*d*), (*e*), (*f*), (*g*); but which, until action brought to enforce the security or winding-up commenced, leaves the company free to dispose of its property by sale or mortgage while carrying on its business in the ordinary course (*h*); and a

(*q*) See notes (*o*) (*p*), p. 167.

(*r*) *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156.

(*s*) *Inns of Court Hotel Co.*, 6 Eq. 82; *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156.

(*t*) *Bryon* v. *Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123.

(*u*) *Gibbs and West's Case*, 10 Eq. 312, *v. supra.* Directors borrowing without authority for the discharge of expenses *bonâ fide* incurred will as trustees be entitled to indemnity from their *cestuis que trust*: *German Mining Co.*, *E. p. Chippendale*, 4 D. M. & G. 19. The distinction between moneys borrowed and debts contracted is established, and rests on sound principles: Ibid. 40. See, however, further, *infra*, "Equitable debt."

(*x*) *Marine Mansions Co.*, 4 Eq. 601; *Panama Mail Co.*, 5 Ch. 318; *cf. Lishman's Claim*, 23 L. T. 759. As to its charging the company's lands, see *Wickham* v. *New Brunswick Railway Co.*, L. R. 1 P. C. 64.

(*y*) *New Clydach Co.*, 6 Eq. 514; and see *Florence Land Co.*, *E. p. Moor*, 10 Ch. Div. 530; *Colonial Trusts Corp.*, *E. p. Bradshaw*, 15 Ch. D. 465; *King* v. *Marshall* 33 Beav. 565.

(*z*) *Gardner* v. *London, Chatham, and Dover Railway Co.*, 2 Ch. 201; *Blaker* v. *Herts Waterworks Co.*, 41 Ch. D. 399.

(a) See *per* Giffard, L.J., 5 Ch. 321.

(*b*) *Florence Land Co.*, *E. p. Moor*, 10 Ch. Div. 530, notwithstanding *Norton* v. *Florence Land Co.*, 7 Ch. D. 332. See also *Jones* v. *Swansea Soc.*, 29 W. R. 382; 50 L. J. (Q. B.) 428; 44 L. T. 106.

(*c*) *Colonial Trusts Corp.*, *E. p. Bradshaw*, 15 Ch. D. 465.

(*d*) *Panama Mail Co.*, 5 Ch. 318.

(*e*) *Marine Mansions Co.*, 4 Eq. 601.

(*f*) *Florence Land Co.*, *E. p. Moor*, 10 Ch. Div. 530; and see *Hodson* v. *Tea Co.*, 14 Ch. D. 859.

(*g*) *Colonial Trust Corp.*, *E. p. Bradshaw*, 15 Ch. D. 465, 472.

(*h*) *Florence Land Co*, *E. p. Moor*, 10 Ch. Div. 530, 540, 547; *Moor* v. *Anglo-Italian Bank*, 10 Ch. Div. 681, 687; *Hamil-*

mortgage so executed may have priority over the charge of the undertaking (*i*), even though the charge on the undertaking be expressed to be a first charge on the undertaking lands and effects (*k*).

Debentures charging the undertaking of a waterworks company incorporated under this Act as a limited company have been held not to confer upon the holders the statutory power of sale under s. 19 of the Conveyancing Act, 1881, and to be within the principle of *Gardner* v. *London, Chatham, and Dover Railway Co.*, 2 Ch. 201, so as to exclude any right in the debenture holders to a sale of the undertaking or the appointment of a manager (*l*).

If the debenture be expressed to be a charge which until default in payment of principal or interest shall be a floating security, a purchaser from the company of part of its lands is entitled to reasonable evidence that there has been no default (*m*).

In an action brought by one debenture holder on behalf of himself and all others, the plaintiff cannot have a personal judgment for more than the amount due to himself, but he may have a declaration that he and the other debenture holders are entitled to stand in the position of judgment creditors for the whole amount, and may have a receiver of the property of the company not included in the charge, so as to get protection against other possible judgment creditors (*n*).

charging future property.

Quœre whether Judicature Act, 1875, s. 10, has affected the power of a company to charge after-acquired property as against its other creditors (*o*).

An assignment by way of mortgage of business premises and plant, machinery, and effects in and upon the premises, passes the stock-in-trade for the time being (*p*).

An assignment of all book-debts due and owing, or which may during the continuance of the security become due and owing to the mortgagor, is valid (*q*).

Meaning of "debenture."

No one seems to know exactly what "debenture" means (*r*). Chitty, J., has gone so far as to say that "a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture" (*s*). North, J., would certainly not go so far (*t*). It has been held that for the purposes of the Stamp Act an instrument called on its face a "debenture" with coupons for interest attached and providing that the company will "pay the amount of this debenture to A. B. or order," is chargeable with a debenture stamp and not with a promissory note stamp (*u*).

Registration of debentures under Bills of Sale Acts.

Sect. 17 of the Bills of Sale Act, 1882, enacts that "nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels,

ton's Windsor Ironworks, E. p. Pitman, 12 Ch. D. 707, 710, 712, 714.

(*i*) *Hamilton's Windsor Ironworks, E. p. Pitman*, 12 Ch. D. 707; *Moor* v. *Anglo-Italian Bank*, 10 Ch. Div. 681.

(*k*) *Wheatley* v. *Silkstone Co.*, 29 Ch. D. 715. Contrast, however, *Murray* v. *Scott*, 9 App. Cas. 519.

(*l*) *Blaker* v. *Herts Waterworks Co.*, 41 Ch. D. 399.

(*m*) *E. p. Horne and Hellard*, 29 Ch. D. 736.

(*n*) *Hope* v. *Croydon Tramways Co.*, 34 Ch. D. 730.

(*o*) *Florence Land Co., E. p. Moor*, 10 Ch. Div. 530, 535, 543, 547.

(*p*) *Anglo-American Leather Cloth Co.*, 42 L. T. 504; 43 L. T. 43.

(*q*) *Tailby* v. *Official Receiver*, 13 App. Cas. 523; S. C. 17 Q. B. D. 88; 18 Q. B. Div. 25.

(*r*) See *British India Co.* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 165; *Florence Land Co., E. p. Moor*, 10 Ch. Div. 530, 539; *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215.

(*s*) *Levy* v. *Abercorris Co.*, 37 Ch. D. 260, 264.

(*t*) *Topham* v. *Greenside Co.*, 37 Ch. D. 281, 291; and see *Jenkinson* v. *Brandley Mining Co.*, 19 Q. B. D. 568.

(*u*) *British India Co* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 165.

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and effects of such company." Many questions arise upon this difficult section in a difficult Act.

"Mortgage, loan, or other incorporated company." Must the company be one *ejusdem generis* with a mortgage or loan company, or is the section applicable to every company, howsoever incorporated, whose objects include expressly or by implication a power to borrow money for the undertaking? Upon this question North, J., leans towards holding that the section must refer to companies *ejusdem generis* with a mortgage or loan company, but has difficulty in saying what such a company *ejusdem generis* can be (*x*); while Chitty, J., is satisfied that the words "or other incorporated company" are not to be cut down by the context (*y*). Coleridge, C.J., also is of opinion that the section is not confined to companies incorporated for the purpose of mortgage or loan (*z*).

"Secured upon the capital stock or goods, chattels, and effects of such company." Must the security be one which is secured upon all the company's property, to the exclusion of a charge on specific property? This question was left undecided in *Ross* v. *Army and Navy Hotel Co.* (a). North, J., would seem to be of opinion that a charge upon specific property is not within the section (*x*).

The section speaks of "debentures issued . . . and secured upon . . ." Is a security given to one person alone upon a single contract of loan brought within the section by calling it "a debenture"? It is conceived that the section contemplates an "issue of debentures," a borrowing of money for the benefit of the undertaking from several lenders. But this has not been so decided, and Chitty, J., has held not only that where there are several lenders but only one security given for the benefit of all, this is within the section (*b*), but further that a single security to a single lender which did not purport to be a debenture was within the section (*c*).

It is conceived that if a single lender advances money to the company upon a security given upon some part of the company's chattels—in other words, if the company executes to A. B. a bill of sale to secure money lent—this cannot be brought within the section by calling the security a debenture. It is clear that if the company invites subscriptions to a debenture issue of £100,000, to be secured upon the company's undertaking and all its stock-in-trade, and issues a series of debentures accordingly, this is within the section. Where the line is to be drawn between the two remains to be decided.

A common form of securing debentures is to execute a trust deed assuring to trustees the property to be charged and declaring trusts in favour of the debenture holders, and to issue to the debenture holders an instrument containing only a covenant for payment, but referring on its face to indorsed conditions, one of which is that all the debenture holders shall be entitled to the benefit of the trust deed. In such case the trust deed, even if registered, will not protect the security, for it is not in the form in the schedule to the Act (*d*), and the debentures in the form above described it has been said pass no property and without the trust deed give no security (*d*). But the latter point at any rate is not sound if the trust deed be sufficiently

(*x*) *Topham* v. *Greenside Co.*, 37 Ch. D. 281, 291; and see *Jenkinson* v. *Brandley Mining Co.*, 19 Q. B. D. 568.

(*y*) *Levy* v. *Abercorris Co.*, 37 Ch. D. 260, 263.

(*z*) *Reed* v. *Joannon*, 25 Q. B. D. 300, 304.

(a) 34 Ch. Div. 43.

(*b*) *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215.

(*c*) *Levy* v. *Abercorris Co.*, 37 Ch. D. 260, 264.

(*d*) *Brocklehurst* v. *Railway Printing Co.*, W. N. 1884, 70; *Jenkinson* v. *Brandley Mining Co.*, 19 Q. B. D. 568.

referred to and identified in the debenture (*e*): a debenture in such a form as above may manifest upon its face and by reference to the condition indorsed an intention to give a valid charge, and may amount to an equitable contract, to which effect will be given, to give a charge upon the property. In such case the debentures, although unregistered, will be valid as against the grantor under the Act of 1882 (*f*).

Under the Bills of Sale Act, 1878, an unregistered bill of sale was not void except as against certain persons, viz. trustees in bankruptcy and execution creditors; and inasmuch as a winding-up is not a bankruptcy, and a liquidator is not a trustee in bankruptcy, an unregistered bill of sale given by an incorporated company was good as against the liquidator (*g*). But under the Act of 1882 an unregistered bill of sale is void generally, and the Act applies as much to a bill of sale given by an incorporated company as to one given by an individual (*h*). Except, therefore, where the case falls within sect. 17 the unregistered bill of sale of an incorporated company under the Act of 1882 is void.

A Divisional Court (Coleridge, C.J., and Wills, J.) has, however, held (*i*) that the debenture of an incorporated company is not within the Bills of Sale Act, 1878, at all; and further, that even if it was within it until 1882, yet that the words in sect. 17 of the Act of 1882, "Nothing in this Act," mean "Nothing in the Act of 1878 or the Act of 1882," with the result that the Acts of 1878 and 1882 do not apply to debentures. It is noticeable that according to the report, neither the *Marine Mansions Co.* (*k*) nor *Attenborough's Case* (*l*) was cited. The decision provokes consideration: the argument of the counsel for the defendant is instructive reading.

Debentures issued at a discount.

Debentures may lawfully be issued at a discount, and therefore if it be left to the directors to borrow on such terms as they think fit (*m*), or if power is given them to borrow or raise money (*m*) or to borrow simply (*n*), they may issue debentures at a discount. It is obvious that a discount is really exactly the same thing as an increase in the rate of interest: the discount is only the present value of the difference in the rate of interest calculated over the currency of the debenture.

And there is no reason why a director should not take debentures at a discount on the same terms as other people, and if he does he cannot be made to refund the discount (*o*).

In the *Regent's Canal Ironworks Co.* (*p*) out of 100 debentures of £250 each sixty were issued to the public at 95 per cent. The remaining forty, representing £10,000, were vested in trustees to secure the payment of a loan of £8000. The debenture bore interest at 6 per cent., the £8000 was advanced at 10 per cent. In the winding-up the lenders of the £8000 claimed to prove for the £10,000 and to rank *pari passu* with the holders of the sixty debentures until their advance with 10 per cent. was repaid, and they were held so entitled. The holders of the sixty debentures argued that the issue of the forty debentures had been made at a price of less than 95 per cent., and at a rate of interest in excess of 6 per cent. But clearly this was not so. They were issued as security only. And *quære* whether

(*e*) Not otherwise: *Jenkinson* v. *Brandley Mining Co.*, 19 Q. B. D. 568.
(*f*) *Ross* v. *Army and Navy Hotel Co.*, 34 Ch. Div. 43.
(*g*) *Marine Mansions Co.*, 4 Eq. 601.
(*h*) *Attenborough's Case*, 28 Ch. D. 682.
(*i*) *Reed* v. *Joannon*, 25 Q. B. D. 300, 304.
(*k*) L. R. 4 Eq. 601.
(*l*) 28 Ch. D. 682.
(*m*) *Anglo-Danubian Steam Co.*, 20 Eq. 339.
(*n*) *Campagnie Générale, Campbell's Case*, 4 Ch. D. 470. The words "or in such other manner as the directors may think expedient" here related to the security for repayment, not to the borrowing.
(*o*) *Campbell's Case*, 4 Ch. D. 470.
(*p*) 3 Ch. Div. 43; *cf. E. p. Newton*, 16 Ch. Div. 330.

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the judgments of the Appeal Court do not indicate that if the forty debentures had been issued at a greater discount and higher interest the other debenture holders could not have complained. This must of course depend upon the form of the debentures.

In *Whitehaven Banking Co.* v. *Reed* (*q*) it was held that a company governed by the Comp. Clauses Acts could issue debenture stock by way of collateral security.

Debenture stock.

The issue of debenture stock is not borrowing at all; it is the sale in consideration of a sum of money of the right to receive a perpetual annuity (*r*); and none the less so if the annuity be redeemable at the option of the company. If, as is now frequently the case, a company incorporated under the Companies Acts desires to issue debenture stock, it must take power by its memorandum of association so to do.

Debentures when issued.

Debentures are not issued until they are delivered. Where the debentures (which were to bearer) were executed by the company and stamped and placed in a box, and some of them were handed to an agent for issue, but he, failing to issue them, returned them to the company after a winding-up order had been made, and then one of the directors to whom the company owed money issued them to one of his own creditors who took them in the belief that they were validly issued, the holders could not set them up as between themselves and valid holders of debentures ranking *pari passu* with them: for the debentures were not issued until after winding-up commenced, and whether the company was estopped or not, such other holders were not estopped (*s*).

Priority in numerical order.

Where a number of debentures are sealed one after another in numerical order they *primâ facie* rank in priority accordingly, but if they contain a provision that they shall rank *pari passu* they will so rank (*t*).

Over-draft.

Over-draft on the company's banking account is borrowing; in fact, it does not differ at all from any other borrowing except that it is often of a temporary character (*u*). The cases to the contrary before Stuart, V.C. (*x*), must be taken as overruled.

Building society's borrowing power.

Previous to the Building Societies Act, 1874 (*y*), a benefit building society had no power to borrow unless its articles specially authorized it to do so (*z*). A special power, moreover, was supposed to be good only if limited (a), and if unlimited, was supposed to be illegal (*b*). But this view, which was based upon *Laing* v. *Reed* (a) and was in some subsequent cases accepted as settled, is now displaced by the House of Lords (*c*), and it is finally decided that a power to borrow "as occasion may require"—in other words, a power to borrow for the purposes and objects of the society—is valid although no limit is fixed (*c*).

A rule that the society is established "for the purpose of raising by

(*q*) 54 L. T. 360.
(*r*) *Attree* v. *Hawe*, 9 Ch. Div. 337, 349.
(*s*) *Mowatt* v. *Castle Steel Co.*, 34 Ch. Div. 58.
(*t*) *Gartside* v. *Silkstone Co.*, 21 Ch. D. 762; *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156, 171; *James* v. *Boythorpe Colliery Co.*, W. N. 1890, 28.
(*u*) *Looker* v. *Wrigley*, 9 Q. B. D. 397; *Blackburn Soc.* v. *Brooks*, 22 Ch. Div. 61; 9 App. Cas. 857, 865, 868; and see *Landowners Co.* v. *Ashford*, 16 Ch. D. 411, 437.
(*x*) *Cefn Cilcen Mining Co.*, 7 Eq. 88; *Waterlow* v. *Sharp*, 8 Eq. 501.
(*y*) 37 & 38 Vict. c. 42, s. 15.
(*z*) *E. p. Williamson*, 5 Ch. 309; *Blackburn Soc.* v. *Brooks*, 22 Ch. Div. 61; 9 App. Cas. 857; S. C. (No. 2), 29 Ch. Div. 902. As to liability of directors in the case of an unauthorized borrowing, see *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Chapleo* v. *Brunswick Building Soc.*, 5 C. P. D. 331; 6 Q. B. Div. 696.
(a) *Laing* v. *Reed*, 5 Ch. 4; *Moye* v. *Sparrow*, 18 W. R. 400, 402; 22 L. T. 154, *q.v.* also as to mortgage by deposit by a building society.
(*b*) *Hill's Case*, 9 Eq. 605.
(*c*) *Murray* v. *Scott*, 9 App. Cas. 519.

monthly subscriptions and *deposits on loans* a fund, &c.," is sufficient to authorize the company to borrow (*d*).

If with a borrowing power were coupled an authority to the directors to pledge the individual credit of the members, the latter would no doubt be bad as inconsistent with the nature of a building society, but the borrowing power might none the less be good (*d*).

A power to borrow "for the purposes of the society" is not validly executed by borrowing for another purpose (*e*).

If a building society borrows without a borrowing power (*f*), or in excess of a limited borrowing power (*g*), there is no debt and the society is not liable.

Building Societies Act, 1874.

Under the Building Societies Act, 1874 (*h*), a limited power of borrowing for the purposes of the society, is given to these societies. One of the limits is two-thirds of the amount for the time being secured to the society by mortgages from its members. This amount is not confined to the principal secured, but includes interest, fines, instalments not yet accrued due, and generally all that is secured by the mortgage and outstanding (*i*).

Sect. 15 (5) of that Act requires sects. 14 and 15 of the Act to be indorsed on securities given for deposits or loans made by the society. The provision is directory only. A security is not invalid by reason of the provision not being complied with (*k*).

Building society loans between 2nd Nov., 1874, and 22nd April, 1875.

In the interval between the dates at which the Building Societies Act, 1874, and the Building Societies Act, 1875, came into operation, a society under 6 & 7 Will. IV. c. 32, was, by virtue of the Act of 1874, to be deemed a society under the Act of 1874, and thus had the borrowing power given by the Act of 1874. A society therefore which had no borrowing power under its rules was during this period competent to borrow, and advances made during this period are legal debts (*k*).

Building society preference shares.

A rule by a building society authorizing the directors to issue deposit or paid-up shares at a fixed rate of interest, with a right of withdrawal in preference to ordinary unadvanced members, is valid (*l*). Shares may be paid up in full instead of by instalments (*l*).

Liability of directors of building society.

By the Building Societies Act, 1874, it is provided (s. 43) that "if any society under this Act receives loans or deposits in excess of the limits prescribed by this Act the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess."

Upon this section it has been held, (1) that it does not apply to transactions before the date at which the society is registered under the Act, and (2) that the words "limits prescribed by this Act" mean "limits prescribed by the rules of the society within the limits prescribed by this Act," and that if the directors borrow beyond the limit allowed by the rules they are liable, although the borrowing be not in excess of a limit allowed by the Act (*m*).

Equitable debt:—

Where a debt has been contracted which, owing to the want of a power to

(*d*) *Mutual Aid Soc.*, 29 Ch. D. 182; 30 Ch. Div. 434.

(*e*) *Davis' Case*, 12 Eq. 516.

(*f*) *E. p. Williamson*, 5 Ch. 309; *Blackburn Soc.* v. *Brooks*, 22 Ch. Div. 61; 9 App. Cas. 857; S. C. (No. 2), 29 Ch. Div. 902.

(*g*) *Chapleo* v. *Brunswick Building Soc.*, 5 C. P. D. 331; 6 Q. B. Div. 696; and see *Davis' Case*, 12 Eq. 516.

(*h*) 37 & 38 Vict. c. 42, s. 15.

(*i*) *Neath Building Soc.* v. *Luce*, 43 Ch. D. 158.

(*k*) *Guardian Soc.*, *Hawkins' Case*, 23 Ch. Div. 440, 452.

(*l*) *Guardian Soc.*, 23 Ch. Div. 441; *Murray* v. *Scott*, 9 App. Cas. 519.

(*m*) *Looker* v. *Wrigley*, 9 Q. B. D. 397.

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borrow, is not binding upon the company at law, it is often argued that the company, having had the benefit of the money, is nevertheless liable in equity.

The principle upon which a company has in some cases (*n*) been thus held liable in equity, is this: that where a company, owing debts which would be recoverable at law, borrows money for their payment, although the party lending the money can maintain no action, yet in equity he can stand in the place of the creditors whose debts have been paid with his money (*o*).

tracing money lent.

This principle was illustrated in the *Blackburn Building Society*. That society was not registered under the Act of 1874, and its rules contained no power to borrow. The society had borrowed largely by overdrawing its banking account, and this had gone on for many years. Upon the principle of *Clayton's Case* (*p*) a large part of the over-draft had been repaid by subsequent credits, but at the winding-up of the society there was still a large debt to the bankers. As security for the over-draft the bankers held deeds of the society deposited with them.

The official liquidators first brought an action (*q*) claiming delivery up of the deeds on the footing that there was no debt. In this action the official liquidators succeeded: the Court of Appeal held that the borrowing was unauthorized; that the bankers had no lien on the deeds by agreement or by course of dealing, but that they might hold the deeds as security for so much of their advances as had been applied, upon the principle of *Cork and Youghal Railway Co* (*r*), in paying legal debts of the society and as had not been repaid: but that the bankers could not have the benefit of the rule in *Clayton's Case* (*p*), and could not rely on settled account in respect of the pass-book. The bankers appealed: the society did not. The House of Lords affirmed the order: deciding nothing of course as to whether the bankers were entitled to the security which the Court of Appeal had allowed them, for the society had not appealed.

The official liquidators then brought an action (*s*) to recover from the bankers the moneys which the society had paid to the bankers, and which the bankers had applied in reducing the over-draft. In this action also the official liquidators succeeded, subject to this: that (1) where the bankers' moneys received by the society by way of over-draft had gone to pay withdrawal members the bankers were allowed to stand in the shoes of the withdrawal members (*t*), and (2) where the bankers' moneys were represented by securities obtained by the society with those moneys the bankers were allowed the benefit of such securities, according to their priority, without being postponed to amounts subsequently advanced by the society out of its own funds upon the properties comprised in such securities (*u*).

The doctrine of the subrogation of the lender to the rights of the creditor paid out of money borrowed *ultra vires* is not confined to debts in existence at the time of the advance, nor to cases in which the borrowed money goes direct to the creditor to whose rights the lender claims to be subrogated.

(*n*) *German Mining Co., E. p. Chippendale*, 4 D. M. & G. 19; *Cork and Youghal Railway Co.*, 4 Ch. 748; *Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675, n.; S. C. 19 Q. B. Div. 155; and see *Yorkshire Railway Wagon Co.* v. *Maclure*, 19 Ch. D. 478; W. N. 1882, 75. The cases as between the company and its directors are collected and commented upon in Lindley on Company Law, p. 380, *et seq.*

(*o*) *E. p. Williamson*, 5 Ch. 309, 313, Giffard, L. J.

(*p*) 1 Mer. 572.

(*q*) *Blackburn Soc.* v. *Brooks*, 22 Ch. Div. 61; 9 App. Cas. 857.

(*r*) 4 Ch. 748.

(*s*) *Blackburn Soc.* v. *Brooks* (No. 2), 29 Ch. Div. 902.

(*t*) Upon this, however, see 10 App. Cas. 40.

(*u*) 29 Ch. Div. 902.

The equitable doctrine is based upon a benevolent legal fiction, by which the money lent is still thought of by the Court as the money of the quasi-lender, and is supposed to have been advanced by him to the creditor against an assignment of the creditor's claim against the company. The Court, as the author of this benevolent fiction, can fix its own time and place for the enactment of the supposed bargain between the two parties, who have met and contracted together only in the imagination of the Court (*x*). And the test which the Court applies is not a test of time, but the test whether the amount of the company's liabilities has been really increased (*y*).

Where money has been obtained by illegal borrowing there is therefore a right of tracing and taking (if you can find it) the particular property acquired with the money. And even if tracing has become impossible, no doubt the surplus remaining after paying all debts and returning the members what is due to them must go to those who made the advances (*z*).

If the money be traced into a loan on security in respect of which a commission was charged for the advance and deducted from it, the whole amount secured is to be taken to have been traced into the security, and not the difference between that amount and the commission (a).

Withdrawal members:—

The rules of most building societies contain a clause enabling members upon giving a prescribed notice to withdraw, and in such case to receive payment in some manner provided by the rules.

right to payment;

The rights of a withdrawal member are to be determined simply upon the construction of the contract as found in the rules. A building society is neither a common-law partnership nor a joint stock company (*b*), but is a society of a special kind formed under particular Acts for special purposes. There is no *primâ facie* right in the members to hold all the members liable to contribute to loss (*b*), and in construing the contract you must not import any such right or exclude the withdrawal member from escaping without bearing loss if the rules properly construed allow of his doing so.

Neither are the rules as to withdrawal to be construed as applicable only to the society as a going concern (*c*), although some rules may, upon a proper construction, be so limited (*d*). Where the society is in liquidation the question to be determined is, what were the rights as between the members at the commencement of the winding-up (*e*), and then in administering the assets you have only to give effect to those rights.

If the contract is that the withdrawal member shall be paid only out of a special and definite fund, and owing to the winding-up that fund does not and never will exist, the withdrawal member has no priority over other members (*f*). But if at the date when the winding-up began the contract was that the property of the company shall be so divided that those who have given notice to withdraw shall be paid (not only in point of time but in point of right) before those who have not, then the withdrawal member will be paid in full, although the result may be to throw all the loss on those who have not given notice (*g*); and will take before those who stand

(*x*) *Wenlock* v. *River Dee Co.*, 19 Q. B. Div. 155, 165.

(*y*) *Blackburn Soc.* v. *Brooks*, 22 Ch. Div. 61, 71; *Wenlock* v. *River Dee Co.*, 19 Q. B. Div. 155, 165.

(*z*) *Guardian Soc.*, 23 Ch. Div. 451, 452.

(a) *Neath Building Soc.* v. *Luce*, 43 Ch. D. 158.

(*b*) See 8 App. Cas. 248; 12 App. Cas. 201.

(*c*) *Blackburn Soc.*, 24 Ch. Div. 421; *Walton* v. *Edge*, 10 App. Cas. 33; *Alliance Soc.*, 28 Ch. Div. 559. *Secus*, as to interest, *Blackburn Soc.*, W. N. 1886, 22.

(*d*) *Mutual Soc.*, 24 Ch. D. 425, n.

(*e*) See 24 Ch. Div. 432.

(*f*) *Mutual Soc.*, 24 Ch. D. 425, n., as explained by *Blackburn Soc.*, 24 Ch. Div 421; *Walton* v. *Edge*, 10 App. Cas. 33.

(*g*) *Blackburn Soc.*, 24 Ch. Div. 421; *Walton* v. *Edge*, 10 App. Cas. 33; *Norwich Building Soc.*, 45 L. J. (Ch.) 785; *North*

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behind him in date of withdrawal not only his principal but also such interest as the rules provide (*h*); and so also where the right of the withdrawal member extends not to all the property of the company, but to certain special funds (*i*).

Withdrawal members are no doubt not aptly described as creditors (*k*). The outside creditors of the society are to be paid first (*l*): the withdrawal members may perhaps be said to have as between themselves and the other members the rights of creditors after the outside creditors have been paid (*k*). The order of payment will be (1) outside creditors, including creditors for advances where the society has power to borrow; (2) withdrawal members; (3) other members (*m*).

After winding-up commenced the right to withdraw is no doubt at an end. The assets must be administered according to the rights of the parties at a moment not later than that at which winding-up commences. But the right to withdraw may cease at an earlier date, as at the moment when the society has become notoriously unable to meet its liabilities, and notices of withdrawal given or maturing after that time may not entitle the withdrawal member to payment in priority to other members (*n*).

liability to loss.

In *Brownlie* v. *Russell* (*o*) the rules allowed the advanced member to withdraw on payment of the difference between the advance with its interest and the amount of the instalments which he had paid: a borrowing member who gave notice of withdrawal *after winding-up commenced* was held entitled to withdraw on payment of this difference, although the result was in effect to allow him the whole sum (and not the dividend which the estate would produce upon the sum) which he had paid in respect of instalments. For although the winding-up put an end to the option of withdrawing and was equivalent to a compulsory withdrawal as against all the members, yet it did not take away the right of the mortgagor to redeem by paying what was due from him (*p*).

And upon the same principles the advanced members escaped any share of loss in *Tosh* v. *North British Society* (*q*).

But while advanced members are not, in the absence of special contract, liable to contribute to loss, yet they may, by contract of course, be rendered so liable (*r*). And a rule that "deficiency of income" shall be "apportioned by the directors" between the investing and borrowing members has been held to render advanced members liable for loss, and moreover liable to have the loss apportioned to them by the liquidator, and that not only for payment of outside creditors (*s*) but for providing the amount due to investing members (*t*).

The contract with the withdrawal member is, moreover, one which, like every other contract, can be varied only by the concurrence of both parties. The society cannot by resolution alter the contract. Thus where there was a withdrawal rule, and no rule as to the manner in which losses were to be

British Building Soc., Carrick's Case, 22 Sc. L. R. 833.

(*h*) *Middlesboro' Building Soc.*, 53 L. T. 203.

(*i*) *Alliance Soc.*, 28 Ch. Div. 559.

(*k*) 24 Ch. Div. 430; 10 App. Cas. 43.

(*l*) *Blackburn Soc.*, 24 Ch. Div. 421; *Walton* v. *Edge*, 10 App. Cas. 33; *Mutual Aid Soc.*, 29 Ch. D. 182; 30 Ch. Div. 434.

(*m*) See *Mutual Aid Soc.*, 29 Ch. D. 186.

(*n*) *Sunderland Building Soc.*, 24 Q. B. D. 394; *North British Building Soc., Carrick's Case*, 22 Sc. L. R. 833.

(*o*) 8 App. Cas. 235.

(*p*) 8 App. Cas. 254, 257, 260.

(*q*) 11 App. Cas. 489.

(*r*) In *North British Building Soc., Carrick's Case*, 22 Sc. L. R. 833, liability in the advanced member to share loss was inferred from his having a right to share profit.

(*s*) *Albion Building Soc*, 43 Ch. D. 410, n.

(*t*) *West Riding of Yorkshire Soc.*, 43 Ch. D. 407.

borne, and the society passed a resolution that 7*s.* 6*d.* in the pound should be deducted from the amounts at the credit of members, a member who gave notice to withdraw after the resolution was entitled to be paid the whole amount to his credit without deduction (*u*). In this case the society was not in liquidation.

A borrowing member who by his mortgage deed covenants to pay all subscriptions, fines, and other moneys which, according to the *rules for the time being* of the society, shall be payable by him in respect of the shares, has by his contract agreed to be bound by alterations in the rules, and may be rendered liable to contribute to loss (*x*).

The liability of members in a society under the Building Societies Act, 1874, is limited by s. 14, and in the case of an investment member the limit is the amount actually paid or "in arrear" on his share. A withdrawal member who has paid all his subscriptions up to withdrawal is not in arrear and is not liable at all (*y*).

Whether a withdrawal member ceases to be a member before he has been paid, *quære* (*z*). He certainly does not for all purposes, *e.g.* for ascertaining whether the statutory majority of members have signed an instrument of dissolution (a); and he is still so far a member as to be bound by the rule as to arbitration for the determination of his right to payment on withdrawal (*b*). But *quære* whether, after notice of withdrawal, the society could under a power of alteration contained in the rules alter the rule as to arbitration (*c*). Whether member after withdrawal.

A borrowing member who has redeemed his security or an investing member who has withdrawn and been paid the value of his shares, cannot afterwards be called upon to contribute (*d*).

As to the inspection of the register of mortgages in the case of a company subject to the jurisdiction of the Stannaries Court, see *supra*, p. 140. Stannaries.

Certain companies to publish statement entered in schedule.

44. Every limited banking company and every insurance company, and deposit, provident, or benefit society under this Act shall, before it commences business and also on the first Monday in February, and the first Monday in August in every year during which it carries on business, make a statement in the form marked D. in the first schedule hereto, or as near thereto as circumstances will admit, and a copy of such statement shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on, and if default is made in compliance with the provisions of this section the company shall be liable to a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

(*u*) *Auld* v. *Glasgow Soc.*, 12 App. Cas. 197.

(*x*) *Wilson* v. *Miles Platting Building Soc.*, 22 Q. B. Div. 381, n.; *Rosenberg* v. *Northumberland Building Soc.*, 22 Q. B. Div. 373.

(*y*) *Sheffield Building Soc.*, 22 Q. B. D. 470.

(*z*) *Blackburn Soc.*, 24 Ch. Div. 421; *Walton* v. *Edge*, 10 App. Cas. 33.

(a) *Sibun* v. *Pearce*, 44 Ch. Div. 354.

(*b*) *Walker* v. *Gen. Mutual Building Soc.*, 36 Ch. Div. 777.

(*c*) *Christie* v. *Northern Counties Soc.*, 43 Ch. D. 62, 67.

(*d*) *West Riding of Yorkshire Soc.*, W. N. 1890, 163.

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Every member and every creditor of any company mentioned in this section shall be entitled to a copy of the above-mentioned statement on payment of a sum not exceeding sixpence.

List of directors to be sent to registrar.

45. Every company under this Act, and not having a capital divided into shares (*a*), shall keep at its registered office a register containing the names and addresses and the occupations of its directors or managers, and shall send to the Registrar of Joint Stock Companies a copy of such register, and shall from time to time notify to the registrar any change that takes place in such directors or managers.

(*a*) As to other companies, s. 26.

Penalty on company not keeping register of directors.

46. If any company under this Act, and not having a capital divided into shares, makes default in keeping a register of its directors or managers, or in sending a copy of such register to the registrar in compliance with the foregoing rules, or in notifying to the registrar any change that takes place in such directors or managers, such delinquent company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Promissory notes and bills of exchange.

47. A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf or on account of the company by any person acting under the authority of the company.

Acceptance on behalf of company.

This section does not require that the making, accepting, or indorsing, shall be "expressed to be" on behalf of the company, and it is therefore not necessary that the signature should purport on the face of the instrument to be on behalf of the company (*e*).

Thus a bill of exchange addressed to the company, and signed "A. B.; C. D.; directors of the company," bound the company and did not bind the directors (*e*).

But where four directors signed their names to a promissory note "We the directors of the A. Company promise to pay," and at one corner the seal was affixed with "witnessed by L. L.," the directors were personally liable, for there was nothing to exclude their personal liability, and the affixing the seal was not sufficient to shew that the signature was on behalf of the company (*f*).

(*e*) *Okell* v. *Charles*, 34 L. T. 822.

(*f*) *Dutton* v. *Marsh*, L. R. 6 Q. B. 361; *Courtauld* v. *Sanders*, 15 W. R. 906; 16 L. T. 562; and see cases there cited; and *Gray* v. *Raper*, L. R. 1 C. P. 694; *Penkivil* v. *Connell*, 5 Ex. 381; 19 L. J. (Ex.) 305; *Healey* v. *Story*, 3 Ex. 3, in which agents have been held liable; *Alexander* v. *Sizer*, L. R. 4 Ex. 102, in which the secretary was held not liable.

Under an agreement headed as an agreement between the company and A. by which "we the undersigned three of the directors" agreed to repay A.'s advance, after hearing parol evidence to explain the ambiguity of the agreement, the directors were held personally liable (*g*).

As to what is a sufficient making on behalf of the company by persons acting under the authority of the company, see *Ex parte Agra Bank* (*h*).

In a company, one of whose objects was to accept and indorse bills, it was held that bills accepted *modo et formâ* by the authority of the board of directors were binding on the company, although a collateral provision as to the deposit of securities to a certain amount had not been complied with (*i*). And as to the mode in which authority to accept bills on behalf of such a company may be given, Giffard, L.J., said: "I can have no hesitation in saying that it was not necessary for the directors to pass any resolution in order to make the acceptance of bills binding on the company, or in saying that if the directors met together, and the chairman with their knowledge accepted a bill of exchange, that would bind the company. In the same way if a bill of exchange had been accepted by the chairman without due authority, and the directors afterwards at a meeting, knowing that the acceptance had been given and dealt with, acted on the footing that the bill had been properly accepted, I should not have the least hesitation in saying that the acceptance would bind the company" (*k*).

Power of companies to make bills or notes.

"Without a special authority, express or implied, a corporation has no power to make, indorse, or accept bills or notes" (*l*); and see *Bateman* v. *Mid-Wales Railway Co.* (*m*).

A power to issue bills need not, however, be given in express terms: and the cases appear to go to this, that a corporation may issue bills where the terms of the instrument under which it is constituted authorize, upon a fair construction, the issuing bills, or where the business of the corporation is one which cannot, in its ordinary course, be carried on without bills (*n*).

This Act does not give the power of accepting bills of exchange or issuing negotiable instruments to companies as an incident of their incorporation under the Act, but leaves the power of a company so incorporated, with regard to negotiable securities, to be determined upon the proper construction of the memorandum and articles of association.

Where the memorandum of association contained the words, "In order to the attainment of the main object of the company" [the formation of a *société anonyme* in Peru for the construction of railways there] "they may do, either in the United Kingdom or Peru, or elsewhere, whatsoever they from time to time think incidental or conducive thereto," it was held that, although the object with a view to which the company was incorporated was not one which would confer on the company, as incident to carrying on its business, the power of issuing negotiable instruments, yet that these words were so wide as necessarily to include a power of that kind; and the articles of association providing that "the board shall be entrusted with, and may exercise and perform, the following powers and duties, viz.:—(A) The general conduct and management of the business of the company, and

(*g*) *McCollin* v. *Gilpin*, 5 Q. B. D. 390; 6 Q. B. Div. 516.
(*h*) *Re Barber & Co.*, 9 Eq. 725, 734.
(*i*) *Land Credit Co. of Ireland, E. p. Overend. Gurney, & Co.*, 4 Ch. 460.
(*k*) Ibid. 473.
(*l*) Byles on Bills, 13th ed. p. 71.
(*m*) L. R. 1 C. P. 499.
(*n*) *Per* Cairns, L.J., 2 Ch. 622; *cf.* *General Estates Co., E. p. City Bank*, 3 Ch. 758, 762; *Blakeley Ordnance Co., E. p. Mercantile Bank*, W. N. 1867, 147. As to power of manager to give a promissory note, *Cunningham & Co., Simpson's Claim*, 36 Ch. D. 532.

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especially the doing of all things, and the making and performing of all contracts, which in their judgment are necessary and proper for the purpose of carrying into effect the object mentioned in the memorandum of association," it was held that the power given to the company by the memorandum was clearly delegated by the articles to the directors (*o*).

Liability of directors.

If directors of a company which has no power to accept bills do accept a bill in such way as to purport to bind the company, they are liable to a *bonâ fide* holder for misrepresentation of fact in representing that they had authority to accept on behalf of the company (*p*).

Prohibition against carrying on business with less than seven members.

48. If any company under this Act carries on business when the number of its members is less than seven (*α*) for a period of six months after the number has been so reduced, every person who is a member of such company during the time that it so carries on business after such period of six months, and is cognizant of the fact that it is so carrying on business with fewer than seven members, shall be severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same, without the joinder in the action or suit of any other member.

(*α*) s. 79 (3).

Provisions for Protection of Members.

General meeting of company.

49. A general meeting (*α*) of every company under this Act shall be held once at the least in every year (*β*).

(*α*) Sch. I. Table A. (29)—(43).
(*β*) *i.e.* a year from 1st January to 31st December, *Gibson* v. *Barton*, L. R. 10 Q. B. 329; *Edmonds* v. *Foster*, 33 L. T. 690.

A general meeting is to be held within four months after registration (*q*).

This meeting may be either an ordinary or an extraordinary meeting. If the articles follow Table A. the first directors retire at the first ordinary meeting (*r*), but if an extraordinary meeting be called to satisfy the Act, their retirement may be postponed (*s*).

Mining partnerships within the Stannaries.

As to meetings and proceedings in the case of cost book mining companies in the Stannaries, see the Stannaries Act, 1869 (32 & 33 Vict. c. 19), ss. 4–8, and the Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 25.

Power to alter regulations by special resolution.

50. Subject to the provisions of this Act, and to the conditions contained in the memorandum of association (*α*), any company formed under this Act may, in general meeting from time to time, by passing a special resolution in manner hereinafter mentioned (*β*), alter all or any of the regulations of the company contained in the articles of association (*γ*) or in the table marked A. in the first schedule, where such table is applicable to the company, or

(*o*) *Peruvian Railways Co.* v. *Thames and Mersey Marine Insurance Co.*, 2 Ch. 617; and see *General Estates Co., E. p. City Bank*, 3 Ch. 758.
(*p*) *West London Commercial Bank* v. *Kitson*, 12 Q. B. D. 157; 13 Q. B. Div. 360.
(*q*) Comp. Act, 1867, s. 39.
(*r*) Table A. art. (58).
(*s*) *Lord Claud Hamilton's Case*, 8 Ch. 548.

make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution (δ). Sect. 50.

(α) ss. 6–13.
(β) s. 51.
(γ) ss. 14–16.
(δ) ss. 176, 196, as to companies not formed under this Act; 32 & 33 Vict. c. 19, s. 7, as to mining companies in the Stannaries.

Alteration of the regulations.

The permanence of the general constitution and frame of the company is secured by the provisions relating to the memorandum of association (*t*). The power here given of altering the articles cannot be extended so as to authorize an alteration in the memorandum by the introduction into the articles of a clause so providing. Such a clause is contrary to the statute, and is wholly nugatory and void (*u*). So on the other hand the power of alteration given by this section cannot be rejected by the company. A company cannot contract itself out of the section and deprive itself of the power of altering its articles or some of them (*x*).

The memorandum will not be construed with such excessive strictness as to prevent a majority from doing against the will of a minority everything which does not fall within its very words (*y*), and in matters upon which the memorandum is ambignous (*z*), or silent (a), it may be explained by the contemporaneous articles (*b*). But the principle of *Natusch* v. *Irving* (*c*), and *Const* v. *Harris* (*d*) forbids the will of a majority imposing on a minority anything really outside its scope.

Meaning of "regulations."

The word "regulations" in this section is not confined, it is conceived, to regulations in matters of detail, but (subject to what is said presently) extends to all such matters as having regard to ss. 8, 9, and 10, are properly introduced into the articles as distinguished from the memorandum. Thus in the case of an unlimited company or a company limited by guarantee it will include the regulations as to capital (*e*). The word "regulations" is the word used in sect. 14 and also at the head of Table A. as the word expressive of the whole contents of the articles.

Preference shares.

There are, however, some matters which so form an essential part of the original contract of partnership as to be incapable of alteration by the will of a majority against a minority of the members. Of these the most familiar and the one which is the subject of authority is the right of the member to that share in the profits which was originally agreed upon. Thus unless the original constitution of the company allows of the issue of preference

(*t*) ss. 6–13.
(*u*) *Ashbury Railway Co.* v. *Riche*, L. R. 7 H. L. 653; and see *ante*, s. 12, n.
(*x*) *Walker* v. *London Tramways Co.*, 12 Ch. D. 705.
(*y*) *Simpson* v. *Westminster Palace Hotel Co.*, 2 D. F. & J. 141; 8 H. L. C. 712; *Featherstonhaugh* v. *Lee Moor Co.*, 1 Eq. 318, where there was in the articles a power for two-thirds of the shareholders to bind the company.
(*z*) *Phœnix Bessemer Co.*, 32 L. T. 854; 44 L. J. (Ch.) 683; *London Financial Association* v. *Kelk*, 26 Ch. D. 107, 133, 135.
(a) *Harrison* v. *Mexican Railway Co.*, 19 Eq. 358.
(*b*) See also *Anderson's Case*, 7 Ch. Div. 75, 98, 106, and *ante*, p. 15.
(*c*) Gow on Partnership, 3rd ed. 398; 2 Coop. C. C. 358.
(*d*) Turn. & Russ. 496.
(*e*) See *ante*, s. 12, note.

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shares the company cannot issue them (*f*), and cannot by special resolution alter its regulations so as to acquire power to issue them (*g*). For the issue of preference shares would be an alteration of the rights of the ordinary shareholder in respect of dividend, and this a majority cannot impose on a minority. So in the case of an unlimited company having a capital divided into shares, the same principle, it is conceived, would prevent a majority so altering the regulations by special resolution as to reduce (*h*) or increase the nominal amount of the shares, *i.e.* the amount which it has been agreed to subscribe if necessary to the going company: for this would be allowing the majority to diminish their own liability or increase that of the minority in respect of the amount of capital upon which it was originally agreed to trade.

Where priorities as between different classes of shares are intended at the time of the incorporation of the company, the memorandum of association should contain provisions to that effect (*i*), for silence in the memorandum implies equality amongst the shareholders (*k*). But a power in contemporaneous articles of association to increase the capital by the issue of preference shares is good (*l*).

A power to borrow may, no doubt, be given by special resolution (*m*).

Company cannot reject power of alteration.

It was very common with the older companies to provide by the articles or deed of settlement that certain articles should be "fundamental," and an article was inserted that the "fundamental" provisions should be unalterable. In the case of such companies, whether formed under this Act or formed otherwise and afterwards incorporated under this Act, it is conceived that this attempt to prevent alteration is altogether futile. The company cannot contract itself out of the power given by this section (*n*).

Preference shares.

In the absence of authority for the purpose, the issue of preference shares is *ultra vires* (*o*), because it is a variation of the constitution of the company; and for the same reason the articles cannot be altered so as to give the power (*p*). And if the articles give power to issue preference shares to a limited number, a special resolution cannot authorize an increase in the number (*q*).

These decisions rest upon the principle that in the absence of express provision it is an implied condition that the shareholders are entitled to rank equally in respect of dividend. But it is not necessary, although it is expedient (*r*), that express provision on the subject should be contained in the memorandum of association, it is sufficient if it be found in the contemporaneous articles—for in any matter not inconsistent with but explanatory of the memorandum the articles may control it (*s*).

Therefore, where the articles provided that new shares might be issued with such "privileges" as the company should think fit, there was power to

(*f*) *Hutton* v. *Scarborough Hotel Co.* (No. 1), 2 Dr. & Sm. 514; 4 D. J. & S. 672.

(*g*) S. C. 2 Dr. & Sm. 521.

(*h*) See *Smith* v. *Goldsworthy*, 4 Q. B. 430.

(*i*) *Ashbury* v. *Watson*, 30 Ch. Div. 376, 386.

(*k*) *Hutton* v. *Scarborough Hotel Co.*, 2 Dr. & Sm. 514, 521; 4 D. J. & S., 672.

(*l*) *South Durham Brewery Co.*, 31 Ch. Div. 261.

(*m*) *Bryon* v. *Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123; *cf. Peninsular Co.* v. *Fleming*, 27 L. T. 93.

(*n*) *Walker* v. *London Tramways Co.*, 12 Ch. D. 705.

(*o*) *Hutton* v. *Scarborough Hotel Co.* (No. 1), 2 Dr. & Sm. 514; 4 D. J. & S. 672; 12 L. T. 228, 289; 13 W. R. 574, 631; *Moss* v. *Syers*, 11 W. R. 1046.

(*p*) *Hutton* v. *Scarborough Hotel Co.* (No. 2), 2 Dr. & Sm. 521; 13 L. T. 57; 13 W. R. 1059; 6 N. R. 376.

(*q*) *Melhado* v. *Hamilton*, 28 L. T. 578; 29 L. T. 364.

(*r*) *Ashbury* v. *Watson*, 30 Ch. Div. 378, 386, *vide supra*.

(*s*) See *ante*, p. 15.

issue preference shares with privilege "so far as regards participation in dividends, or any other right whatever" (*t*).

And power for the company to increase its capital, "with or without special privileges or preferences" . . . "as it may from time to time deem expedient," was held to authorize the creation of shares with preference in repayment of capital, as well as in payment of dividend (*u*).

In *Sheffield Nickel Co.* v. *Unwin* (*x*) the company released its vendor from a guarantee of dividend into which he had entered by an agreement which was set out in and confirmed by the articles. This was held valid. The natural curiosity of the reader to know what can have been the argument against its validity is left ungratified by the report, which leaves one to guess both the facts and the arguments. From the cases cited for the plaintiffs, however, one may, perhaps, without doing them injustice, infer that their argument must have been that a guarantee of dividend is unalterable upon the same principle as the right of the shareholders *inter se* to dividend is unalterable in the absence of special power to alter it. If this was so, one cannot wonder that it failed. It is conceived that a special resolution was passed (*y*).

Power to cancel shares.

But it is not of course every alteration in respect of the capital of a company that is *ultra vires*. Thus within certain limits and for certain purposes it may be that a company which has not under its original constitution power to take surrenders of shares, or to cancel shares, may under this section give itself such powers (*z*). The question of the validity of powers of surrender is discussed under Comp. Act, 1867, s. 9.

Special resolutions under which two shares with £5 paid were given for one share with £10 paid, and one share with £5 paid was given for two shares with £2 10s. paid, were held valid, the exchange having been made with consent, and not against the will of any of the holders (*z*).

Comp. Acts, 1867–1880.

The Companies Acts, 1867 to 1880, give some additional powers of dealing with the capital, viz., powers of reduction of capital and shares (a): of subdivision of shares (*b*): of difference between different shareholders in the amount of calls to be paid, and in the time of their payment (*c*): of creating reserve liability (*d*): of returning undivided profits in reduction of paid-up capital (*e*).

Removal of agent.

Where the employment of A. as manager and agent was made a prominent condition in the prospectus, and expressly provided for by the articles, *quære* whether he could be removed except by the authority of a general meeting (*f*).

Definition of "special resolution."

51. A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths (*a*) of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the

(*t*) *Harrison* v. *Mexican Railway Co.*, 19 Eq. 358.
(*u*) *Bangor Slate Co.*, 20 Eq. 59.
(*x*) 2 Q. B. D. 214.
(*y*) See 2 Q. B. D. p. 221.
(*z*) *Teasdale's Case*, 9 Ch. 54, 58.
(a) Comp. Act, 1867, s. 9; Comp. Act, 1877, ss. 3, 5.
(*b*) Comp. Act, 1867, s. 21.
(*c*) Ibid. s. 24.
(*d*) Comp. Act, 1879, s. 4.
(*e*) Comp. Act, 1880, s. 3.
(*f*) *Mair* v. *Himalaya Tea Co.*, 1 Eq. 411.

Sect. 51. intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed: At any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same: Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held whenever such notice is given and meeting held in manner prescribed by the regulations of the company: In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company (β).

(α) This will be a numerical majority, not regarding number of votes to which each is entitled, unless a poll is demanded. See Table A. (42), note. *Horbury Bridge Co.*, 11 Ch. Div. 109.

(β) 32 & 33 Vict. c. 19, ss. 4–6, as to mining companies in the Stannaries.

Interval of not less than fourteen days.

If there is not an interval of fourteen clear days between the two meetings the resolution is not a valid special resolution (g).

But where the power to increase capital was by special resolution, a director who took new shares in capital created by a special resolution which was invalid for want of the proper interval was nevertheless liable as a contributory (h). Obviously the shareholders could waive an irregularity in respect of a provision in their own regulations, introduced for their own protection, and could acquiesce in the creation of the shares despite the irregularity.

Notice.

"At any general meeting of which notice specifying the intention to propose such resolution has been duly given":—

Notices must comply strictly with the provisions of the Act in respect of which they are issued, and if at any meeting it is proposed to pass a resolution in favour of proceeding under any particular provisions of the Act, the notice must clearly give the shareholders to understand that it is intended so to proceed.

Thus, Table B. of the Act of 1856 (19 & 20 Vict. c. 47) provides by art. (28) that "Seven days' notice . . . specifying the place . . . and *purpose* for which any general meeting is to be held, shall be given by advertisement . . ." In a company incorporated under that Act, and which incorporated Table B. with its short articles of association, notice was given by advertisement that it was intended voluntarily to wind up the company, but nothing was said

(g) *Railway Sleepers Supply Co.*, 29 Ch. D. 204.

(h) *Miller's Dale Co.*, 31 Ch. D. 211; *Briton Medical Association, E. p. Littleton*, W. N. 1889, 123.

about the appointment of a liquidator. The appointment of a liquidator at the meeting was held invalid (*i*). This case, however, has been doubted (*k*). **Sect. 51.**

So, under the Act of 1862, where notice was given of a meeting "for the purpose of considering, and, if so determined on, of passing a resolution to wind up the company voluntarily," and at the meeting a resolution was passed "that it has been proved to the satisfaction of the company that the company cannot, by reason of its liabilities, continue its business, and it is advisable to wind up the same," and appointing a liquidator; it was held that the resolution was invalid as an extraordinary resolution under sect. 129 (3), for that the notice, though sufficient for the purpose of passing a resolution requiring confirmation, was insufficient for the purpose of passing a resolution requiring no confirmation (*l*). Sect. 129.

So again where the notice was "To take into consideration the present position of the company's affairs, and the desirability of bringing its operations to a close, and to pass a resolution for the voluntary winding-up of the company, should it be determined to do so," and to appoint liquidators: and at the meeting a resolution was passed in the words of sect. 129 (3), this was invalid, and a supervision order which had been made was discharged (*m*).

To constitute a valid notice for the purpose of an extraordinary resolution under sect. 129 (3), though it may not be necessary to follow the precise terms of that clause, yet it is necessary to give the shareholders a notice which will give them to understand that it is proposed to proceed under that clause (*l*).

If the notice follows the exact words of s. 129 (3) every shareholder will be taken to know that the resolution will not require confirmation (*n*).

Again, where, in a company whose articles contained a power of amalgamation, a notice was given of a meeting "when the agreement [for amalgamation] entered into with the *Bank of Hindustan, Limited*, will be submitted for approval, and resolutions to voluntarily wind up the bank and appoint liquidators will be proposed," it was held that, taking the notice in connection with the fact of there being in the articles a power to amalgamate, the above was not a sufficient notice that this was to be a proceeding under sect. 161 (*o*). Sect. 161.

But Giffard, V.C., there intimated that any sufficiently plain notice would have been effectual, as if the notice had gone on to say, "This is to be carried out under the Act"—or, if it had given notice to the parties that it was intended to pass a resolution giving authority to the liquidators to carry out the arrangement.

For notices are not to be construed with excessive strictness, or mere technicalities introduced into their consideration, provided they give the shareholders proper notice on the subject of that which is proposed to be done (*p*).

And notwithstanding what was said by Turner, L.J., in *Re Imperial*

(*i*) *Stearic Acid Co.*, 11 W. R. 980; 2 N. R. 544; see also *Anglo-Californian Gold Mining Co.* v. *Lewis*, 6 H. & N. 174; *cf.* as to the necessity of specifying the resolution which is to be submitted; *Dean* v. *Bennett*, 9 Eq. 625; 6 Ch. 489.

(*k*) *Welsh Flannel Co.*, 20 Eq. 360; see also note to s. 133 (2).

(*l*) *Bridport Old Brewery Co.*, 2 Ch. 191.

(*m*) *Silkstone Fa'l Co.*, 1 Ch. Div. 38.

(*n*) *Stone* v. *City and County Bank*, 3 C. P. D. 282, 296.

(*o*) *Imperial Bank of China, &c.*, v. *Bank of Hindustan, &c.*, 6 Eq. 91; see also *Irrigation Co. of France, E. p. Fox*, 6 Ch. 176, 193.

(*p*) *Wright's Case*, 12 Eq. 335, n., 345, n. And see Table A., (35), note, *infra*.

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Bank of China, &c. (*q*), it does not follow that because the notice and the resolution include two things, as amalgamation and winding-up, and one of them, as the amalgamation, turns out to be *ultra vires*, the notice and the resolution become as respects the other, viz., the winding-up, invalid (*r*).

A resolution which, for want of sufficient notice, is invalid, cannot be ratified by a subsequent general meeting, for the powers of a general meeting are limited to acts within the articles (*s*).

Conditional notice.

The notice of a meeting must be not contingent or conditional but absolute. A notice of a first meeting to pass certain special resolutions, stating further that should the resolutions be duly passed they will be submitted for confirmation on a day named, is an invalid notice so far as the second meeting is convened, for it is to be held only upon a contingency which at the date of the notice is undetermined (*t*).

"Conclusive evidence."

The declaration of the chairman is by this section made "conclusive evidence" that the resolution has been carried. Hall, V.C., in one case construed this in the largest sense. His Lordship made a supervision order subject to the production of an affidavit stating that the voluntary resolution had been passed by the statutory majority. On the following petition day it was stated that such an affidavit could not be made, as in point of fact it could not be proved that there had been a statutory majority, although if a poll had been demanded there would have been such majority. The chairman of the meeting had however declared the resolution duly passed. His Lordship held this declaration sufficient, and dispensed with the affidavit previously required (*u*).

Of course if the chairman's ruling is challenged by legal proceedings it is not conclusive (*x*).

The chairman has *primâ facie* authority to decide all questions which arise at the meeting and which necessarily require decision at the time, and the entry in the minute book of his decision is *primâ facie* evidence of the correctness of the decision, and the onus of displacing that evidence is on those who impeach its correctness (*y*).

If the chairman improperly refuse to put an amendment, the resolution if passed is not binding (*z*).

Amendments.

Sometimes a company's articles contain regulations as to giving notice of amendments to resolutions. In the absence of any such regulations it is conceived that it would be competent to a meeting to entertain and vote upon any amendment pertinent to the subject matter of the resolution of which notice has been given (a). Having regard to the words of this section "notice specifying the intention to propose *such* resolution," *quære* whether a special resolution deriving as it does its efficacy from the statute must be passed in the very words of which notice has been given, or whether an amendment is not admissible.

Provision where no regulations as to meetings.

52. In default of any regulations as to voting (*a*) every member shall have one vote, and in default of any regulations as to summoning general meetings a meeting shall be held to be duly

(*q*) 1 Ch. 339, 347.

(*r*) *Cleve* v. *Financial Corporation*, *Williams* v. *Financial Corporation*, 16 Eq. 363, and see s. 129, n.

(*s*) *Lawes' Case*, 1 D. M. & G. 421.

(*t*) *Alexander* v. *Simpson*, 43 Ch. Div. 139.

(*u*) *Brynmawr Coal Co.*, W. N. 1877, 45.

(*x*) *Horbury Bridge Co.*, 11 Ch. Div. 109; *Pender* v. *Lushington*, 6 Ch. D. 70; *Harben* v. *Phillips*, 23 Ch. Div. 14.

(*y*) *Indian Zoedone Co.*, 26 Ch. Div. 70.

(*z*) *Henderson* v. *Bank of Australasia*, 62 L. T. 869, and on App. 6 Times, L. R. 424.

(a) The question arose in *Patent Cocoa Fibre Co.*, W. N. 1876, 60, 132; 24 W. R. 483.

summoned of which seven days' notice (β) in writing has been served on every member in manner in which notices are required to be served by the table marked A. in the first schedule hereto (γ), and in default of any regulations as to the persons to summon meetings five members shall be competent to summon the same, and in default of any regulations as to who is to be chairman of such meeting, it shall be competent for any person elected by the members present to preside (δ).

(α) Scb. I. Table A. (44)—(51).
(β) Table A. (35).
(γ) Table A. (95)—(97).
(δ) Table A. (29)—43).

Members resident abroad.

As to the services of notices of general meetings on members resident out of the jurisdiction:—"It seems to me that the Act has reference only to shareholders who can be reached by the ordinary English post" (*b*). But, *quære*, on what ground can this be so?

Voting.

As to the exercise of the power of voting see note to Table A., art. (44).

"Regulations."

"In default of any regulations" includes not only the case of there being no regulations at all, but also the case of there being regulations which have become inoperative. Thus where by the articles the power of calling meetings was given to the directors and to no one else, and there were no directors, this section became applicable (*c*).

Registry of special resolutions.

53. A copy of any special resolution that is passed by any company under this Act shall be printed and forwarded to the Registrar of Joint Stock Companies, and be recorded by him: If such copy is not so forwarded within fifteen days from the date of the confirmation of the resolution, the company shall incur a penalty not exceeding two pounds for every day after the expiration of such fifteen days during which such copy is omitted to be forwarded, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Under s. 129 a company may go into voluntary liquidation either by a special or an extraordinary resolution. There is no provision in the Act for registering extraordinary resolutions. But the registrar does, it is believed, receive and register extraordinary resolutions, and they should be registered both because obviously the record at Somerset House of a company's existence is otherwise incomplete, and also because the result is to relieve the company from subsequent demand by the office for the yearly returns which the Act requires.

A case has arisen in which the registrar, in ignorance of the voluntary winding-up, which was by extraordinary resolution, had struck the company off the register and dissolved it under sect. 7 of the Act of 1880, and application had to be made to restore it (*d*).

Copies of special resolutions.

54. Where articles of association have been registered, a copy of every special resolution for the time being in force shall be

(*b*) *Per* Malins, V.C., *Union Hill Silver Co.*, 22 L. T. 400.
(*c*) *Brick and Stone Co.*, W. N. 1878, 140.
(*d*) *Outlay Assurance Soc.*, 34 Ch. D. 479.

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annexed to or embodied in every copy of the articles of association that may be issued after the passing of such resolution: Where no articles of association have been registered, a copy of any special resolution shall be forwarded in print to any member requesting the same on payment of one shilling, or such less sum as the company may direct: And if any company makes default in complying with the provisions of this section it shall incur a penalty not exceeding one pound for each copy in respect of which such default is made; and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

By the Companies Act, 1867, sect. 8, a copy of the special resolution there mentioned is to be annexed to every copy of the memorandum of association, and default is to be a default under this section.

Execution of deeds abroad.

55. Any company under this Act may, by instrument in writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom; and every deed signed by such attorney, on behalf of the company, and under his seal, shall be binding on the company, and have the same effect as if it were under the common seal of the company.

Companies Seals Act.

See also the Companies Seals Act, 1864, 27 & 28 Vict. c. 19, "An Act to enable Joint Stock Companies carrying on Business in Foreign Countries to have Official Seals to be used in such Countries." This section is not repealed or affected by that Act (see sect. 7 thereof).

Examination of affairs of company by inspectors.

56. The Board of Trade may appoint one or more competent inspectors to examine into the affairs of any company under this Act, and to report thereon, in such manner as the Board may direct, upon the applications following: (that is to say),

(1.) In the case of a banking company that has a capital divided into shares, upon the application of members holding not less than one-third part of the whole shares of the company for the time being issued:

(2.) In the case of any other company that has a capital divided into shares, upon the application of members holding not less than one-fifth part of the whole shares of the company for the time being issued:

(3.) In the case of any company not having a capital divided into shares, upon the application of members being in number not less than one-fifth of the whole number of persons for the time being entered on the register of the company as members.

57. The application shall be supported by such evidence as the Board of Trade may require for the purpose of shewing that the applicants have good reason for requiring such investigation to be made, and that they are not actuated by malicious motives in instituting the same; the Board of Trade may also require the applicants to give security for payment of the costs of the inquiry before appointing any inspector or inspectors. Application for inspection to be supported by evidence.

58. It shall be the duty of all officers and agents of the company to produce for the examination of the inspectors all books and documents in their custody or power: Any inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly: If any officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, he shall incur a penalty not exceeding five pounds in respect of each offence. Inspection of books.

The inspection of the books of account by members is provided for by Table A. (78).

59. Upon the conclusion of the examination the inspectors shall report their opinion to the Board of Trade: Such report shall be written or printed, as the Board of Trade directs: A copy shall be forwarded by the Board of Trade to the registered office of the company, and a further copy shall, at the request of the members upon whose application the inspection was made, be delivered to them or to any one or more of them: All expenses of and incidental to any such examination as aforesaid shall be defrayed by the members upon whose application the inspectors were appointed, unless the Board of Trade shall direct the same to be paid out of the assets of the company, which it is hereby authorized to do. Result of examination, how dealt with.

60. Any company under this Act may by special resolution (*a*) appoint inspectors for the purpose of examining into the affairs of the company. The inspectors so appointed shall have the same powers and perform the same duties as inspectors appointed by the Board of Trade (*β*), with this exception, that, instead of making their report to the Board of Trade, they shall make the same in such manner and to such persons as the company in general meeting directs; and the officers and agents of the company shall incur the same penalties, in case of any refusal to produce any book or document hereby required to be produced to such inspectors, or to answer any question, as they would have incurred if such inspector had been appointed by the Board of Trade. Power of company to appoint inspectors.

(*a*) s. 51. (*β*) ss. 56–59.

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Report of inspectors to be evidence.

61. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in such report.

Notices.

Service of notices on company.

62. Any summons, notice, order, or other document required to be served upon the company, may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company at their registered office (*a*).

(*a*) s. 39.

A section corresponding to this is contained in sect. 135 of the Companies Clauses Act (8 & 9 Vict. c. 16), sect. 134 of the Land Clauses Act (8 & 9 Vict. c. 18), and sect. 138 of the Railway Clauses Act (8 & 9 Vict. c. 20).

Under Order IX. r. 8, a writ of summons may be served in manner here provided. The point discussed in *White* v. *Land and Water Co.* (*e*) has thus become unimportant.

A company whose registered office is in Scotland, but also carrying on business in England, cannot be served with a writ of summons in England (*f*).

But a foreign corporation carrying on business in England is liable to be sued in an English court, and may be served in the same manner as an English corporation aggregate (*g*).

This Act does not contain any sections similar to sects. 136, 137, 138, of the Companies Clauses Act as to service by the company on the shareholders, but regulations will be found in Table A. (95)–(97).

As to the service of a winding-up petition, see Gen. Order, Nov. 1862, rule 3, *infra*; as to service on contributories and creditors of the company, Ibid. rules 63, 64.

Rules as to notices by letter.

63. Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post-office.

Authentication of notices of company.

64. Any summons, notice, order, or proceeding requiring authentication by the company may be signed by any director, secretary, or other authorized officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print.

In bankruptcy a corporation may prove a debt, vote, and otherwise act by an agent duly authorized under the seal of the corporation (*h*).

(*e*) W. N. 1883, 174; and see *Towne* v. *London Steamship Co.*, 28 L. J. (C. P.) 217.

(*f*) *Watkins* v. *Scottish Insurance Co.*, 23 Q. B. D. 285.

(*g*) *Haggin* v. *Comptoir d'Escompte*, 23 Q. B. Div. 519.

(*h*) Bankruptcy Act, 1883, s. 148.

Legal Proceedings.

Recovery of penalties.

65. All offences under this Act made punishable by any penalty may be prosecuted summarily before two or more justices, as to England, in manner directed by an Act passed in the session holden in the eleventh and twelfth years of the reign of Her Majesty Queen Victoria, chapter forty-three, intituled "An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders," or any Act amending the same; and as to Scotland, before two or more justices or the sheriff of the county, in manner directed by the Act passed in the session of Parliament holden in the seventeenth and eighteenth years of the reign of Her Majesty Queen Victoria, chapter one hundred and four, intituled "An Act to amend and consolidate the Acts relating to Merchant Shipping," or any Act amending the same, as regards offences in Scotland against that Act not being offences by that Act described as felonies or misdemeanours; and as to Ireland, in manner directed by the Act passed in the session holden in the fourteenth and fifteenth years of the reign of Her Majesty Queen Victoria, chapter ninety-three, intituled "An Act to consolidate and amend the Acts regulating the Proceedings of Petty Sessions and the Duties of Justices of the Peace out of Quarter Sessions in Ireland," or any Act amending the same.

11 & 12 Vict. c. 43.

17 & 18 Vict. c. 104.

14 & 15 Vict. c. 93.

Application of penalties.

66. The justices or sheriff imposing any penalty under this Act may direct the whole or any part thereof to be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person upon whose information or at whose suit such penalty has been recovered; and, subject to such direction, all penalties shall be paid into the receipt of Her Majesty's Exchequer in such manner as the Treasury may direct, and shall be carried to and form part of the Consolidated Fund of the United Kingdom.

Evidence of proceedings at meetings.

67. Every company under this Act shall cause minutes of all resolutions and proceedings of general meetings (α) of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books (β) to be from time to time provided for the purpose: and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company

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(α) Sch. I. Table A. (29)—(43). (β) s. 154.
(γ) Table A. (55)—(71).

Minute as evidence.

Where the articles provided that a minute signed by any person purporting to be the chairman of any meeting of directors should be receivable in evidence without any further proof, and an entry in the minute book stated that a certain number of shares had been subscribed for, including 100 by the chairman, who signed the minute, not at the next meeting, but after winding-up proceedings were commenced (*i*), it was held that the minute was *primâ facie* evidence against all who were present, and that, as it was not proved to be false, the chairman was liable as a contributory for 100 shares (*k*).

But a director who was not present at the meeting at which the resolution was passed, and who denied all knowledge of it, was held not bound by the insertion of his name for fifty shares (*l*).

The signature of the minutes by the chairman of the following meeting may be sufficient, even when not so expressly provided (*m*).

Statute of Frauds.

The signature of the chairman in the minute book to a resolution adopting an agreement may be sufficient to satisfy the Statute of Frauds (*n*).

Invalid appointment of directors, &c.

Endangering accuracy for the sake of brevity, it may perhaps be said that the effect of the last sentence of this section and of the similar provision frequently found in articles of association is that, as between the company and persons having no notice to the contrary, directors, &c., *de facto* are as good as directors, &c., *de jure*.

Outsiders are bound to know what Lord Hatherley has called the "external position of the company" (*o*): but they are not bound to know its "indoor management." If, therefore, persons are held out, so to speak, as directors, if they act as directors, and the shareholders do not take any steps to prevent them from doing so, outsiders are entitled to assume that they are directors, and, as between the company and such outsiders, the acts of such directors *de facto* will bind the company (*p*).

Therefore bankers who received from the company's office a formal notice signed by the "secretary" that they were to pay cheques signed by "either two of the following three directors," and who paid cheques accordingly, were discharged, although no directors or secretary had ever been appointed (*p*). In this case it was vainly argued that the clause applied only

(*i*) *Cf. Landowners Co.* v. *Ashford*, 16 Ch. D. 411, 426, 429–432.
(*k*) *E. p. Sir C. P. Roney*, 4 D. J. & S. 226; 4 N. R. 83, 389; 12 W. R. 815, 994; 10 L. T. 394, 770.
(*l*) *Tothill's Case*, 1 Ch. 85.
(*m*) *Southampton Dock Co.* v. *Richards*, 1 Man. & Gr. 448; *Sheffield Railway Co.* v. *Woodcock*, 7 M. & W. 574; *Miles* v. *Bough*, 3 Q. B. 845.
(*n*) *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314.
(*o*) *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869, 893.
(*p*) *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869.

where there had been an appointment though invalid, and did not apply where there was no appointment at all.

And as against the director himself the section may render his acts as director valid (*q*).

If the absence of notice to the contrary be rightly taken to be of the essence of the question, it follows, as has been held, that while the saving clause applies to acts done before the invalidity of the appointment is shewn (*r*), yet when a defect has been discovered in the appointment or qualification of a director, manager, or liquidator, it does not give validity to his subsequent proceedings (*s*).

There is little difficulty in distinguishing from cases of this kind those authorities which shew that in making calls (*t*), in forfeiting shares (*u*), and in like matters of internal administration, acts done by persons purporting to act as directors but who are not such in fact are not binding on the shareholders. Those are cases in which a company is seeking to enforce against a member duties purporting to be imposed upon him by persons to whom he and his co-shareholders have never delegated the authority of imposing such duties.

"Manager."

As to the meaning of "manager" see *Gibson* v. *Barton* (*x*). The minutes were there used as evidence.

Jurisdiction of Vice-Warden of Stannaries.

68. In the case of companies under this Act, and engaged in working mines within and subject to the jurisdiction of the Stannaries, the Court of the Vice-Warden of the Stannaries shall have and exercise the like jurisdiction and powers, as well on the common law as on the equity side thereof, which it now possesses by custom, usage, or statute in the case of unincorporated companies, but only so far as such jurisdiction or powers are consistent with the provisions of this Act and with the constitution of companies as prescribed or required by this Act; and for the purpose of giving fuller effect to such jurisdiction in all actions, suits, or legal proceedings instituted in the said Court, in causes or matters whereof the Court has cognizance, all process issuing out of the same, and all orders, rules, demands, notices, warrants, and summonses required or authorized by the practice of the Court to be served on any company, whether registered or not registered, or any member or contributory thereof, or any officer, agent, director, manager, or servant thereof, may be served in any part of England without any special order of the Vice-Warden for that purpose, or by such special order may be served in any part of the United Kingdom of Great Britain and Ireland, or in the adjacent

(*q*) *York Tramways Co.* v. *Willows*, 8 Q. B. Div. 685.

(*r*) *Hallows* v. *Fernie*, 3 Ch. 467, 473; and see *Murray* v. *Bush*, L. R. 6 H. L. at pp. 53, 69, 80; *Newhaven Local Board* v. *Newhaven School Board*, W. N. 1885, 157.

(*s*) *Bridport Old Brewery Co.*, 2 Ch. 191; *Harben* v. *Phillips*, 23 Ch. Div. 14, 27, 34.

(*t*) *Howbeach Coal Co.* v. *Teague*, 5 H. & N. 151. Doubted in *York Tramways Co.* v. *Willows*, 8 Q. B. Div. 685. But see *London and Southern Counties Land Co.*, 31 Ch. D. 223.

(*u*) *Garden Gully Co.* v. *McLister*, 1 App. Cas. 39.

(*x*) L. R. 10 Q. B. 329.

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islands, parcel of the dominions of the Crown, on such terms and conditions as the Court shall think fit; and all decrees, orders, and judgments of the said Court made or pronounced in such causes or matters may be enforced in the same manner in which decrees, orders, and judgments of the Court may now by law be enforced, whether within or beyond the local limits of the Stannaries; and the seal of the said Court, and the signature of the registrar thereof, shall be judicially noticed by all other Courts and judges in England, and shall require no other proof than the production thereof. The registrar of the said Court, or the assistant registrar, in making sales under any decree or order of the Court shall be entitled to the same privilege of selling by auction or competition without a license, and without being liable to duty, as a judge of the Court of Chancery is entitled to in pursuance of the Acts in that behalf.

Provision as to costs in actions brought by certain limited companies.

69. Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony (*a*) that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

(*a*) 20 & 21 Vict. c. 14, s. 24, stood, "if it be proved to his satisfaction," *v.* note, *infra.*

Security, when required in a cross-suit.

Where a company is plaintiff in a cross-suit, or what is virtually a cross-suit, it is not a "plaintiff or pursuer" within the meaning of this section, and will not be required to give security for costs; the principle upon which the Court acts in respect of security for costs (and which is not altered by this section), being that a party who is really a defendant, though nominally a plaintiff, is not to be hampered in his defence.

And, therefore, where a company was plaintiff in a suit to set aside a policy on which the defendant in the suit had already brought against the company an action at law, which was still pending, the Court refused to order the company to give security (*y*).

But where A. filed a bill against B., the registered holder of shares in a company, and against the company and their secretary, for specific performance of an alleged contract by B. to transfer the shares to A., and for an injunction to restrain the company from transferring them to any person other than A.; and the company thereupon filed a bill against A. and B., praying for declarations that the alleged contract was fraudulent and void, and that A. and B. were trustees for the company; the company were required to find security for costs, for their bill was not a mere cross-bill, but asked for the performance of an entirely different agreement (*z*).

So where the I. Society filed a bill against the M. Company to foreclose a mortgage; and, by the leave of the Court, in the winding-up of the M. Company a bill was filed in the name of the M. Company against the I. Society seeking

(*y*) *Accidental and Marine Insurance Co.* v. *Mercati*, 3 Eq. 200.

(*z*) *Washoe Mining Co.* v. *Ferguson*, 2 Eq. 371.

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to impeach the security, or, in the alternative, to redeem on a different footing from that on which the I. Society sought to foreclose, it was held that the bill was not a mere cross-bill, and that the M. Company must give security for costs (a).

Security, when company in liquidation.

Semble, where a bill is filed in the name of a [*quære* limited] company which is being wound up, security for costs must always be given whether the bill be a purely cross-bill or not (*b*).

Primâ facie, the very fact of being in liquidation supplies "reason to believe," unless evidence is given to the contrary (*c*).

Unlimited company.

The foregoing must, it is conceived, be taken to apply only to a limited company, for an unlimited company is not within the section. It was held at law that an unlimited company, although in liquidation and sworn to be insolvent, could not be made to give security (*d*).

Company's appeal from winding-up order.

Where an order to wind up a limited company has been made and the order is appealed by the company itself without any one else being made responsible for costs, the Court of Appeal will entertain an application for security (*e*).

Waiver of right to security.

Under the new practice the old rule as to waiver of right to security by taking a step in the cause is gone (*f*), and under Order LXV. r. 6, the discretion as to security may be unlimited.

But under the old practice a defendant did not waive his right to security by filing his answer under compulsion from expiration of time, before he was in possession of the facts requisite to shew that "the assets of the company will be insufficient" (*g*).

And even if the action had gone on for a considerable time, yet if the plaintiffs amended so as to raise a new case which would add substantially to the costs, the defendant might then obtain security (*e*).

Amount of security.

The security must be "sufficient." The general rule of the Court which under the old practice (*h*) limited the amount to £100 did not apply; the security given was for an amount equal to the probable amount of costs payable (*i*).

(It was held under the 20 & 21 Vict. c. 14, s. 24, the wording of which was, with the exception noted above, identically the same, that a bond for £100 was sufficient security (*k*). This must be taken to be overruled.)

The Court may direct security to be given for the costs up to a certain stage in the proceedings, and then allow the application to be renewed (*l*).

Evidence of insufficiency of assets.

Under the 20 and 21 Vict. c. 14, s. 24, which differed from this section only as noted above, it was held that an affidavit by the defendant's agent to the effect stated in the section was, if unanswered, a sufficient ground for requiring security for costs (*m*).

(a) *Moscow Gas Co.* v. *International Financial Society*, 7 Ch. 225.

(*b*) *Moscow Gas Co.* v. *International Financial Society*, 7 Ch. 225; *Freehold Land Co.* v. *Spargo*, W. N. 1868, 94, is another case of company in liquidation.

(c) *Northampton Coal Co.* v. *Midland Wagon Co.*, 7 Ch. Div. 500; *Pure Spirit Co.* v. *Fowler*, 25 Q. B. D. 235.

(*d*) *United Ports Co.* v. *Hill*, L. R. 5 Q. B. 395.

(*e*) *Diamond Fuel Co.*, 13 Ch. Div. 400, 412; *Photographic Artists Association*, 23 Ch. Div. 370.

(*f*) *Martano* v. *Mann*, 14 Ch. Div. 419; *Lydney Co.* v. *Bird*, 23 Ch. D. 358.

(*g*) *Washoe Mining Co.* v. *Ferguson*, 2 Eq. 371.

(*h*) The amount is now in the discretion of the judge. Order LXV. r. 6.

(*i*) *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan*, 1 Ch. 437; *Freehold Land Co.* v. *Spargo*, W. N. 1868, 94.

(*k*) *Australian Steamship Co.* v. *Fleming*, 4 K. & J. 407.

(*l*) *Western of Canada Oil Co.* v. *Walker*, 10 Ch. 628.

(*m*) *Official Liquidators of Southampton, &c., Steamboat Co.* v. *Rawlins*, 2 N. R. 544; 11 W. R. 978; 9 Jur. (N.S.) 887, where *Caillaud's Tanning Co.* v. *Caillaud*, 26 Beav.

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Undertaking on injunction.

Where an injunction is granted on the application *ex parte* of a limited company, the Court will require the undertaking of some responsible person as to damages, the undertaking of the company is not sufficient (*n*).

Declaration in action against members.

70. In any action or suit brought by the company against any member to recover any call or other moneys (*a*) due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other moneys due whereby an action or suit hath accrued to the company.

(*a*) See *Peninsular Co.* v. *Fleming*, 27 L. T. 93.

Where a transfer has been made and registered after a call has been made, but before it is payable, it is not easy to say whether the transferor or the transferee is the person liable (*o*). It is evident that this section creates a difficulty in making the transferor liable, for he is no longer a member.

The Companies Clauses Act (*p*) provides that it shall be sufficient "to declare that the defendant is the holder," &c., and to prove "that the defendant at the time of making such call was a holder," &c., and the Stannaries Act, 1869 (*q*), that it shall be sufficient to state that the defendant "was at the time of such call being made the holder," &c.

Upon the Companies Clauses Act (*p*) it has been held that by declaring that "the defendant is the holder," is meant that he was the holder at the time the call was made (*r*), and, *quære*, whether this Act is not to receive a similar construction.

Alteration of Forms.

Board of Trade may alter forms in schedule.

71. The forms set forth in the second schedule hereto, or forms as near thereto as circumstances admit, shall be used in all matters to which such forms refer; the Board of Trade may from time to time make such alterations in the tables and forms contained in the first schedule hereto so that it does not increase the amount of fees payable to the registrar in the said schedule mentioned, and in the forms in the second schedule, or make such additions to the last-mentioned forms as it deems requisite. Any such table or form, when altered, shall be published in the *London Gazette*, and upon such publication being made such table or form shall have the same force as if it were included in the schedule to this Act, but no alteration made by the Board of Trade in the table marked A. contained in the first schedule shall affect any company registered prior to the date of such alteration, or repeal, as respects such company, any portion of such table.

427, was commented on and doubted as reported.

(*n*) *Anglo-Danubian, &c., Co.* v. *Rogerson*, 10 Jur. (N.S.) 87; 3 N. R. 185. *Quære Pacific Steam Navigation Co.* v. *Gibbs*, 14 W. R. 218; 13 L. T. 431.

(*o*) See Table A. (4), note.

(*p*) 8 & 9 Vict. c. 16, ss. 26, 27; see sect. 16.

(*q*) 32 & 33 Vict. c. 19, s. 13. See sect. 14, "all calls made."

(*r*) *Belfast Railway Co.* v. *Strange*, 5 Rail. Cas. 548; 1 Ex. 739.

Arbitrations.

Power for companies to refer matters to arbitration.

72. Any company under this Act may from time to time, by writing under its common seal, agree to refer and may refer to arbitration, in accordance with "The Railway Companies Arbitration Act, 1859" (*a*), any existing or future difference, question, or other matter whatsoever in dispute between itself and any other company or person, and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies.

(*a*) 22 & 23 Vict. c. 59.

Provisions of 22 & 23 Vict. c. 59, to apply.

73. All the provisions of "The Railway Companies Arbitration Act, 1859," shall be deemed to apply to arbitrations between companies and persons in pursuance of this Act; and in the construction of such provisions "the companies" shall be deemed to include companies authorized by this Act to refer disputes to arbitration.

PART IV.

Winding up of Companies and Associations under this Act (*a*).

Preliminary.

Meaning of contributory.

74. The term "contributory" shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up (β). It shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory (γ).

(*a*) As to companies registered under Acts of 1856–7–8, *v.* ss. 175–178; as to companies registered but not formed under this Act, ss. 196–198; as to unregistered companies, ss. 199–204. A company registered under the Act cannot be made bankrupt: see Bankruptcy Act, 1883, s. 123.

(β) ss. 38, 76–78.

(γ) *Cf.* ss. 196 (5), 200.

This section refers to sect. 38 (*q.v.*); and under that section will be found discussed the definition of a "contributory."

"Alleged to be a contributory."

A winding-up order has been made on the petition of persons alleging themselves to be contributories, and being past members who had transferred their shares, and who under the deed of settlement were thereby, as between themselves and the other proprietors, discharged from liability (*s*).

(*s*) *Times Fire Co.*, 30 Beav. 596.

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In the case last cited the petitioners were in fact contributories, for their liability was of course not discharged as against creditors; and in general an application by an alleged contributory will not be entertained unless he will admit himself to be a contributory (*t*).

Fully paid-up shareholder.

The term includes the holder of fully paid-up shares, and such a shareholder is entitled to the benefit of the enactments in the Act which provide for the adjustment of the rights of the contributories among themselves (*u*). He may also present a petition for winding up the company (*x*).

But since a fully paid-up shareholder is not liable to contribute anything to the assets of the company, he will not be put on the list of contributories unless by his own desire (*y*).

And the Court will not settle a supplemental list of contributories, containing the names of holders of fully paid-up shares, simply to bring such shareholders within sect. 101, and give the Court jurisdiction to enforce payment of debts due from them to the company (*z*).

Scripholder.

Whether or not the transferee of a scrip certificate, transferable by delivery, which entitles the holder to become a shareholder in respect of the shares therein mentioned, and in the meantime to receive dividends, is a contributory, *quære* (a).

In *Ormerod's Case* (*b*) O. applied for 100 shares—the directors registered him in respect of ten shares only, and gave him scrip in respect of ninety shares. He was held to be a contributory in respect of ten shares only.

Nature of liability of contributory.

75. The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland) of the nature of a specialty (*a*), accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls as well as calls already made.

(*a*) ss. 16, 90, 134.

Debt by specialty.

The liability to contribute to the assets in the winding-up is a debt by specialty in which the heirs of the contributory are bound, just as much as is a call made by the directors in a going company. There is in this respect no difference of obligation in respect of directors' calls and calls made in the winding-up. The same legal obligation binds members and contributories at all times subsequent to the registration of the articles of association (*c*).

Unregistered company.

The 75th section is, by virtue of sect. 199, applicable to unregistered companies; and the liability of a shareholder in a company not registered, but

(*t*) *Re Continental Bank Corporation, Re London and Mediterranean Bank*, 15 W. R. 548; 16 L. T. 112; W. N. 1867, 114, 178; a motion to stay proceedings in winding-up. *Queen's Benefit Building Society*, 6 Ch. 815.

(*u*) *Anglesea Colliery Co.*, 2 Eq. 379; 1 Ch. 555; *Hodges' Distillery Co., E. p. Maude*, 6 Ch. 51; and *v.* s. 38.

(*x*) *National Savings Bank Association*, 1 Ch. 547; and *v.* s. 82.

(*y*) *Leifchild's Case*, 1 Eq. 231; *Hastie's Case*, 7 Eq. 3, 6.

(*z*) *Marlborough Club Co.*, 5 Eq. 365; and *v.* s. 101.

(*a*) *Littlehampton Steamship Co.*, 34 Beav. 256; 2 D. J. & S. 521; 34 L. J. (Ch.) 237. See this and some analogous cases collected in note to Table A. (8), "Transfers by delivery," *et supra*, p. 69.

(*b*) 5 Eq. 110.

(*c*) *Buck* v. *Robson*, 10 Eq. 629; and see s. 16.

wound up, under the Act, is of the nature of a specialty debt. And the liquidator of such a company is entitled to prove against the estate of a deceased contributory for the estimated value of such liability, although no call has actually been made in the winding-up, and to have a proportionate share of the fund set apart to meet it (*d*).

Nature of liability

The liability under this section commences at the date when the contributory entered into the contract under which he became a member (*e*).

Set-off.

But until a call is made, there is nothing more than a liability to contribute. This creates a debt (*e*), but it is a debt which does not accrue due till the call is made. And, therefore, in any question of set-off between the company and a member who is also a creditor of the company, no account will be taken of the liability of the member in respect of future calls, not due at the date at which the right of set-off arises (*f*).

Where a call is made under a winding-up it has reference back by virtue of this section, and constitutes a debt due at the time the winding-up began. And, therefore, if, after the commencement of the winding-up, a shareholder assign a debt due to him from the company, the assignee takes subject to a right of set-off on the part of the company of all calls made subsequently to the assignment and previously to the payment of the debt (*g*).

When a call is made, it is owing from the day on which it is made, although it be "payable" on a subsequent day (*h*).

Interest on calls in the winding-up.

Where a call is made in the winding-up, and the notice of call requires payment by a certain day, and states that in default of payment on the day named interest will be charged, the case falls within the statute 3 & 4 Will. 4, c. 42, and interest is payable from the day named in the notice up to the day when payment is made. And payment into Court to a "security account" till the liability of the contributories has been established is not payment so as to stop interest (*i*).

Provisions contained in the articles as to interest on calls do not necessarily apply to calls made by the liquidators in the winding-up. In a case where the articles provided for 10 per cent. Malins, V.C., allowed interest at 5 per cent. The notice of call contained no intimation that interest would be charged (*k*).

As to interest on calls made before the winding-up order, and whether regulations as to interest in the articles apply to liquidators' calls, see Table A. (6), note.

Bankruptcy of contributory:—

A contributory who becomes bankrupt becomes a stranger to the company, and no order in the winding-up, *e.g.*, to take proceedings against a director, can be made on his application. His name remains on the list of contributories, but by sect. 77 the trustee in bankruptcy represents him, and is deemed to be the contributory (*l*).

under Bankr. Act, 1861;

This section and the 77th section provide for the event of the bankruptcy of a *contributory*. Now a shareholder does not become a contributory until the commencement of the winding up of the company. *Primâ facie*, then, it would appear that these sections are applicable only to the case in which the shareholder has become a contributory before the date of his bankruptcy,

(*d*) *In re Muggeridge, Muggeridge* v. *Sharp*, 10 Eq. 443.

(*e*) *E. p. Canwell*, 4 D. J. & S. 539; 33 L. J. (Bk.) 26; *Williams* v. *Harding*, L. R. 1 H. L. 9, 29; *West of England Bank, E. p. Hatcher*, 12 Ch. D. 284.

(*f*) *Grissell's Case*, 1 Ch. 528; and see s. 101.

(*g*) *China Steamship Co., E. p. Mackenzie*, 7 Eq. 240; *cf. South Blackpool Hotel Co., E. p. James*, 8 Eq. 225; and cases on "debentures" cited *infra*, s. 158, n.

(*h*) *Re China Steamship Co., Dawes' Case*, 38 L. J. (Ch.) 512.

(*i*) *Overend, Gurney, & Co., E. p. Lintott*, 4 Eq. 184; *Barrow's Case*, 3 Ch. 784.

(*k*) *Welsh Flannel Co.*, 20 Eq. 360.

(*l*) *Cape Breton Co.*, 19 Ch. Div. 77.

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that is to the case in which the winding up of the company precedes the bankruptcy of the shareholder, or a deed which takes the place of a bankruptcy.

preceding winding-up;

It was said by Lush, J., in *Martin's Anchor Co.* v. *Morton* (*m*) that this would be too narrow a construction of the sections; but it was held by the Court of Common Pleas in *Financial Corporation* v. *Lawrence* (*n*) that this is the true construction, and that these sections speak only from the winding up of the company. For it is essential for proof under the Bankruptcy Act, 1861, that the debt to be proved should be a debt capable of valuation at the date of the bankruptcy; but while the company is a going concern the amount of liability to future calls is incapable of being estimated (*o*), and the ownership of the shares may even be a source of gain. The case therefore of a bankruptcy preceding a winding-up seems, on principle, to be similar to the case of *Mudge* v. *Rowan* (*p*), and the debt being one which it is impossible to estimate at the time of the bankruptcy, the debt is not provable under the bankruptcy (*q*).

The decision in *Martin's Anchor Co.* v. *Morton* (*m*) proceeds only to this, that if a shareholder become bankrupt, and *receive his discharge* before the winding up of the company, but retain his shares, he is not discharged from liability to pay subsequent calls.

So in *Hastie's Case* (*r*) the shareholder had become bankrupt, and obtained his discharge before the company was wound up. The assignees having repudiated the shares, they remained in the name of the bankrupt, and he was held liable as a contributory in respect of calls made subsequent to the date of his bankruptcy.

The carefully-worded judgment of Giffard, L.J., in this case, concludes as follows:—"For the actual decision of this case it is enough to say, that a bankrupt must be retained as a contributory where the bankruptcy and the discharge precede the winding-up, where the debt is not shewn to be capable of valuation, where the assignees have repudiated the shares, and they have always remained, and still remain, vested in the bankrupt."

It was held, however, by the Court of Common Pleas (*s*), that it can make no difference whether the bankrupt (having become bankrupt before the winding-up) has or has not obtained his order of discharge, or whether, under an inspectorship deed, the property has or has not been distributed before the commencement of the winding-up. For the bankrupt obtains his discharge as soon as he has made a full disclosure of his estate, and before it has been distributed.

And therefore where a shareholder executed an inspectorship deed, and after its execution a call was made on the shares, and subsequently, but before the property included in the deed had been distributed among the creditors, the winding up of the company commenced, it was held that the call was not barred by the deed (*s*).

subsequent to winding-up.

But where the bankruptcy, or that which is equivalent to the bankruptcy of the shareholder, is subsequent to the winding up of the company, the liquidator (whether the company be registered or unregistered (*t*)) is entitled to prove for the amount of the shareholder's liability against his

(*m*) L. R. 3 Q. B. 306.
(*n*) L. R. 4 C. P. 731.
(*o*) See *General Discount Co.* v. *Stokes*, 17 C. B. (N.S.) 765; 13 W. R. 138.
(*p*) L. R. 3 Ex. 85.
(*q*) See also *Hastie's Case*, 7 Eq. 3, 7.
(*r*) 7 Eq. 3; 4 Ch. 274.
(*s*) *Financial Corporation* v. *Lawrence*, L. R. 4 C. P. 731; see also *E. p. King*, 4 Eq. 566; 3 Ch. 10; where, however, the deed was not one to which the Act provides that the law of bankruptcy shall apply.
(*t*) *E. p. Ball*, *Re Adams*, 10 Ch. 48.

estate, and the assignees or trustees of the estate are to be inserted in the list of contributories in lieu of the bankrupt; and this whether the bankrupt be liable as an A. or a B. contributory, and if as a B. contributory, whether the B. list have or have not been made out at the date of the bankruptcy.

For as soon as the winding up of the company takes place, the liability of the shareholder, which was not an existing obligation, becomes by the statute a debt, and the shareholder becomes a contributory, and the contributory is a debtor for an amount which, whether he be an A. or a B. contributory, the Legislature assumes to be capable of being estimated (*u*).

And, therefore, where a contributory of a company in liquidation executed a deed of arrangement with his creditors, and entered the company as creditors only for a call which had been made, it was held that the company ought to have been entered as creditors also for the estimated amount of future calls; and since, had the company been entered as creditors in respect of the calls which were subsequently made, the dissenting creditors would have been the majority in value, the deed was held not binding on a dissentient creditor (*x*).

And where E., being a shareholder in a company, transferred his shares in November, 1864; and the company was wound up by an order made on the 1st of July, 1865, on a petition presented on the 27th of June, 1865; and on the 30th of July, 1866, a sequestration in bankruptcy was issued in Scotland against E., and a sequestrator appointed; and on the 10th of August, 1867, E. obtained his discharge; and the B. list was not finally settled till the 7th of November, 1870; it was held that E. was, by having obtained his discharge, entitled to be removed from the list of contributories, for that his liability as a B. contributory was provable as a debt in the sequestration, and he was discharged therefrom accordingly (*y*).

So where a contributory of a mining company in liquidation became bankrupt and obtained his order of discharge, and nearly two years afterwards a call was made under the winding-up, it was held that he was by his discharge released from all liability in respect of the call (*z*).

So in *Brown's Case* (a) the shareholder filed a petition for liquidation by arrangement after the presentation of the winding-up petition; the trustee under the liquidation disclaimed the shares under the 23rd section of the Bankruptcy Act, 1869, and the bankrupt on the same day received his discharge. Subsequently the winding-up order was made. The company had proved their debt for calls due and future liability, thereby estopping themselves from taking proceedings to set aside the bankruptcy, and the shareholder was therefore discharged from all liability.

Bankruptcy of transferee.

But the special right which is given by this section to the company to prove against the estate of a bankrupt contributory in respect of all liability attaching to the shares does not in terms, nor, it seems, in spirit, extend to a proof by a transferor against the estate of a transferee who has allowed the liability in respect of the shares transferred to fall on the transferor.

And, therefore, where A. executed a transfer of shares to B., but before B. had executed and registered it the company was wound up, and A. was accordingly put on the list of contributories and paid calls; and shortly

(*u*) *E. p. Pickering*, 4 Ch. 58; and see *Financial Corporation* v. *Lawrence*, 4 C. P. 731, 738; *Mitchell's Case*, 5 Ch. 400; *Parbury's Case*, 3 D. F. & J. 80; *McEwen's Case*, 6 Ch. 582.

(*x*) *E. p. Pickering*, 4 Ch. 58.

(*y*) *McEwen's Case*, 6 Ch. 582.

(*z*) *E. p. Marshall, In re Waddington*, 7 Ch. 324; *City Discount Co.* v. *Lloyd*, 24 L. T. 512.

(a) (Eur. Arb.) Reil. 32; L. T. 21; 17 Sol. J. 310.

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after the winding-up order B. executed a deed of inspectorship under sect. 192 of the Bankruptcy Act, 1861; in a suit by A. to make B.'s estate liable for the amount of the calls, it was held that A.'s claim was not provable under the deed, and a plea of the deed was consequently overruled (*b*).

And the same holds good of any right of indemnity as between transferor and transferee. Thus where X. transferred to Y. and Y. to Z., and Y. after the winding-up executed an inspectorship deed, and X. and Y. being put on the B. list, X. made payments on the shares under a compromise with the official liquidator, X. was held entitled to recover from Y., for Y.'s liability to indemnify X. was not provable under the deed (*c*).

Bankruptcy Act, 1869.

In cases arising under the Bankruptcy Act, 1869, Lindley, L.J. (*d*), expresses the opinion that "when a shareholder becomes bankrupt all calls in arrear are provable as debts, and his liability to future calls may be estimated and proved as well when the company is being wound up as when it is not."

The judgment of Bacon, V.C., in *Furdoonjee's Case* (*e*) seems to be at variance with this view. In *Furdoonjee's Case* (*e*), the dates were:—12th October, 1866, liquidation resolutions under the Indian Insolvency Act: 13th October, 1866, order of the Court confirming the resolutions: 29th July, 1867, company ordered to be wound up: 10th October, 1868, debtor discharged: 1876, motion by official liquidator to settle the debtor on the B. list of contributories. In the debtor's statement the shares were mentioned as involving a possible liability. Bacon, V.C., there could not see how the liability could have been provable when the insolvency commenced: there was no *constat* that there ever would be a call on the shares: and deciding the question upon the ground that the company was an English company, and without attempting to reconcile a decision of the High Court at Bombay to the contrary effect which proceeded upon the Indian Statute, his Lordship put the debtor on the list of contributories.

This case, it has been said, must be taken as a decision upon the Indian Insolvency Act (*f*), and Chitty, J., has held that where the bankruptcy (or liquidation proceedings, as it was there) precedes but the debtor's discharge does not precede the winding-up the liability as a contributory is not "incapable of being fairly estimated" and is therefore provable in the liquidation proceedings (*g*).

Bankruptcy Act, 1883.

Similar considerations no doubt apply under sect. 37 of the Bankruptcy Act, 1883.

Disclaimer.

If the bankruptcy precede the winding-up, and if (i.) the trustee disclaims under sect. 23 of the Bankruptcy Act, 1869, whether before or after the winding-up (for *semble* notwithstanding sect. 153 of this Act he may disclaim after winding-up (*h*)), the shares are to be deemed forfeited at the date of adjudication in bankruptcy, and the injury resulting therefrom is provable by virtue of that section; but if (ii.) he does not disclaim, then it may be a question whether the liability to future calls, and the possible future cost of a future liquidation, is a provable liability (*i*).

(*b*) *Holmes* v. *Symons*, 13 Eq. 66.

(*c*) *Kellock* v. *Enthoven*, L. R. 3 Q. B. 458; Ibid. 9 Q. B. 241.

(*d*) Lindley on Company Law, p. 556.

(*e*) 3 Ch. D. 264.

(*f*) See 25 Ch. D. 421; and Lindley on Company Law, pp. 556, 557 (*k*).

(*g*) *Mercantile Mutual Association*, 25 Ch. D. 415.

(*h*) *West of England Bank, E. p. Budden*, 12 Ch. D. 288. But the point was not argued.

(*i*) There is the authority of a case in the European Arbitration for saying that the liability for costs is not provable even when the bankruptcy is subsequent to the winding-up, *infra*, note (*l*).

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If the bankruptcy be subsequent to the winding-up, then (i.) *semble* notwithstanding sect. 153 of this Act the trustee can disclaim (*k*): but (ii.) on the authorities above noticed, the company may prove for calls and liability to future calls. As respects costs of winding-up it would seem that if the bankruptcy and discharge have taken place in the interval between the presentation of the winding-up petition and the order, the liability to the costs is incapable of valuation, and therefore in respect of these the bankrupt is not discharged (*l*).

If under the Act of 1869, liability to future calls is provable by the company in a bankruptcy antecedent to the winding-up, then it would seem to follow that any right of indemnity on the part of a transferor is provable also against a transferee.

Where the dates ran:—(1) bankruptcy of A., (2) winding-up, (3) liquidation of B., (4) disclaimer by trustee of A. and trustee of B., and no call was made between events (2) and (3), it was held that neither A. nor B. nor either trustee could be put on the A. list of contributories, but that the liquidator must prove in the bankruptcy and liquidation for the injury sustained. For as regards A. his shares were by the disclaimer forfeited as of the date of event (1), and there was therefore no liability as a present member on these shares; and as regards B. at the date of event (3) when the shares were by the disclaimer forfeited, there was no call due—if there had been such a call, then, *semble*, B.'s trustee [or *quære* rather B. himself (*m*)] would have been put on the list in respect of that (*n*).

Bankruptcy—Set-off.

By sect. 101 and the decision in *Grissell's Case* (*o*), the rule in Chancery in the winding up of a limited company is, that no set-off is allowed as between the liquidator and the persons who have to pay calls.

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But in the case of a bankrupt contributory, the ordinary jurisdiction of the Court of Chancery not extending into bankruptcy, the rules of the Court of Bankruptcy will apply. The 95th section of this Act, by providing that the official liquidator may "prove . . . and draw a dividend in the matter of the bankruptcy . . . of any contributory, for any *balance* against the estate of such contributory," is a very strong indication that this Act meant to adopt the Bankruptcy Acts, for it is in the Court of Bankruptcy that the balance must be ascertained.

And, therefore, if a contributory, who is also a creditor of a company in liquidation, becomes bankrupt, or executes a deed which takes the place of a bankruptcy, after the commencement of the winding-up, the debt must be set off against the calls, whether the claim be made in the bankruptcy (*p*) or in the winding-up (*q*).

And if the contributory have before his bankruptcy but after the commencement of the winding-up, assigned his debt to a third party (*q*), or if the assignment have been made after the bankruptcy, but be not for valuable consideration (as where bills were indorsed after the bankruptcy to an agent for collection (*r*)), the assignee will stand in the same position as the contributory would have done in respect of set-off.

(*k*) *West of England Bank, E. p. Roberts*, 12 Ch. D. 288; and see *Levi* v. *Ayers*, 3 App. Cas. 842.

(*l*) *Davies' Case* (Eur. Arb.), L. T. 80; 17 Sol. J. 670; and see *Brown's Case* (Eur. Arb.), Reil. 32; L. T. 21; 17 Sol. J. 310.

(*m*) See *Cape Breton Co.*, 19 Ch. Div. 77.

(*n*) *West of England Bank, E. p. Budden and Roberts*, 12 Ch. D. 288.

(*o*) 1 Ch. 528; *et v.* s. 101.

(*p*) *In re Duckworth*, 2 Ch. 578; *E. p. Cooper*, 15 L. T. 637.

(*q*) *E. p. Strang*, 5 Ch. 492; and see *E. p. Morton*, 17 W. R. 606; 38 L. J. (Ch.) 390.

(*r*) *Carralli and Haggard's Claim*, 4 Ch. 174.

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Contributories in case of death.

76. If any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned (*a*), his personal representatives, heirs, and devisees shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly (*β*).

(*a*) s. 98. (*β*) ss. 99, 105.

Liability of deceased member's estate.

The liability of a contributory is by sect. 75 a specialty debt, *debitum in præsenti, solvendum in futuro* (*s*), and may be enforced, so long as the shares are left standing in the deceased member's name, or in that of his executors, as executors merely, both against his personal estate and against his real estate in the hands of devisees (*t*).

If the personal representatives make default in payment of calls made upon them, the personal and real estates of the deceased member may be administered (*u*). The heirs and devisees need not necessarily be placed on the list of contributories as well as the personal representatives, but may be added when the Court thinks fit (*x*).

Upon the death of a member, and until his shares are personally accepted, transferred, or in some way disposed of by his executors, the deceased member, that is, his estate, remains a member, and his representatives are on the one hand entitled to the benefits accruing upon, and on the other are in their representative capacity, but not necessarily personally (*y*), liable for calls in respect of his shares (*z*).

Whether, therefore, the shareholder die after the commencement of the winding-up, and either before or after he has been placed on the list of contributories (a), or whether he have died many years before the winding-up, but his shares have not been either personally accepted (*b*), or otherwise disposed of (*c*) by his executors, the liability of his estate is the same, and is that which would have been the liability of the shareholder if living.

Distribution of assets :—

Executors then should be careful, before proceeding to distribute their testator's estate among the beneficiaries, to see that they have provided for the contingent liability in respect of such shares as they have not disposed of, for otherwise they may become personally liable.

Thus executors who had paid a legacy without providing for the contingent liability on shares in a company which was a going concern at their testator's death (*d*), were ordered personally to pay the amount of the legacy in satisfaction of calls, the estate being insufficient (*e*).

In such a case the rule that executors cannot recover from a legatee a payment made with notice of a debt does not apply to prevent them from obtaining such indemnity as they can from the testator's estate, and the executors will be entitled to call upon the residuary legatees to refund, for the purpose of indemnifying them, the capital sums paid to them, but not any intermediate income (*f*).

(*s*) *Re Muggeridge*, 10 Eq. 443, 446.
(*t*) *Turquand* v. *Kirby*, 4 Eq. 123; *Hamer's Devisee's Case*, 2 D. M. & G. 366.
(*u*) s. 105.
(*x*) s. 99.
(*y*) *Buchan's Case*, 4 App. Cas. 549.
(*z*) See note to Table A. art. (12).
(*a*) s. 76.
(*b*) *v. supra*, p. 77.
(*c*) v. *infra*, Table A. art. (12).
(*d*) In some cases it may be unnecessary to make any provision. *Tate* v. *Rolls*, W. N. 1880, 159.
(*e*) *Taylor* v. *Taylor*, 10 Eq. 477.
(*f*) *Jervis* v. *Wolferstan*, 18 Eq. 18.

Executors, moreover, cannot protect themselves or their testator's estate (except as regards assets already paid away) from the claim of the company or its liquidator merely by publishing advertisements and distributing the assets under Sir G. Turner's Act (*g*) or Lord St. Leonards' Act (*h*). under statutory protection.

Thus where the executrix of a testator, who had been settled on the list of contributories in his lifetime, advertised for claims against the estate, and the official liquidator sent in no claim, she was nevertheless more than a year afterwards placed as executrix on the list of contributories (*i*).

So where the executors of a shareholder, who died many years before the winding-up, had distributed the assets of their testator under Sir G. Turner's Act, without making provision for the contingent liability on his shares, they were put on the list of contributories, with a view to proceedings being taken for the administration of the testator's estate; but with a note to the effect that they alleged they had distributed the assets under the provisions of the Act 13 & 14 Vict. c. 35 (*k*).

Russell's Executors' Case (*l*) was a similar case, where the assets had been distributed under Lord St. Leonards' Act, and the executors never knew that their testator was possessed of the shares.

Executors are not, however, entitled to any indemnity against liability in respect of shares specifically bequeathed, and which have been transferred under the order of the Court in an administration suit; the order is a perfect indemnity to them (*m*). Shares specifically bequeathed.

Under the earlier Winding-up Acts it was said that a call was not *debitum in præsenti, solvendum in futuro*, and it was therefore held that executors were not liable for a *devastavit* in having paid even simple contract debts before a call was made (*n*), nor were they entitled as against simple contract creditors to set aside a part of the estate to provide for future calls (*o*). Payment of debts.

And as respects debts or liabilities not being of a lower nature than the call, it appears that the same rule holds good under this Act, and if the executor pays creditors entitled to claim before the call is made, his position is good (*p*).

The liability of the shareholder's estate is however under this Act a contingent liability in respect of which the liquidator of the company may claim to have a sum set apart to answer future calls; and, therefore, where the estate of a deceased shareholder was the subject of an administration suit, the liquidator of the company was held entitled to prove against the estate for the estimated value of such liability, although no call had actually been made in the winding-up, and to have a proportionate share of the fund set apart to meet it (*q*).

The cases last referred to were all previous to the Act (*r*), by which specialty debts are deprived of their right of priority of payment. In cases, therefore, falling within that Act it is conceived that, on the principle of *Lady Rolt's Case* (*s*), executors will not be liable for a *devastavit* for paying debts, whether simple contract or by specialty, before a call is made, or before claim, as in *In re Muggeridge* (*q*), by the liquidator for the amount of the estimated liability.

(*g*) 13 & 14 Vict. c. 35.
(*h*) 22 & 23 Vict. c. 35, s. 29.
(*i*) *Markwell's Case*, W. N. 1872, 210.
(*k*) *Cole's Executors' Case* (Alb. Arb.), 15 Sol. J. 711.
(*l*) (Alb. Arb.), 15 Sol. J. 790.
(*m*) *Addams* v. *Ferick*, 26 Beav. 384.
(*n*) *Henderson* v. *Gilchrist*, 17 Jur. 570.
(*o*) *Wentworth* v. *Chevell*, 3 Jur. (N.S.) 805.
(*p*) *Lady Rolt's Case* (Eur. Arb.), L. T. 106.
(*q*) *In re Muggeridge*, *Muggeridge* v. *Sharp*, 10 Eq. 443.
(*r*) 32 & 33 Vict. c. 46.
(*s*) (Eur. Arb.), L. T. 106.

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Liability of representatives.

Executors, when made contributories in respect of their testator's shares, are liable of course only in their representative character, and not personally, unless they have personally accepted the shares (*t*), or except so far as they have made themselves liable for a *devastavit* (*u*).

Joint tenants of shares.

When two or more persons are registered as joint holders of a share they are joint tenants so far as the legal interest is concerned, and the legal title survives. And in the absence of anything to the contrary in the articles, the covenant into which they are by sect. 16 to be taken to have entered will be taken to be a joint and not a joint and several covenant. Upon the death of one, therefore, his liability will cease (*x*). The case referred to arose under the Act of 1856, and liability as a present member was the only question discussed.

Shares in an unregistered company stood in the names of K. and J. K. died, but the names of his executors were not put on the register. In the winding-up it was held that K. and J. having been joint tenants, with benefit of survivorship as to the beneficial interest, and not tenants in common, K. was, under his several covenant for himself, his heirs, executors, and administrators, to perform all the obligations attaching to the shares, liable only in respect of such obligations as attached up to the time of his death, and his executors were therefore placed on the list in their representative capacity in respect of such obligations only (*y*).

Contributories in case of bankruptcy.

77. If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding-up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets in due course of law any moneys due from such bankrupt in respect of his liability to contribute to the assets of the company being wound up (*a*); and for the purposes of this section any person who may have taken the benefit of any Act for the relief of insolvent debtors before the eleventh day of October, one thousand eight hundred and sixty-one, shall be deemed to have become bankrupt.

(*a*) See s. 75.

Quære, whether under the Bankruptcy Act, 1861, and the Acts of 1869 and 1883, this section is, as respects calls made subsequent to the commencement of the bankruptcy, applicable only to the case of a contributory becoming bankrupt subsequent to the commencement of the winding-up. See notes to sect. 75.

An argument has been drawn from the last clause of the section, which provides that, for the purposes of the section, a person who became insolvent before the 11th of October, 1861, shall be deemed to have become bankrupt, to shew that as this Act was not passed until 1862, the section must apply to previous bankruptcies, for otherwise this clause would be unmeaning.

(*t*) *Supra*, p. 77. *Buchan's Case*, 4 App. Cas. 549.
(*u*) *Taylor* v. *Taylor*, 10 Eq. 477.
(*x*) *Hill's Case*, 20 Eq. 585.
(*y*) *Kirby's Executors' Case* (Alb. Arb.), 15 Sol. J. 922; Reil. 67; and see *Alexander's Case*, 15 Sol. J. 788.

With respect to this, Giffard, L.J., said in *Hastie's Case* (*z*), the section "would be applicable if the assignees chose to take the shares; it would be applicable to such calls as were made before the bankruptcy, as, for instance, if the directors called up the whole or part of the capital, and their calls were not met; again, it would be applicable if, for any reasons or under any circumstances, the calls, or any of them, were capable of valuation at the date of the bankruptcy;" but, *quære*, whether in some of the cases here put, the assignees could "be deemed to represent such bankrupt for all the purposes of the winding-up."

The assignees are to be "deemed to be contributories," but, *semble*, they should not be put on the list, the bankrupt's name should be left on the list (a).

Contributories in case of marriage.

78. If any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall during the continuance of the marriage be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly.

Husband's liability.

The result of this section and sect. 75 is, that where a female shareholder marries and the company is afterwards wound up, the husband is to be treated as having become, at the date of the marriage, a debtor, and not merely the husband of a debtor, in respect of the liability on the shares. In the winding-up, therefore, he is himself a contributory without any limit, such as provided by the Married Women's Property Acts as to a husband's liability in respect of debts of the wife contracted before marriage (*b*).

In the argument of this case, the point, so far as the report shews, seems to have been missed, that the section runs, "If any female contributory marries," and, therefore, *primâ facie*, and upon the analogous decisions under sect. 75, applies only to the case where the female is a contributory when she marries, that is to say, where the winding-up precedes the marriage.

Separate estate of married woman.

Where a married woman, having separate estate, contracted to take shares in her own name in a banking company formed under the 7 Geo. 4, c. 46, which was subsequently wound up, the Court, being of opinion that such contract was entered into on the credit of her separate estate, placed her on the list of contributories in her own right (*c*).

The authorities on the liability of the husband of a female shareholder who marries will be found collected, *supra*, p. 78.

A married woman cannot be settled on the list in the absence of her husband (*d*).

The above cases must be taken of course as referable to the law as to married women as existing at the date of their decision.

Winding-up by Court.

Circumstances under which company may be wound up by Court.

79. A company under this Act may be wound up by the Court as hereinafter defined (*a*), under the following circumstances; (that is to say,)

(*z*) 4 Ch. 274, 278.
(*a*) *Cape Breton Co.*, 19 Ch. Div. 77.
(*b*) *West of England Bank, E. p. Hatcher*, 12 Ch. D. 284.
(*c*) *Mrs. Matthewman's Case*, 3 Eq. 781.
(*d*) *Lang's Case*, 4 App. Cas. 547.

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(1.) Whenever the company has passed a special resolution (β) requiring the company to be wound up by the Court:

(2.) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year:

(3.) Whenever the members are reduced in number to less than seven (γ):

(4.) Whenever the company is unable to pay its debts:

(5.) Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

(α) s. 81. But now see Comp. (W. Up) Act, 1890, s. 1.

(β) s. 51.

(γ) s. 48. An unregistered company must consist of more than seven members to be wound up under the Act, s. 199.

As to winding-up under the supervision of the Court, see sect. 147.

As to the winding up of a subsidiary company in the case of amalgamated life assurance companies, see Life Assurance Companies Act, 1872, s. 4, *infra*.

Bankruptcy Court.

A registered company cannot (ε) be made bankrupt (ζ), but after a winding-up order has been made, the subsequent proceedings might under this Act have been had in the Local Court of Bankruptcy (η).

As to who may petition, see sect. 82, *infra*.

CONTRIBUTORY'S PETITION. Petitioner's interest very small.

It is not imperative on the Court to issue a winding-up order (θ); and at any rate, if the application is made by a shareholder the Court ought to exercise a judicial discretion (ι). It will not in the case of a limited company make a winding-up order on the petition of a shareholder whose interest and liability are very small against the wish of the bulk of the shareholders. The case of an unlimited company is open to other considerations (κ).

Petitioner's case not satisfactory.

Where the Court was satisfied that the petition was presented in bad faith, it dismissed the petition (λ).

The Winding-up Acts are not to be used for the purpose of settling controverted points between individual shareholders and the company (μ).

By sect. 91 the Court may have regard to the wishes of the creditors and contributories—and when a shareholder comes for a winding-up order it is the duty of the Court to see whether the other shareholders and the creditors agree in thinking that the winding-up is the best course. And if there be a strong opposition on their part the Court will not grant a winding-up order unless it sees that some plain injustice is being done to the members who present the petition, which cannot be avoided otherwise than by giving them a winding-up order (ν).

Carriage of order given to shareholder other than petitioner.

Where a shareholder, having presented a petition for a winding-up order,

(ε) Although *semble* an unincorporated company or its members can: Bankruptcy Act, 1883, s. 123.

(ζ) Bankruptcy Act, 1883, s. 123.

(η) *Infra*, s. 81.

(θ) *European Life Assurance Society*, 9 Eq. 122, 126; and see ss. 86, 91, 149; and *E. p. Wise*, 1 Drew. 465, under the Act of 1848.

(ι) *Planet Benefit Society*, 14 Eq. 441, 450; *Middlesborough Assembly Rooms Co.*, 14 Ch. Div. 104, and cases *post*.

(κ) *London Suburban Bank*, 6 Ch. 641; 19 W. R. 600, 763. As to an unlimited company, see *Norwich Yarn Co.*, 12 Beav. 366; *Electric Telegraph of Ireland Co.*, 22 Beav. 471; *Professional, &c., Building Society*, 6 Ch. 856.

(λ) *Metropolitan Saloon Omnibus Co., E. p. Hawkins*, 28 L. J. (Ch.) 830; 5 Jur. (N.S.) 922.

(μ) *Wheal Lovell Mining Co., E. p. Wyld*, 1 Mac. & G. 1.

(ν) *Professional, &c., Building Society*, 6 Ch. 856; *City and County Bank*, 10 Ch. 470; and see *London Permanent Benefit Building Society*, 17 W. R. 513, 717; 20 L. T. 388; 21 L. T. 8.

asked at the hearing that the petition might stand over to enable the company to pass resolutions to wind up voluntarily, the Court, being of opinion that the case required investigation, made a compulsory order, giving the carriage of it to another shareholder who appeared to support the petition (*o*).

Number of shareholders very small.

Again, where the number of shareholders is very small, and there are no difficulties in the way of a voluntary winding-up, the Court will in its discretion refuse to make an order on a shareholder's petition (*p*). But in a proper case, as where the proceedings of the directors were very irregular, and there appeared to be an absence of *bonâ fide* intention on their part to carry on business in a proper manner (*q*), and where there were matters to be investigated, and there was overwhelming influence on the part of one director (*r*), an order will be made although the number of shareholders be very small, and an order has been made to wind up a company where there were only seven shareholders and no debts (*s*).

Fully paid-up shareholder.

As to the rights of a fully paid-up shareholder as a petitioner, see sect. 82, *infra*.

Creditor's Petition.

But where a creditor who cannot obtain payment of his debt comes for a winding-up order, the Court must, *ex debito justitiæ*, make it, if he brings his case within the Act (*t*): unless the case be within exceptions which the Court has established to the general rule (*u*).

"It is not a discretionary matter with the Court, when a debt is established and not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it, but ordinarily speaking, it is the duty of the Court to direct a winding-up" (*x*).

But *ex debito justitiæ* applies only as between the creditor and the company. If a majority of creditors are of a different opinion to the petitioning creditor, the Court is bound, under sects. 91, 149, to have regard to their wishes, and may accordingly make a supervision order instead of a compulsory order (*y*), or, if the company be already in voluntary liquidation (*z*), or even if it be not in liquidation at all (*u*), may refuse to make any order if a majority of creditors so desire.

But if the company is not in voluntary liquidation, it is conceived that (subject to the discretion of the Court to direct the petition to stand over where there is a better prospect of payment if that course is taken (a), or where there is nothing to wind up (*b*), or to refuse an order in exceptional cases (*u*)) the Court cannot refuse an order to a creditor who makes out his case, though all the world be against him. For the creditor is entitled to payment, and a winding-up order is really a substitute for judgment in an action.

(*o*) *Berlin Great Market and Abattoirs Co.*, 19 W. R. 793; 24 L. T. 773.

(*p*) *Natal, &c., Co.*, 1 H. & M. 639; *Sea and River Marine Insurance Co.*, 2 Eq. 545; and see *E. p. Wise*, 1 Drew. 465; *E. p. Inderwick*, 3 De G. & Sm. 231.

(*q*) *London and County Coal Co.*, 3 Eq. 355.

(*r*) *West Surrey Tanning Co.*, 2 Eq. 737.

(*s*) *Sanderson's Patents Association*, 12 Eq. 188.

(*t*) *London Suburban Bank*, 6 Ch. 641, 643; *Western of Canada Oil Co.*, 17 Eq. 1.

(*u*) *Uruguay Central Railway Co.*, 11 Ch. D. 372, 383; *Chapel House Colliery Co.*, 24 Ch. Div. 249; *New York Exchange*, 39 Ch. Div. 415.

(*x*) *Per* Lord Cranworth, *Bowes* v. *The Hope, &c., Society*, 11 H. L. C. 389; *General Co. for Promotion of Land Credit*, 5 Ch. 363, 380, affirmed 5 H. L. 176.

(*y*) *West Hartlepool Co.*, 10 Ch. 618.

(*z*) *Langley Mill Co.*, 12 Eq. 26.

(a) *Brighton Hotel Co.*, 6 Eq. 339; *Western of Canada Oil Co.*, 17 Eq. 1; *Great Western Coal Co.*, 21 Ch. D. 769.

(*b*) *St. Thomas' Dock Co.*, 2 Ch. D. 116.

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In *In re Home Assurance Association* (*c*), where the company only, and not other creditors, opposed, Wickens, V.C., said that an unsatisfied judgment creditor was entitled to the usual compulsory order, and refused to accede to an application that the drawing-up of the order might be postponed for a fortnight, to give the association an opportunity of settling the debts upon the proceeds of a call which had been made upon the shareholders.

And where a company was *de facto* unable to pay its debts at the time when two petitions, the one by a shareholder, and the other by an execution creditor, were presented for a winding-up order, an order was made on both petitions, although they were opposed by a majority of shareholders, and it was alleged on the part of the company that it would be able to meet its engagements so soon as a call which had been made on the shareholders, and which was payable in two months, had been paid up (*d*).

It seems to have been held in *In re General Rolling Stock Co.* (*e*) that where it is admitted that the company must be wound up, and the only question is whether a voluntary or a compulsory winding-up is the more desirable, a creditor is entitled on his petition to a compulsory order, although other creditors oppose it, and support a voluntary winding-up. From the report of the case, however, it does not appear that there were not many creditors supporting the compulsory order.

But even as between a creditor and the company, *ex debito justitiæ* does not apply to such an extent as to compel the Court to make an immediate order. The Court may, under sects. 86, 91, order the petition to stand over to give the company an opportunity of arranging for payment of its debts, and, when there is reasonable hope of an arrangement being made, will make such order (*f*), and may make a supervision instead of a compulsory order even if the voluntary winding-up was resolved upon after the petition was presented (*g*).

And again, it is only *ex debito justitiæ* that the creditor should have his order if there is some chance of his getting paid by means of it. If there are no assets that a winding-up order can reach (as when all the assets are already charged in favour of debenture-holders in excess of their value), and other creditors oppose, an immediate order may be refused (*h*). If there are no assets, an order may be refused (*i*), and generally the Court will not make a compulsory order if it is satisfied that such an order will do no good (*g*).

In *Olathe Silver Mining Co.* (*k*) Pearson, J., made an order which may often be useful in these cases. His Lordship was not satisfied that the company had not assets outside those included in the debenture-holder's security. Under these circumstances he directed an inquiry upon the point, and referred it to chambers to appoint a provisional liquidator with all the powers of an official liquidator, but directed him to take no steps beyond taking possession without the direction of the judge—the petition to stand over until the inquiry was answered.

And where the creditor was a debenture-holder whose interest was in arrear, and who was entitled to payment only *pari passu* with the other

(*c*) 12 Eq. 112.

(*d*) *International Contract Co., E. p. Spartali and Tabor*, 14 L. T. 726.

(*e*) 34 Beav. 314; 13 W. R. 423.

(*f*) *Brighton Hotel Co.*, 6 Eq. 339; *Western of Canada Oil Co.*, 17 Eq. 1.

(*g*) *New York Exchange*, 39 Ch. Div. 415.

(*h*) *St. Thomas' Dock Co.*, 2 Ch. D. 116. The form of the undertaking required from the company in this case should be noted. It is often useful.

(*i*) *Free Fishermen of Faversham*, 36 Ch. Div. 329.

(*k*) 27 Ch. D. 278.

debenture-holders, and was therefore entitled to sue only on behalf of himself and all other like creditors, and his holding of £600 was opposed by holders of £142,700, a winding-up order was refused altogether (*l*). Inasmuch as unsecured creditors of course rank *pari passu*, the decision is, it is conceived, applicable generally (*m*).

And where the petitioner was a secured creditor who alleged his security to be insufficient, and the majority of the creditors opposed and assigned good reason for their opposition, the Court refused to make an order, and directed the petition to stand over for six months, or until the petitioner should take steps to enforce his security (*n*).

Again, where a resolution for voluntary liquidation had been passed and a majority of creditors desired a voluntary winding-up, and the Court was satisfied that that would be the better course, a creditor's petition for a compulsory order was dismissed—and, after the presentation of the petition, an offer having been made to the petitioner which, in the opinion of the Court, was reasonable and ought to have been accepted by him, but which he rejected, the order was to pay him his costs only up to the time when such offer was made (*o*).

The above observations as to the right of a creditor to an order are addressed to the case of an outside creditor, and are not equally applicable to a creditor who is a creditor only in the capacity of a member, as for instance a member of a benefit building society who has given notice of withdrawal (*p*).

Disputed debt.

If the liquidators in a voluntary winding-up offer to hold themselves personally liable for a disputed debt, and offer to set aside out of the assets a sum sufficient to satisfy the claim, if established, with interest and costs, a petition for a compulsory order will be ordered to stand over till the claim has been established in an action, and the petitioner will be ordered to pay all costs incurred since the offer (*q*).

A winding-up petition is not a legitimate method for a creditor to adopt in order to obtain payment of a debt which is *bonâ fide* disputed by the company; and any attempts so to enforce payment will be discouraged by the Court (*r*).

It is obvious that great damage might be done to a perfectly solvent company by the presentation of a winding-up petition by an unreasonable creditor, whose debt the company are able and willing to pay if established, but to whom they *bonâ fide* believe they are not indebted. In such a case, on writ issued by the company, an injunction will be granted to restrain the creditor from presenting a petition (*s*). If the petition has been presented the Court may on motion stay all proceedings under it or dismiss it (*t*).

(*l*) *Uruguay Central Railway Co.*, 11 Ch. D. 372, 383.

(*m*) See also *Chapel House Colliery Co.*, 24 Ch. Div. 259.

(*n*) *Great Western Coal Co.*, 21 Ch. D. 769.

(*o*) *Langley Mill Co.*, 12 Eq. 26.

(*p*) *Planet Benefit Society*, 14 Eq. 441.

(*q*) *Imperial Guardian, &c., Society*, 9 Eq. 447; and see *Times Life, &c., Co.*, 9 Eq. 382.

(*r*) *Catholic Publishing Co.*, 33 L. J. (Ch.) 325; 2 D. J. & S. 116; *Rhydydefed Colliery Co.*, 3 De G. & J. 80; *Imperial Guardian, &c., Society*, 9 Eq. 447; *London and Paris Banking Corp.*, 19 Eq. 444; *General Exchange Bank*, 14 W. R. 826; 14 L. T. 582; 12 Jur. (N.S.) 465; *British Alliance Co.*, W. N. 1877, 261; *cf.* as to use of debtor's summons in bankruptcy, *E. p. Sewell*, 13 Ch. Div. 266; and see the cases cited *infra* as to injunction to restrain presentation of winding-up petition.

(*s*) *Cadiz Waterworks Co.* v. *Barnett*, 19 Eq. 182; *Niger Merchants Co.* v. *Capper*, 18 Ch. D. 557, n.; *Cercle Restaurant Co. v. Lavery*, 18 Ch. D. 555; *Merchant Banking Co. of London* v. *Hough*, W. N. 1874, 230; *John Brown & Co.* v. *Keeble*, W. N. 1879, 173.

(*t*) *Gold Hill Mines*, 23 Ch. Div. 210; *Campagnie Générale, E. p. Neuchatel Co.*, W. N. 1883, 17.

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And an action will lie for falsely, maliciously, and without reasonable cause presenting a petition to wind up a trading company, even though no pecuniary loss or special damage be proved, for the presentation of the petition is from its nature calculated to injure the credit of the company (*u*)

An injunction may be granted to restrain a libel likely to injure a friendly society or joint stock company (*x*).

Again, in a case of disputed debt a petition will be dismissed unless it is believed that if the debt be established at law against the company they will be unable to satisfy it (*y*).

If the debt is *bonâ fide* contested and there is no evidence other than non-compliance with the statutory notice to shew that the company is insolvent, and the company denies its insolvency, the petition will be dismissed (*z*).

In the case of the debt on which a petition is founded being *bonâ fide* disputed by the company, the convenient and proper course is, not to try the question of the debt on the petition, but to adjourn the hearing of the petition under sect. 86 until the debt has been established in an action (a).

But the petition will not be ordered to stand over as a matter of course: the Court will require to see that the debt is disputed on some substantial ground (*b*).

Where a petition was presented by a creditor who had brought an action at law to enforce payment of a debt which the voluntary liquidator disputed as excessive, the petition was retained to abide the result at law, to be dismissed with or without costs according as the action failed or succeeded (*c*).

The Court will, however, in a proper case take upon itself to decide the dispute at the hearing of the petition, and will make a winding-up order without waiting till the debt has been established in an action (*d*).

The company must shew reasonable grounds for disputing the debt (*e*); and if the Court sees that the debt is disputed on some ground which is not substantial, the Court will itself decide on the question of fact; and, to save the trouble and expense of an action at law, a winding-up order may be made with a direction that it be not drawn up for some short time, in order to give the company the opportunity to meet the demand (*b*).

Judgment debt.

If the petitioner have already obtained a judgment in his favour, he cannot, upon an allegation that the judgment was obtained by fraud, be called upon, as a preliminary to his right to an order, to go into farther evidence in support of his claim (*f*). But upon the respondents undertaking to bring an action to set aside the judgment, the petition may be ordered to stand over (*f*). If, however, the judgment be shewn to have been obtained by collusion, the petition may be dismissed although the judgment have not been impeached in an action (*g*).

Cestui que trust of debenture deed.

Where by a debenture trust deed the company covenanted to pay the

(*u*) *Quartz Hill Co.* v. *Eyre*, 11 Q. B. Div. 674.

(*x*) *Hill* v. *Hart Davies*, 21 Ch. D. 798. But see *Liverpool Stores* v. *Smith*, 37 Ch. Div. 170.

(*y*) *London Wharfing Co.*, 35 Beav. 37; *London and Paris Banking Corporation*, 19 Eq. 444.

(*z*) 19 Eq. 444, 448.

(a) *Catholic Publishing Co.*, 33 L. J. (Ch.) 325; 2 D. J. & S. 1, 116; *Universal Bank*, 14 W. R. 906; 14 L. T. 691; and see *Bowes* v. *Hope, &c., Society*, 11 H. L. C. 389.

(*b*) *King's Cross Industrial Dwellings Co.*, 11 Eq. 149; 19 W. R. 225.

(*c*) *Inventors' Association*, 2 Dr. & Sm. 553; 13 W. R. 1033; 12 L. T. 840.

(*d*) *Imperial Silver Quarries Co.*, 16 W. R. 1220.

(*e*) *Brighton Club, &c., Co.*, 35 Beav. 204; *Great Britain Mutual Society*, 16 Ch. Div. 246.

(*f*) *Bowes* v. *The Hope, &c., Society*, 11 H. L. C. 389; reversing S. C. 1 N. R. 542.

(*g*) *United Stock Exchange*, W. N. 1884, 251; 51 L. T. 687; *cf. E. p. Lennox*, 16 Q. B. Div. 315.

interest on the debentures to the trustees, and each bond contained a covenant by the company with the trustees for payment of £100 to the "bearer thereof," and of interest to the "bearer" of the coupons annexed, it was held that neither as to principal nor interest was the bearer a creditor, either legal or equitable, of the company, so as to be entitled to present a winding-up petition, his right of action being only through the trustees (*h*).

But where the obligation was direct by the company to pay the bearer, the bearer could present a petition (*i*).

Under contract between A. and B. there can be no right of action in C., unless it be by statute (*k*), or unless C. possesses an actual beneficial right which places him in the position of *cestui que trust* under the contract (*l*). Thus upon contract contained in the articles of association a third party cannot sue (*m*): neither can even a shareholder sue (*n*). For although by virtue of sect. 16 the articles, if he is a shareholder, bind the company and himself as if he had signed and sealed them, yet the authorities have established that the articles do not even then constitute a contract with the company, but only a contract between the members *inter se* (*n*).

Claim for principal due for default in payment of interest.

Where debentures name, as is the common form, a time and place for payment of interest, and provide that upon default in payment of interest the principal sum shall immediately become payable, the principal does not become payable unless demand for payment is made at the specified place (*o*). The rule that the debtor must find his creditor, if he be within the realm, and pay him is excluded if a place for payment is named (*o*).

Special remedy.

If the creditor have, by reason of the constitution of the company, a special remedy by the appointment of a receiver, he cannot claim an order *ex debito justitiæ* until the special remedy has been tried and has failed.

Receiver.

Thus, where debenture-holders were empowered by Act of Parliament to enforce payment of principal and interest by the appointment of a receiver, the Court refused to make at their instance a winding-up order until a receiver had been actually appointed and had failed to obtain payment (*p*).

Sub-sect. 2.

The jurisdiction to wind up a company when it does not commence its business within a year from its incorporation or suspends its business for a year, is discretionary, and is to be exercised only where the Court is of opinion that this is a fair indication that there is no intention of carrying on the business—if the delay or suspension is satisfactorily accounted for an order may be refused (*q*).

Thus, where a gas company formed for obtaining and working concessions for establishing gas-works in Russia, had, during two years and a half, never made any gas, but had obtained a concession and purchased land, and nine-tenths of the shareholders were in favour of going on, an order was refused (*r*).

And where an assembly rooms company, incorporated in 1874, had bought

(*h*) *Uruguay Central Railway Co.*, 11 Ch. D. 372; *cf. Empress Engineering Co.*, 16 Ch. Div. 125; *Gandy* v. *Gandy*, 30 Ch. Div. 57.

(*i*) *Olathe Silver Mining Co.*, 27 Ch. D. 278.

(*k*) *Re Tilleard*, 3 D. J. & S. 519; see 25 Ch. Div. 107.

(*l*) *Gandy* v. *Gandy*, 30 Ch. Div. 57, 67; *Touche* v. *Metropolitan Railway Warehousing Co.*, 6 Ch. 671.

(*m*) *Eley* v. *Positive Gov. Ass. Soc.*, 1 Ex. Div. 20, 88; *Rotherham Alum Co.*, 25 Ch. Div. 103; *Empress Engineering Co.*, 16 Ch. Div. 125.

(*n*) *Browne* v. *La Trinidad*, 37 Ch. Div. 1, 13, 14.

(*o*) *Thorn* v. *City Rice Mills*, 40 Ch. D. 357.

(*p*) *Exmouth Dock Co.*, 17 Eq. 181; *Herne Bay Co.*, 10 Ch. D. 42.

(*q*) *Metropolitan Railway Warehousing Co.*, 15 W. R. 1121; 17 L. T. 108; *Middlesborough Assembly Rooms Co.*, 14 Ch. Div. 104; *Capital Fire Ass.*, 21 Ch. D. 209.

(*r*) *Petersburg Gas Co.*, W. N. 1874, 196.

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the site and carried the building up to the level of the street by the end of 1875, and shortly afterwards, owing to the depression of trade in the neighbourhood, the directors with the sanction of the great body of shareholders resolved to proceed no further till times improved, a shareholder's petition presented in 1879 and supported by about one-eighth against four-fifths in value of the shares was dismissed (*s*).

So where the company's objects were to carry on business in the United Kingdom and in other parts of the world, and it had commenced to carry on business in a foreign country, and there appeared a *bonâ fide* intention to commence business in this country, the petition was dismissed (*t*).

If, on the other hand, the Court is satisfied that the business never has been, and never will be commenced, an order will not be refused on a shareholder's petition, notwithstanding that the company has never received any money, and has no debts (*u*).

For when a company is once incorporated it cannot be extinguished except by means of a winding-up, a fact which should be borne in mind in considering a shareholder's right to an order (*x*). If, therefore, a majority of shareholders unreasonably refuse to pass resolutions for voluntarily winding up a company which never has done and never will do anything, a shareholder is entitled to an order (*u*).

It appears, however, that the winding-up order which was made in the case of the *Tumacacori Co.* (*u*) was never prosecuted (*y*), and in a similar case (*z*) Bacon, V.C., refused to follow that authority, and dismissed a petition presented by the legal personal representative of a subscriber of the memorandum who also alleged himself to be a creditor (*z*). In this case no shares were ever allotted, the deposits were repaid, and the V.C. held that no debt was shown to exist.

If under any of the other *placita*, occasion is given for a winding-up order, the company may of course be wound up notwithstanding the year has not expired (a).

But a strong case must be shewn to induce the Court to interfere before the year has expired (*b*).

Ceasing to carry on business.

It is not ceasing to carry on business if a company abandon one of three or four purposes for which it was established, and continue to carry on the others, provided such abandonment be not an abandonment of the principal object of the company (*c*).

And where the company's objects were to acquire gas patents, and especially the patents of W. D. R., and to utilize the patents, and supply "such gas," and the patents proving a total failure, the company carried on the business of manufacturing common gas, a petition presented on the footing that the *substratum* of the company was gone, and that the company had ceased to carry on the business for which it was incorporated, was dismissed (*d*).

A shareholder of a company which has become amalgamated with another

(*s*) *Middlesborough Assembly Rooms Co.*, 14 Ch. Div. 104.

(*t*) *Capital Fire Ass.*, 21 Ch. D. 209.

(*u*) *Tumacacori Mining Co.*, 17 Eq. 534.

(*x*) See *Princess of Reuss* v. *Bos*, L. R. 5 H. L. 176.

(*y*) See 4 Ch. D. 876.

(*z*) *New Gas Generator Co.*, 4 Ch. D. 874.

(*a*) *London and County Coal Co.*, 3 Eq. 355; in which the petition was presented within three months from the date of incorporation. *German Date Coffee Co.*, 20 Ch. Div. 169.

(*b*) *Hop and Malt Exchange Co.*, W. N. 1866, 222; *Langham Skating Rink Co.*, 5 Ch. Div. 669, 685.

(*c*) *Norwegian, &c., Iron Co.*, 35 Beav. 223; *Patent Bread Co.*, 14 W. R. 787; 14 L. T. 582.

(*d*) *New Gas Co.*, 36 L. T. 364; 37 L. T. 111; 5 Ch. Div. 703; *cf. Langham Skating Rink Co.*, 5 Ch. Div. 669.

company is not entitled to an order to wind up the first company on the ground that it has ceased to carry on business (*e*). **Sect. 79.**

The inclination of the Court is against applying the expensive machinery of a winding-up order to a company with very few shareholders, unless there be a substantial reason for it. Sub-sect. 3.

This was the rule before the Act of 1862 (*f*), and has been followed also under that Act (*g*).

But in a proper case a winding-up order will be made in the case of a company with a very small number of shareholders (*h*); and the fact that the section provides for making an order when the number of shareholders is less than seven shews that an order must be proper when the number is seven or more than seven.

Semble: a winding-up order, with its consequent costs, is only justified in these small cases by the suspicion of fraud which a winding-up may succeed in detecting (*i*). But no doubt it is no answer to a creditor that the company has no assets—he is entitled to his order to see if he cannot find some (*k*).

Where there were large assets and no debts an order was made at the instance of shareholders for the purpose of working out the final disposition of the assets (*l*).

It is believed that no case is reported in which an order has been made simply under the terms of this *placitum*.

As to sub-sect. 4, see sect. 80. Sub-sect. 4.

The 5th clause, although thus worded in order to include all cases not before mentioned, cannot be interpreted otherwise than in reference to matters *ejusdem generis* as those in the previous clauses (*m*). Sub-sect. 5. "Just and equitable."

A leading case on this head is *Re Suburban Hotel Co.* (*n*), where it was said that a case might occur in which the Court might give, under the Act, to a minority of shareholders the relief sometimes given in partnership cases, where the whole *substratum* of the business which the company was incorporated to carry on has become strictly impossible, as *e.g.* where the business was to work a patent which turned out to be invalid and wholly useless (*o*); or where each partner in a mining company had contributed all he was bound to contribute, the whole amount had been spent, no profitable working of the mines had been made, and no partner was willing to contribute any more (*p*); in such cases the Court might perhaps order the company to be wound up (*n*).

The principle thus stated has since been the subject of decision. Thus where the principal and substantial object of the company was to acquire a particular gold mine in New Zealand (*q*), and where the principal and substantial object was to manufacture from dates a substitute for coffee under a German patent (*r*), and in the one case the title to the gold mine

(*e*) *National Financial Corporation*, W. N. 1866, 243; 14 W. R. 907; 14 L. T. 749; and see *Anglo-Australian, &c., Life Assurance Co.*, 1 Dr. & Sm. 113.

(*f*) *E. p. Wise*, 1 Drew. 465; *E. p. Inderwick*, 3 De G. & Sm. 231.

(*g*) *Sea and River Marine Insurance Co.*, 2 Eq. 545; *Natal, &c., Co.*, 1 H. & M. 639.

(*h*) *West Surrey Tanning Co.*, 2 Eq. 737; *London and County Coal Co.*, 3 Eq. 355; *Sanderson's Patents Association*, 12 Eq. 188; *cf. Tumacacori Mining Co.*, 17 Eq. 534, *supra*.

(*i*) *New Gas Generator Co.*, 4 Ch. D 874.

(*k*) *Lacey & Co.*, W. N. 1877, 71; 46 L. J. (Ch.) 660.

(*l*) *Anglo-Mexican Mint Co.*, W. N. 1875, 168.

(*m*) *E. p. Spackman*, 1 H. & T. 259; 18 L. J. (Ch.) 261; 1 Mac. & G. 170; *Suburban Hotel Co.*, 2 Ch. 737; *Anglo-Greek Steam Co.*, 2 Eq. 1; *European Life Assurance Society*, 9 Eq. 122.

(*n*) 2 Ch. 737.

(*o*) *Baring* v. *Dix*, 1 Cox, 213.

(*p*) *Jennings* v. *Baddeley*, 3 K. & J. 78.

(*q*) *Haven Gold Mining Co.*, 20 Ch. Div. 151.

(*r*) *German Date Coffee Co.*, 20 Ch. Div. 169.

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altogether failed, and in the other the German patent was not and, it appeared, could not be obtained, it was held that notwithstanding the memorandum of association contained general objects, yet the *substratum* of the company was gone, and a majority could not hold a minority to the speculative continuation of a scheme which had proved futile. In each case the petition was a shareholder's petition, and was opposed by the large majority of the shareholders, and the company was solvent. But a compulsory order was made (*s*).

Again, where the business had been carried on at a constant loss, all the capital spent, all the property except some worthless patents sold, and there was nothing left but these patents and a sum of money insufficient to pay the debts, the company was wound up on a shareholder's petition (the company but no shareholders opposing) on the ground that it had come to an end without the slightest hope of resuscitation (*t*).

Again, if the company be plainly and commercially—though not in a technical sense—insolvent; that is to say, if the Court is reasonably satisfied that the existing and probable assets will be insufficient to meet the existing liabilities, it would probably consider it "just and equitable" to wind up the company (*u*). And if the company be one with reserve liability under the Companies Act, 1879, the reserve capital will for this purpose be set out of consideration (*x*).

It is conceived that it was on some such grounds as these last mentioned that the order in *In re British Oil and Cannel Co.* (*y*) was founded; although the report of the case is not very clear. The Vice-Chancellor appears to have proceeded on the ground that "the assets and the way in which the company had been managed were both unsatisfactory." A majority of shareholders there opposed the petition, and the order was, that a meeting should be held to consider the advisability of passing a resolution for winding up voluntarily, and in default of such a resolution a compulsory order was made.

So if the company never had a proper foundation, and was a mere "bubble company," the Court would consider it came within this subsection (*z*).

But the mere fact of there having been fraud in the promotion of the company, or fraudulent misrepresentation in the prospectus, will not of itself be sufficient to found a winding-up order, for the majority of the shareholders may waive the fraud and confirm the transaction (a).

The words "just and equitable," however, do not give the Court a loose discretion which may be exercised whenever it thinks the speculation not a very successful one; and the winding-up process cannot be used to evoke a judicial decision as to the probable success or failure of a company. And, therefore, the Court cannot wind up a solvent company against the wish of the majority of the shareholders, merely because the business has been carried on at a loss (*b*).

There is no doubt that the "just and equitable" clause gives the Court

(*s*) *Cf. Crown Bank*, 44 Ch. D. 634, where a banking company had given up banking, and were carrying on only land speculation and dealing in shares.

(*t*) *Diamond Fuel Co.*, 13 Ch. Div. 400.

(*u*) *European Life Assurance Society*, 9 Eq. 122, 128; and see s. 80 (4); *cf. E. p. Lawton*, I. K. & J. 204.

(*x*) *Bristol Joint Stock Bank*, 44 Ch. D. 703.

(*y*) 15 L. T. 601.

(*z*) *Anglo-Greek Steam Co.*, 2 Eq. 1; *West Surrey Tanning Co.*, 2 Eq. 737; *London and County Coal Co.*, 3 Eq. 355.

(a) *Haven Gold Mining Co.*, 20 Ch. Div. 151.

(*b*) *Surburban Hotel Co.*, 2 Ch. 737; *Joint Stock Coal Co.*, 8 Eq. 146; *National Live Stock Insurance Co.*, 26 Beav. 153; *New Zealand Quartz Co.*, W. N. 1873, 174.

power to wind up a company in cases not coming under any of the first four heads, but there must be strong ground for exercising the power, at any rate at the instance of a shareholder. For the Act creates as between the shareholders a domestic tribunal, and the Court will be very slow to withdraw from it the decision as to whether the company's business shall be carried on (*c*).

Mismanagement or misapplication of the funds on the part of the directors will not give the Court authority to wind up the company, until it has produced insolvency; although their misconduct might be the subject of a suit (*d*).

So where a company is proceeding to do something which is *ultra vires*, a shareholder has a right in an action, on behalf of himself and all other shareholders, to restrain the company, though every shareholder but himself be acquiescent; but has no right to come for a winding-up order under the "just and equitable" clause (*e*).

Re Factage Parisien (*f*) is not an authority to shew that a minority, against the wishes of a majority, have a right to an order for winding up a losing concern; for had the Court held that opinion there would have been no reason for directing a meeting to be called to ascertain the wishes of the shareholders (*g*).

In *In re Great Northern Copper Mining Co.* (*h*) a mining company was wound up against the wishes of a majority of shareholders, the company being a losing concern. But the circumstances of the case were peculiar. A petition had been presented for winding up four years before, the company had done practically no business since, some bills had been dishonoured in Australia, and the Master of the Rolls rested his order partly on the fact that the *substratum* of the business was gone, and referred to the remarks of Lord Cairns in *In re Suburban Hotel Co.* referred to above (*i*).

Insolvency.

If a company is commercially insolvent, if, that is, it cannot meet current demands, it is properly the subject of a winding-up order. It is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable: but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent.

The tests which the Act gives for ascertaining inability to pay debts will be found to agree with this statement.

Apart from commercial insolvency, it is proper, in considering the solvency or insolvency of a company, to take into account the subscribed but uncalled-up capital (*k*). If any of those tests of insolvency (*l*), or of the impossibility of carrying on the business, which are mentioned in the 79th and 80th sections, occur, then the shareholders have a right to have the company wound up; but, subject to the wishes of the majority, to be expressed by a special resolution under the 1st clause; and subject to the occurrence of any

(*c*) *Langham Skating Rink Co.*, 5 Ch. Div. 669. *Cf. Middlesborough Assembly Rooms Co.*, 14 Ch. Div. 104; *Gold Co.*, 11 Ch. Div. 701, 710.

(*d*) *Anglo-Greek Steam Co.*, 2 Eq. 1; *Bwlch-y-Plwm Co.*, 17 L. T. 235; *National Live Stock Insurance Co.*, 26 Beav. 153; *Anglo-Egyptian Navigation Co.*, 21 L. T. 19; 8 Eq. 660.

(*e*) *Irrigation Co. of France, E. p. Fox*, 6 Ch. 176, 184.

(*f*) 13 W. R. 214, 330; 34 L. J. (Ch.) 140; 11 L. T. 500, 556; 11 Jur. (N.S.) 121.

(*g*) See 2 Ch. 746.

(*h*) 17 W. R. 462; 20 L. T. 264.

(*i*) 2 Ch. 737.

(*k*) *European Life Assurance Society*, 9 Eq. 122.

(*l*) *International Contract Co., E. p. Spartali and Tabor*, 14 L. T. 726.

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of those tests, the shareholders' contract is to supply the specified amount of capital for the purpose of carrying on the business as long as it can be carried on (*m*); and, therefore, insolvency cannot be attributed to a company where the uncalled-up capital is sufficient to pay the debts, unless, *semble*, evidence can be brought to show the insolvency of the shareholders, and it can thus be proved to the satisfaction of the Court that the uncalled capital of the company is not in point of fact capable of being obtained by a call upon the shareholders (*n*).

(See, however, further as to life assurance companies the provisions of the Life Assurance Companies Act, 1870, noticed under sect. 80.)

As to what amounts to a declaration of insolvency for the purpose of enabling one who has contracted to supply the company with goods against acceptances to refuse to make further deliveries except against cash payments, see *E. p. Carnforth Co.* (*o*).

Foreign company.

It is no bar to the jurisdiction of the Court to wind up a company that all the operations of the company are in a foreign country, if the management be in this country, and the business, or a branch of the business, be transacted here (*p*).

An order has been made to wind up a company incorporated by registration in India, having its principal place of business in India, with a branch office and a manager in England (*q*): so again in the case of a New Zealand company (*r*) and an Australian company (*s*).

In *Re Union Bank of Calcutta* (*t*) the jurisdiction of the Court was not denied, but Knight Bruce, V.C., declined to make an order on the ground that there was not at any time any intention to transact business in England, and that there did not exist in this country the means of doing substantial justice.

In *Re Natal, &c., Co.* (*u*) the order was refused on the ground of the small number of the shareholders.

If a foreign company have complied with all the requisitions of the Act in respect of registration, and in contemplation of some description of management, and some description of business in this country, have been registered in this country, it may be wound up under the Act, although in point of fact it has never carried on business here, and all its registered shareholders are foreigners. Such a company falls within the spirit of clause 2, and within the words of clause 5 of this section. Having been created by the Act, it can be extinguished in no other way than by the winding-up process provided by the Act (*x*).

(*m*) *Suburban Hotel Co.*, 2 Ch. 737.

(*n*) *European Life Assurance Society*, 9 Eq. 122, 131. It will be observed that the Vice-Chancellor did not say that evidence of the insolvency of the shareholders would not have affected his judgment, but that he had not such evidence of their insolvency as to justify him in assuming that the uncalled capital was not available assets. *Cf. Bradford Tramways Co.*, 4 Ch. Div. 18, and see s. 98, note.

(*o*) *Re Phœnix Bessemer Steel Co.*, 4 Ch. Div. 108.

(*p*) *Madrid and Valentia Railway Co.*, 3 De G. & Sm. 127 ; 2 Mac. & G. 169 ; *Re Factage Parisien*, 34 L. J. (Ch.) 140 ; 13 W. R. 214, 330 ; 11 L. T. 500, 556 ; 11 Jur. (N.S.) 121 ; *Peruvian Railways Co.*, 2 Ch. 617 ; *Tumacacori Mining Co.*, 17 Eq. 534 ; *Matheson Brothers, Limited*, 27 Ch. D. 225 ; *Commercial Bank of South Australia*, 33 Ch. D. 174 ; *cf. Newby* v. *Van Oppen*, L. R. 7 Q. B. 293, as to the jurisdiction against a foreign corporation as defendants in respect of a cause of action arising within the jurisdiction ; and *Haggin* v. *Comptoir d'Escompte*, 23 Q. B. Div. 519, as to service.

(*q*) *Commercial Bank of India*, 6 Eq. 517 ; *cf. Imperial Anglo-German Bank*, 25 L. T. 895 ; 26 L. T. 229 ; and see s. 199.

(*r*) *Matheson Brothers, Limited*, 27 Ch. D. 225.

(*s*) *Commercial Bank of South Australia*, 33 Ch. D. 174.

(*t*) 3 De G. & Sm. 253.

(*u*) 1 H. & M. 639.

(*x*) *General Company for Promotion of*

But a purely foreign company or partnership complete and existing in a foreign country cannot, it seems, be brought within the purview of the English Act. A company over whose shareholders the English legislature has no power cannot be registered under, and cannot, it seems, be wound up under the Act (*y*).

Company, when deemed unable to pay its debts.

80. A company under this Act shall be deemed to be unable to pay its debts (*a*):

(1.) Whenever a creditor, by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor:

(2.) Whenever, in England and Ireland, execution or other process issued on a judgment, decree, or order obtained in any Court in favour of any creditor, at law or in equity, in any proceeding instituted by such creditor against the company, is returned unsatisfied in whole or in part:

(3.) Whenever, in Scotland, the inducie of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made:

(4.) Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(*a*) *Conf.* s. 199 (4).

Exceeding £50.

A creditor is not entitled to a winding-up order under this section when there is a *bonâ fide* dispute as to the amount of his debt, although it be admitted to exceed £50 (*z*).

But if the petitioner is a creditor for an amount exceeding £50, a winding-up order obtained on his petition is not bad because founded on a demand of more than afterwards turns out to be due (a).

It seems to be sometimes assumed that a creditor for less than £50 cannot petition. There is nothing in the Act to preclude him: and indeed in *Yate Collieries Co.* (*b*) an order was made, though on what ground, when the petitioner's interest was so small and there seem to have been no assets, does

Land Credit, 5 Ch. 363; affirmed *sub nom. Princess of Reuss* v. *Bos*, L. R. 5 H. L. 176.

(*y*) *Bulkeley* v. *Schutz*, L. R. 3 P. C. 764; *Lloyd Generale Italiano*, 29 Ch. D. 219; and see *Bateman* v. *Service*, 6 App. Cas. 386, and notes to ss. 4, 6, *ante*.

(*z*) *Brighton Club, &c., Co.*, 35 Beav. 204; and see further ss. 79, 82.

(a) *Cardiff Coal Co.* v. *Norton*, 2 Ch. 405, 410; S. C. 2 Eq. 558.

(*b*) W. N. 1883, 171.

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not appear. His right to petition is founded on sect. 82, and no limit is there fixed (*c*). But in practice the Court treats the £50 limit in this section as a guide to the amount of the stake which the petitioner ought to have (*d*).

In bankruptcy two creditors, whose debts together amount to more than £50 though each debt is less, can combine in issuing a debtor's summons (*e*).

Registered office.

Where a company has no registered office, the creditor may serve his demand at the company's unregistered office (*f*).

Sub-sects. 1 and 4.

Sub-sect. 1 refers to sect. 79 (4), and the proof of the company being unable to pay its debts is, that the creditor does not receive payment or security within twenty-one days. A petitioner who relies upon statutory demand and non-payment for twenty-one days as evidence of the inability of the company to pay its debts must allow the twenty-one days to expire before he presents his petition, for the order will only be made if it be shewn that there was a case for an order when the petition was presented. A petitioner, therefore, who relies simply upon non-payment after statutory demand has no ground for his petition until three weeks have expired (*g*).

But neglect in payment of a sum as to which the statutory notice has been given is only one of several ways of shewing insolvency. The particular indications of insolvency mentioned in sub-sects. 1, 2, 3, are all included in 4, and under 4 you may shew insolvency in any other way than the ways mentioned in 1, 2, and 3. If the creditor relies upon neglect of a statutory notice, of course he must prove it, and prove that it took place before petition presented, but he may shew insolvency in any other way he likes (*h*).

Thus dishonour of the company's acceptance in the hands of the petitioner (*h*), or the fact that being a judgment creditor the company have informed him that he had better not levy for they have no assets (*i*), is enough.

Disputed debt.

The Court will not encourage attempts on the part of creditors to enforce by means of this section the payment of a debt *bonâ fide* disputed by the company, when it does not appear that the company is unable to pay its debts (*k*).

A creditor who has served his notice has not a statutory right to an order if payment is not made within the three weeks. "Neglected" is not necessarily equivalent to "omitted," it means "omitted to pay without reasonable excuse." If the debt is *bonâ fide* disputed by the company, non-payment is not neglect (*l*).

Sub-sect. 4.

Inability to pay debts refers to debts absolutely due for which a creditor may claim immediate payment; and the Court will, therefore, not make a winding-up order under article (4) if no debt has been due and payable under article (1) and remains unpaid, and if there are no immediate liabilities which cannot be met, merely because the debts are being paid out of assets not properly applicable to their payment. Neither will a winding-up order be made under sect. 79 (5), by reason of liabilities not immediately payable, unless the Court be reasonably satisfied that the existing and probable assets are insufficient to meet the existing liabilities. And of the

(*c*) *Cf.* under the Life Assurance Comp. Act, *British Alliance Corporation*, 9 Ch. D. 635.

(*d*) See 23 Ch. D. 295.

(*e*) *In re Andrew*, 1 Ch. Div. 358.

(*f*) *British and Foreign Gas, &c., Co.*, 13 W. R. 649; 12 L. T. 368; 11 Jur. (N.S.) 559.

(*g*) *Catholic Publishing Co.*, 33 L. J. (Ch.) 325; 2 D. J. & S. 116.

(*h*) *Globe Steel Co.*, 20 Eq. 337.

(*i*) *Flagstaff Co. of Utah*, 20 Eq. 268; *Yate Collieries Co.*, W. N. 1883, 171.

(*k*) *London Wharfing and Warehousing Co., Lim.*, 35 Beav. 37; *et v.* notes to s. 79.

(*l*) *London and Paris Banking Corp.*, 19 Eq. 444.

future prospects of the company, whether in the form of liabilities or profits, in respect of future business, the Court will take no account whatever (*m*).

Life Assurance Companies Act, 1870.

The definition of insolvency or inability to pay debts which is found in the case of *In re European Life Assurance Society* (*n*), last above referred to, is, with respect to life assurance companies, enlarged by the 21st section of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), *v. infra.*

That section provides that an order to wind up such a company may be made "upon its being proved to the satisfaction of the Court that the company is insolvent, and in determining whether or not the company is insolvent, the Court shall take into account its contingent or prospective liability under policies and annuity and other existing contracts; . . . and in the case of a proprietary company having an uncalled capital of an amount sufficient with the future premiums receivable by the company to make up the actual invested assets equal to the amount of the estimated liabilities, the Court shall suspend further proceedings on the petition for a reasonable time (in the discretion of the Court) to enable the uncalled capital, or a sufficient part thereof, to be called up; and if at the end of the original or any extended time for which the proceedings shall have been suspended such an amount shall not have been realised by means of calls as, with the already invested assets, to be equal to the liabilities, an order shall be made on the petition as if the company had been proved insolvent."

Definition of "the Court."

81. *The expression "the Court" (α), as used in this part of this Act, shall mean the following authorities: (that is to say,)*

In the case of a company engaged in working any mine within and subject to the jurisdiction of the Stannaries,—the Court of the Vice-Warden of the Stannaries, unless the Vice-Warden certifies that in his opinion the company would be more advantageously wound up in the High Court of Chancery, in which case "the Court" shall mean the High Court of Chancery:

In the case of a company registered in England that is not engaged in working any such mine as aforesaid,—the High Court of Chancery:

In the case of a company registered in Ireland,—the Court of Chancery in Ireland:

In all cases of companies registered in Scotland,—the Court of Session in either division thereof:

Provided that where the Court of Chancery in England or Ireland makes an order (β) for winding up a company under this Act, it may, if it thinks fit, direct all subsequent proceedings for winding up the same to be had in the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate; and thereupon such last-mentioned Court of Bankruptcy shall, for the purposes of winding up the company, be deemed to be "the Court" within the meaning of the Act, and shall have for the purposes of such

(*m*) *European Life Assurance Society*, 9 Eq. 122; *E. p. Spackman*, 1 Hall & Tw. 229; 18 L. J. (Ch.) 261; 1 Mac. & G. 170.

(*n*) 9 Eq. 122.

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(*a*) Comp. Act, 1867, ss. 12, 41, 42. As to industrial and provident societies, 39 & 40 Vict. c. 45, s. 17; and note to s. 199 of this Act.

(*β*) Gen. Order, Nov. 1862, Form 3.

Jurisdiction to wind up.

This section is repealed by the Comp. (W. Up) Act, 1890, and s. 1 of that Act now defines the Court which in each case has jurisdiction to make a winding-up order or a supervision order. It will be found to be the High Court, the Palatine Court, the County Court, or the Stannaries Court, as the case may be. And in sect. 3 is a power of transfer from one Court to another.

Stannaries Court.

The jurisdiction of the Stannaries Court is now defined by sect. 1 of that Act. Before that Act and before the Stannaries Act, 1887, the test of the jurisdiction of the Stannaries Court was that the company was or had been engaged in working a mine within the jurisdiction (*o*), and the reason was that if the company had been actually working a mine there would naturally be local claims of tradesmen and workmen which could be more satisfactorily dealt with by a local court (*o*). Where, therefore, the company was formed to purchase mines in "Cornwall or elsewhere in England," and had contracted to purchase a lease of a mine in Cornwall, but had never acquired the lease or worked the mine, the jurisdiction to wind it up was in the High Court (*o*).

If a company had been established for [and engaged in] working mines within the jurisdiction of the Stannaries Court, the jurisdiction of that Court was not ousted by the fact that some of the objects of the company were to be carried out beyond its district (*p*).

Where the mine had been sold Kay, J., held that he had jurisdiction to entertain an application for the appointment of a new liquidator (*q*).

Under the Stannaries Act, 1887 (which extends to all persons, bodies, and companies, whether "constituted" under the Companies Acts or not, engaged in or formed for working mines within the Stannaries, see sect. 2), the Stannaries Court has "the same jurisdiction in the winding-up of all companies formed for working mines within the Stannaries (unless they are shown to be then actually working mines or to be engaged in any other undertaking, or to have entered into any contract for such working or undertaking beyond the limits of the Stannaries) as has heretofore been exercised by the said Court pursuant to the 81st sect. of the Companies Act, 1862, in respect of companies engaged in working any mine within and subject to the jurisdiction of the said Stannaries" (sect. 28).

The above language, with some addition, will be found repeated in s. 1 (4) of the Comp. (W. Up) Act, 1890.

County Court.

By the Companies Act, 1867, ss. 41, 42 (*v. infra*), the Court of Chancery in England might after making a winding-up order direct all subsequent proceedings to be had in a County Court, and might transfer the winding-up from one County Court to another. These sections are repealed by the Comp. (W. Up) Act, 1890, and ss. 1 and 3 of that Act supersede them.

By the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 17, societies registered under that Act may be wound up under this Act, either by the Court or voluntarily; and the Court having jurisdiction in the winding-up will be the County Court. As to the Court of Appeal in such a case, see sect. 124 of this Act.

(*o*) *Silver Valley Mines*, 18 Ch. Div. 472; overruling *East Botallack Mining Co.*, 34 Beav. 82.

(*p*) *Penhale and Lomax, &c., Co.*, 2 Ch. 398.

(*q*) *North Molton Mining Co.*, W. N. 1886, 78; 34 W. R. 527; 54 L. T. 602.

Submission to judge.

A submission of a question to determination "in a summary manner by the judge acting in the matter of the winding-up," is a submission to the judge personally, and leaves no right of appeal. A submission to have the question decided by the Court of Chancery in the winding-up would be different (*r*).

Application for winding-up to be made by petition.

82. Any application to the Court for the winding up of a company under this Act shall be by petition (*α*); it may be presented by the company, or by any one or more creditor or creditors (*β*), contributory or contributories (*γ*) of the company, or by all or any of the above parties, together or separately (*δ*); and every order (*ε*) which may be made on any such petition shall operate in favour of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.

(*α*) Gen. Ord. Nov. 1862, Rules 1–5, and March, 1868, Rule 1.

(*β*) Including under the Life Assurance Comp. Act, 1870 (33 & 34 Vict. c. 61), the holder of a current policy, *v.* ss. 2, 21 of that Act; and see Life Assurance Comp. Act, 1872, s. 4.

(*γ*) See, however, Comp. Act, 1867, s. 40.

(*δ*) Under s. 14 of the Comp. (W. Up) Act, 1890, the official receiver may petition for a compulsory order in the case of a company which is being wound up voluntarily or under supervision.

(*ε*) Gen. Order Nov. 1862, Rules 6, 7, Forms 3–5.

Creditor:—garnishee;—

Semble, a creditor in equity may petition as well as a creditor at law (*s*). But a garnishee of a debt due from the company cannot petition: the garnishee is creditor neither at law nor in equity of the debtor of the garnishor (*s*); he has but a lien upon the debt.

In such a case the garnishee order does not transfer the debt (*t*), and the garnishor remains the creditor (*u*). But it does not follow that the Court would make an order on his petition. Thus where the petitioner was the creditor of a banking company for only £65, and the debt had been attached in the Lord Mayor's Court by a creditor of the petitioner, the petition was, on the ground of the uncertain nature of the petitioner's interest, dismissed with costs (*x*).

assignee.

The assignee of a debt can petition (*y*). In bankruptcy the equitable assignee of a debt has been allowed to petition for adjudication without joining the assignor (*z*). But the bare legal owner of a debt of which some one else not under disability is absolute beneficial owner could not petition without joining the person beneficially entitled: the reason being that the latter must join in the oath that the debt has not been paid, and that he has no security (a).

A creditor who has presented a petition cannot sell his debt and the right to proceed with the petition (*b*).

(*r*) *Durham County Society, E. p. Wilson*, 7 Ch. 45.

(*s*) *Combined Weighing Co.*, 43 Ch. Div. 99, 105; *Law Courts Chambers*, W. N. 1889, 189.

(*t*) *Chatterton* v. *Watney*, 17 Ch. Div. 259.

(*u*) *E. p. Chinery*, 12 Q. B. Div. 342.

(*x*) *European Banking Co., E. p. Baylis*, 2 Eq. 521.

(*y*) *London and Birmingham Alkali Co.*, 1 D. F. & J. 257; *Paris Skating Rink Co.*, 5 Ch. Div. 959; and *supra* s. 80 (1).

(*z*) *E. p. Cooper*, 20 Eq. 762. See now Judic. Act, 1873, s. 25 (6).

(a) *E. p. Culley*, 9 Ch. Div. 307; *E. p. Dearle*, 14 Q. B. Div. 184.

(*b*) *Paris Skating Rink Co.*, 5 Ch. Div. 959; the decision is rested on grounds of public policy.

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Executor of creditor.

The executor of a creditor can petition before obtaining probate (*c*).

Secured creditor.

A secured creditor may present a winding-up petition (*d*), and he does not by presenting one elect to give up his security or in any way lose his right to it (*d*). He does not do so even in bankruptcy by presenting a petition for adjudication (*e*), but s. 6 of the Bankruptcy Act, 1869, does not [nor does Bankruptcy Act, 1883, s. 6 (2)] in fact apply to winding-up (*d*).

Where a mortgagee who has presented a winding-up petition gives notice of intention to exercise his power of sale in his mortgage, he may be restrained from so doing pending the hearing of the petition (*f*).

Unliquidated claim.

A claim for unliquidated damages (as for fraudulent misrepresentation) will not support a petition. The claimant must make himself a creditor by changing his claim for damages into a judgment before he can petition (*g*).

So a claim by an unpaid vendor of land under the Lands Clauses Acts, the amount of whose purchase money has been assessed, but whose title has not been accepted, will not support a winding-up petition (*h*).

Current rent.

Rent for the expired portion of a current quarter is not by virtue of the Apportionment Act a debt due which will support a petition (*i*).

Debt less than £50.

It is not necessary that the petitioning creditor's debt should amount to £50 (sect. 80); but if it be less than £50 the petitioner must shew his right to a winding-up order otherwise than by the non-payment of his debt three weeks after demand. A judgment debt on which execution was issued and *nulla bona* returned, was held sufficient as a proof of inability to pay debts (*k*).

See further sects. 79, 80.

Shareholder.

By the Companies Act, 1867, s. 40, a shareholder other than an original allottee cannot, except in the event of the members being reduced in number to less than seven, petition for a winding-up order, unless he have held the shares for at least six months in the eighteen months previously to the commencement of the winding-up.

Shareholder *de jure*.

A shareholder *de jure* who by the company's default is not registered as a shareholder *de facto* may petition. Thus persons who had obtained (more than six months before) a decree in a suit ordering the company to allot them certain shares and register them as holders thereof were held good petitioners though the company had never complied with the order (*l*).

Share warrant holder.

Quære whether the holder of a share warrant who is not an original allottee can petition. Companies Act, 1867, s. 40, says "registered in his name" (*m*).

Shareholder in arrear.

The fact that a shareholder is in arrear of calls is not a bar to his presenting a winding-up petition, at any rate if he pays the call into Court (*n*). It had been said that the petition of a shareholder in arrear might on that account be dismissed (*o*): for otherwise shareholders might present petitions simply to stave off the payment of calls which they had been called upon to pay (*p*). But this was rather supplementing the Act than interpreting it (*n*).

(*c*) *Masonic Ass. Co.*, 32 Ch. D. 373.

(*d*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681. *Great Western Coal Co.*, 21 Ch. D. 769, is another instance. *Cf. Carmarthen Coal Co.*, 45 L. J. (Ch.) 200.

(*e*) *Cf. E. p. Vanderlinden*, 20 Ch. Div. 289.

(*f*) *Cambrian Mining Co., E. p. Fell*, W. N. 1881, 125; 29 W. R. 881.

(*g*) *Pen-y-Van Colliery Co.*, 6 Ch. D. 477.

(*h*) *Milford Docks Co., Lister's Case*, 23 Ch. D. 292.

(*i*) *United Club Co.*, W. N. 1889, 67.

(*k*) See p. 220 (*h*) (*i*).

(*l*) *Patent Steam Engine Co.*, 8 Ch. D. 464.

(*m*) *Positive Assurance Co.*, W.N. 1877, 23.

(*n*) *Diamond Fuel Co.*, 13 Ch. Div. 400, 406; and see *Birch Torr Co., E. p. Lawton*, 1 K. & J. 204.

(*o*) *European Life Assurance Society*, 10 Eq. 403; *Steam Stoker Co.*, 19 Eq. 416; *Petersburg Gas Co.*, 33 L. T. 637; 24 W. R. 230; and see *Joint Stock Coal Co.*, 8 Eq. 146, 152.

(*p*) *Steam Stoker Co.*, 19 Eq. 416.

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A holder of fully paid-up shares is a "contributory" within the meaning of sect. 74 and of this section (*q*), and can present a petition for winding up the company (*r*). Paid-up shareholder.

But he must shew sufficient grounds for a winding-up, for he cannot be called upon to contribute anything, and his interest is only this, that if there be a surplus of assets he is entitled to be repaid a portion of such surplus. And if he be the sole petitioner, and the creditors do not press for payment, and the company has not had a fair trial, the order will be refused (*s*).

If the company's assets are insufficient for payment of its debts a paid-up shareholder has no interest whatever in the matter. If he presents a petition he must allege and prove, at least to the extent of a *primâ facie* case (*t*), that there are assets of the company of such an amount as that in the winding-up there will be such a surplus as to give him a tangible interest (*u*). And if the allegation of assets be only of moneys to be recovered from directors or others for fraud, that would as a general rule be insufficient to support a winding-up petition (*x*), although if a reasonable probability of recovering such moneys be shewn the case might be otherwise; and where in the interval between winding-up order and appeal from it an order had actually been made against one director, which, however, was under appeal, a winding-up on a fully paid shareholder's petition was sustained (*y*).

In *In re Constantinople and Alexandria Hotels Co.* (*z*), there being two petitions, the one by a paid-up shareholder, the other by shareholders who had paid only the deposit, the conduct of the winding-up was given to the paid-up shareholder.

An order has been made upon the petition of executors to wind up a company whose deed of settlement provided that executors should not be proprietors, for they were nevertheless contributories (a). Executor of shareholder.

There does not seem to be any reason to doubt that a past member, liable as a B. contributory, can petition. He is, of course, included under the term "contributory," and the enactment of Companies Act, 1867, s. 40, which imposes upon a contributory as one qualification for presenting a petition, that his shares must have been registered in his name for "at least six months during the eighteen months previously to the commencement of the winding-up," plainly shews that the petition of a B. contributory was contemplated among others. The writer, however, is not aware of any authority under this Act for such a petition, and it would manifestly be an exceptional case in which such a petition would be presented. B. contributory.

An order has been made to wind up a company, registered under the 7 & 8 Vict. c. 110, on the petition of past members who, as between themselves and the other proprietors, were discharged from liability (*b*).

A new petitioner is created by the Comp. (W. Up) Act, 1890. By s. 14 of Official receiver.

(*q*) *Anglesea Colliery Co.*, 2 Eq. 379; 1 Ch. 555.

(*r*) *National Savings Bank Association*, 1 Ch. 547; *London Armoury Co.*, 11 Jur. (N.S.) 963; although doubted in an early case, *Cheshire Patent Salt Co.*, 1 N. R. 533.

(*s*) *Patent Artificial Stone Co.*, 34 Beav. 185; 11 Jur. (N.S.) 4; 13 W. R. 285; 34 L. J. (Ch.) 330; *Patent Bread Machinery Co.*, 14 W. R. 787; 14 L. T. 582; *Lancashire Brick and Tile Co.*, 34 Beav. 330; 13 W. R. 569; *Irrigation Co. of France, E. p. Fox*, 6 Ch. 176, 190; *New Zealand Quartz Co.*, W. N. 1873, 174.

(*t*) *Diamond Fuel Co.*, 13 Ch. Div. 400, 411.

(*u*) *Rica Gold Washing Co.*, 11 Ch. Div. 36. So also in the case of an application under s. 165, *Bentinck* v. *Fenn*, 12 App. Cas. 652.

(*x*) *Rica Gold Washing Co.*, 11 Ch. Div. 36, 43.

(*y*) *Diamond Fuel Co.*, 13 Ch. Div. 400. In *Gold Co.*, 11 Ch. Div. 701, 707, also the objection of fully paid shareholder failed.

(*z*) 13 W. R. 851.

(a) *Norwich Yarn Co.*, 12 Beav. 366.

(*b*) *Times Fire Assurance Co.*, 30 Beav. 596.

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that Act the official receiver of the Court which has jurisdiction to wind up the company can present a petition for a compulsory order in the case of a company which is being wound up voluntarily or under supervision.

Security for costs.

A petitioner residing out of the jurisdiction (*c*) (including Scotland (*d*)), or who gives an address at which he cannot be found (*e*), must give security for costs, and the amount under the old practice was £100 (*a*). Under the new practice the amount is discretionary (*f*). But *semble* special reason must be shewn if more than £100 is asked for (*g*).

A petitioner who has presented a petition for the liquidation of his own affairs must give security for costs, although no resolution for liquidation has been passed (*h*).

Where the petitioner was a judgment creditor out of the jurisdiction security was refused—for the company had the security in their own hands, viz., the judgment debt (*i*).

Shareholders out of the jurisdiction who appear and oppose cannot be made to give security for costs to the petitioner. It is curious that application should even have been made for security in such a case. The opposing shareholders were cross-examining the petitioner and no doubt putting him to great expense (*k*).

The company do not, by filing affidavits after taking out a summons for security, waive their right to it (*l*).

Petitioner is *dominus litis*.

A creditor who has presented and advertised a petition is not a trustee for other persons, or bound to bring the petition to a hearing in order to give creditors or shareholders an opportunity to appear to support or oppose it; but he is entitled to dismiss it or to agree with the company for its withdrawal upon terms (*m*). If, after an offer to satisfy his debt and costs, he proceed with the petition, he will be allowed no costs incurred after such offer (*n*).

If the company want to get rid of a petition it is conceived that the creditor is entitled to require, in addition to the payment of his debt, both his own costs of the petition and also an indemnity against the costs of creditors and shareholders who may appear upon it.

For the advertisement of the petition is an invitation to the creditors and contributories to appear if they think proper (*o*): and if the petitioner elects to dismiss his petition he must provide for their costs (*p*).

For this reason the petitioner will not be allowed to take his petition out of the list, so as not to appear in the Court paper of the day for which it is answered (*q*).

(*c*) *Home Assurance Association*, 12 Eq. 112; *E. p. Seidler*, 12 Sim. 106; *E. p. Latta*, 3 De G. & Sm. 186. See as to Life Assurance Companies, the Life Ass. Comp. Act, 1870, s. 21.

(*d*) *East Llangynog Lead Co.*, W. N. 1875, 81; 23 W. R. 587; *Howe Machine Co., Fontaine's Case*, 41 Ch. D. 118.

(*e*) *Sturgis Syndicate, Limited*, W. N. 1875, 218; 34 W. R. 163; 53 L. T. 715.

(*f*) Order LXV., r. 6.

(*g*) *Paxton* v. *Bell*, W. N. 1876, 221, 249; 24 W. R. 1013.

(*h*) *Carta Para Co.*, 19 Ch. D. 457.

(*i*) *Contract Corp.*, W. N. 1887, 218.

(*k*) *Percy Mining Co.*, 2 Ch. D. 531.

(*l*) See note (*c*); and see *ante*, s. 69, note.

(*m*) As in *Harris* v. *Venables*, L. R. 7 Ex. 235.

(*n*) *Times Life Assurance and Guarantee Co.*, 9 Eq. 382; *Home Assurance Association*, 12 Eq. 59; *Hereford Waggon Co.*, 17 Eq. 423; and see *Imperial Guardian Society*, 9 Eq. 447, and s. 79; although in an earlier case, *Mid Wales Hotel Co.*, 17 L. T. 597, it was held the better course when a petition had been presented and advertised, to let it be called on and withdrawn if no one objected. See also Gen. Ord. Nov. 1862, Rule 2, note.

(*o*) *New Gas Co.*, 5 Ch. Div. 703; *Diamond Fuel Co.*, W. N. 1878, 11.

(*p*) See note (*r*), p. 227; and *Patent Cocoa Fibre Co.*, 1 Ch. D. 617.

(*q*) *Re An Insurance Co.*, 33 L. T. 49; *Anglo-Virginian Land Co.*, W. N. 1880, 155.

And if when it is called on he elects to dismiss it, it will be dismissed with costs, and the costs of creditors who have appeared in consequence of the advertisement of the petition will be included in the order (*r*). In such case the Court may be unable to form any judgment whether persons appearing to support the petition or persons appearing to oppose it are in the right, for the merits of the petition may not be gone into: and in such case whether they support or oppose they are entitled to their costs (*s*).

The reasons for a contrary decision in *Jablochkoff Electric Light Co.* (*t*) do not seem satisfactory.

But no doubt according to the ordinary rule it is only one set of costs that will in general have to be provided. It is true that in *North Brazilian Sugar Factories* (*u*) Chitty, J., gave separate sets of costs to all shareholders and creditors whether supporting or opposing; but as he explained in *Peckham Tramways Co.* (*x*) (where he gave only one set of costs), he did so because the petitioner refused to give any reason for the withdrawal of his petition. In *Re Paper Bottle Co.* (*y*) North, J., also gave separate sets of costs to every one appearing, following *North Brazilian Sugar Factories* (*u*); but *Peckham Tramways Co.* (*x*) was not cited. And in *Criterion Gold Mining Co.* (*z*) Kay, J., refused separate sets of costs, pointing out that if the petition had been dismissed on its merits separate sets of costs would not have been given, and that no more ought to be given when it is withdrawn.

The real difficulty, however, is that if the petition is heard there is a winning side and a losing side, and the winning side get the one set of costs. It is difficult to do complete justice on the same lines when no one can say which side would have won.

The petitioner being thus liable for costs it is conceived that he is entitled to call upon the company to indemnify him in the matter if they wish to get rid of his petition by paying his debt: and that if they pay the debt without thus providing for costs he is entitled to bring on his petition to get them (a). But if the company provide for the petitioner's costs and give him an indemnity against the costs of parties appearing, *semble* the petitioner ought not to instruct counsel to appear on the hearing of the petition (*b*).

Where the petition had never been advertised a shareholder appearing was not allowed costs (*c*).

Where the petition stated that in the event of voluntary resolutions being passed the petition would be withdrawn, and notice had been given to shareholders who had taken copies of the petition that if such resolutions were passed and they appeared their costs would be objected to, and voluntary resolutions were passed, the petitioner withdrawing his petition was not ordered to pay their costs (*d*).

Second petition:—

When a creditor is aware (*e*) that a petition to wind up has been presented, he is not at liberty to present a second petition, without the risk of having

(*r*) *Home Assurance Association*, 12 Eq. 59; *Hereford Waggon Co.*, 17 Eq. 423; *Marlborough Club Co.*, 1 Eq. 216; but see *infra*, pp. 248–250.

(*s*) *Patent Cocoa Fibre Co.*, 1 Ch. D. 617; *Nacupai Co.*, 28 Ch. D. 65; *North Brazilian Sugar Factories*, W. N. 1887, 3; 56 L. T. 229.

(*t*) W. N. 1883, 189; 49 L. T. 566; 32 W. R. 168.

(*u*) W. N. 1887, 3; 56 L. T. 229.

(*x*) 57 L. J. Ch. 462.

(*y*) 40 Ch. D. 52.

(*z*) 41 Ch. D. 146.

(a) *Flagstaff Co. of Utah*, 20 Eq. 268.

(*b*) *Adjustable Horse-Shoe Syndicate*, W. N. 1890, 157.

(*c*) *United Stock Exchange*, 28 Ch. D. 183.

(*d*) *District Bank of London*, 35 Ch. D. 576.

(*e*) As to advertisement being notice, see note to Gen. Ord. Nov. 1862, Rule 2.

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to pay costs (*f*), even if the first be the petition of the company (*g*). A rule, therefore, that, when once a petition has been presented the petitioner shall not be at liberty to dismiss it if a creditor appear and prove his debt and wish to take advantage of the petition, would be very convenient. But no such rule exists in the Court.

And, therefore, where a creditor applied to dismiss his petition, his debt having been secured, and another creditor appeared on the petition and objected to its dismissal, the petition was nevertheless dismissed (*h*).

If a second petitioner alleged and proved fraud affecting the first petition the matter would resolve itself into this, that the first petition would be dismissed with costs, and the second petition would thus become the first. This is therefore really no exception to the general rule of the Court, which, as strictly administered, deals with a second petition presented with knowledge of a first by uniformly dismissing it with costs on the ground that it is unnecessary (*i*).

It is perhaps allowable to express a doubt whether this rule coupled with the rule which gives the petitioner a preference in the appointment of official liquidator is satisfactory. It is unfortunately by no means exceptional to find the affairs of a company to have been so conducted as that those who have been concerned in its management ought to be the last persons to control its liquidation. In such a case advantage is taken of the practice as it now stands to secure the control of the liquidation. So soon as the crisis approaches, the moment is forestalled at which a hostile petition may be expected, a petition is presented by some one friendly to the directorate, the appointment of liquidator is secured, and all unpleasantness is avoided.

Another common device which the practice facilitates, is the presentation of a friendly petition, which is from time to time adjourned until the company has had time to pass voluntary resolutions, when the petition is either withdrawn, or if some creditor is too much in earnest in wanting payment to put up with this, a supervision order is taken under which the voluntary liquidators of course continue in office. Such manœuvres may be foiled: but a practice is to be deprecated which assists them. It is believed to be common practice in such a case to present a second petition, with the full expectation of paying the costs of it, simply in order to drive the first petitioner to a hearing.

Jessel, M.R., in the *Norton Iron Co.* (*k*), said that the remedy of the creditor who was in earnest, and who found a first petition in his way, was this:—he should write to the first petitioner requiring to know before a certain day whether or no he was going *bonâ fide* to press for an order, and stating that in default of a satisfactory answer he should present another petition. And it was certainly competent for any creditor before his Lordship to appear and insist on the petition being disposed of in its due course (*l*).

(*f*) *Accidental and Marine Insurance Co., E. p. Rasch*, 36 L. J. (Ch.) 75; 15 L. T. 173; *Joint Stock Coal Co.*, 8 Eq. 146; *Empire Assurance Corporation*, 16 L. T. 341; *Brooke & Co.*, W. N. 1888, 213; *Building Societies Trust*, 44 Ch. D. 140; unless the petition which has been presented is virtually the petition of the company, and merely collusive; *Humber Ironworks Co.*, 2 Eq. 15; *United Service Co.*, 7 Eq. 76; or is otherwise suspicious, as where, subsequent to the presentation of the petition, a voluntary winding-up was commenced, and the petitioner accepted the office of liquidator under it: *Commercial Discount Co., Cooper's Case*, 1 N. R. 416; 32 Beav. 198; and see *infra*, p. 253.

(*g*) *Standard Cement Co.*, W. N. 1890, 91.

(*h*) *Home Assurance Association*, 12 Eq. 59.

(*i*) See *Norton Iron Co.*, W. N. 1877, 223; 47 L. J. (Ch.) 9; *Building Societies Trust*, 44 Ch. D. 140.

(*k*) W. N. 1877, 223; 47 L. J. (Ch.) 9.

(*l*) Not necessarily the first time it is in the paper. *Margate Hotel Co.*, W. N. 1888, 73, North, J.

Where a second petition is presented in ignorance that a first petition is pending, the second petitioner is entitled to his costs up to the time when he became aware of the first (*m*). If he goes on with his petition after that time he will not get the subsequent costs unless he has good reason to believe that the first petition is not *bonâ fide*, *e.g.*, that the company has indemnified the first petitioner against costs (*m*). In ignorance of the first.

When several petitions are presented in different branches of the Court the regular course is to transfer them to that branch of the Court where the first petition was presented (*n*). Transfer of petitions.

The Court will not make an order upon a petition at the instance of other persons appearing upon it if the petitioner has no case, at any rate unless sufficient notice be given (*o*). But the petition might perhaps in some cases be treated as amended (*p*). Order, whether made at instance of person other than petitioner.

But, *semble*, if the petitioner have petitioned in a wrong character, the petition may be amended, and an order made upon it.

Thus where a member of a benefit building society petitioned as a creditor, he was allowed to amend his petition by stating that he was a creditor only in respect of money advanced by him as a member (*q*).

An order will not be made if a sufficient case is not stated on the petition, even if such a case is proved in evidence. The order must be made *secundum allegata et probata* (*r*). *Secundum allegata et probata.*

If a sufficient case is not alleged the petition is, as it is now commonly called, demurrable (*s*), and the respondents may object to the evidence being read at all until the demurrer has been decided. Demurrable petition.

It would be well if a demurrer could be in fact put in; for otherwise, if the company allows the petition to come on without filing any evidence, it has to rely on the indulgence of the Court if the demurrer fails, while, if the company files evidence, and owing to the success of the demurrer it is not wanted, the costs of the evidence may not be allowed (*t*).

Moreover, if a demurrer could be put in the demurring party would be in a position to open the demurrer, and if he failed could be made to pay the costs of it, neither of which is possible where there is no demurrer (*u*).

Leave to amend a demurrable winding-up petition has been given in several instances (*x*).

Benefit building societies were, previous to the Building Societies Act, 1874, held to be subject to this Act for the purposes of winding-up (*y*), and an order has been made to wind up such a society on the petition of a member who had given notice of withdrawal of his deposits, the petition (as amended) stating that he was a creditor of the company in respect of money advanced by him as a member, in respect of which notice of withdrawal had been given (*z*). Benefit building society.

(*m*) *General Financial Bank*, 20 Ch. Div. 276; *Building Societies Trust*, 44 Ch. D. 140.

(*n*) *West Hartlepool Co.*, 10 Ch. 629; and see *infra*, p. 253.

(*o*) *Spence's Co.*, 9 Eq. 9; *Home Assurance Association*, 12 Eq. 59. The observations *contra* in *Empire Assurance Corporation*, 16 L. T. 341, are not borne out.

(*p*) *Vron Colliery Co.*, 20 Ch.Div.442, 447.

(*q*) *Queen's Benefit Building Society*, 6 Ch. 815.

(*r*) *Steam Stoker Co.*, 19 Eq. 416; *Wear Engine Works Co.*, 10 Ch. 188; *Patent Cocoa Fibre Co.*, W. N. 1876, 132; *Langham Skating Rink Co.*, 5 Ch. Div. 669; *Rica Gold Washing Co.*, 11 Ch. Div. 36.

(*s*) See note (*r*) and *New Gas Co.*, 36 L. T. 364; 37 L. T. 111; 5 Ch. Div. 703; *Petersburg Gas Co.*, 33 L. T. 637.

(*t*) *Steam Stoker Co.*, 19 Eq. 416; *Star and Garter Co.*, 28 L. T. 258; W. N. 1873, 74.

(*u*) *British Alliance Corporation*, 9 Ch. D. 635.

(*x*) *E.g. White Star Co.*, 48 L. T. 815; *Queen's Benefit Building Soc.*, 6 Ch. 815.

(*y*) See note to s. 199, *infra*.

(*z*) *Queen's Benefit Building Society*, 6 Ch. 815; and see *Doncaster Permanent Building Society*, 3 Eq. 158.

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But such a member is not entitled *ex debito justitiæ* to an order (a).

Under the 32nd section of the Building Societies Act, 1874 (*b*), a society under that Act may terminate or be dissolved upon certain events; and fourthly, "By winding up either voluntarily under the supervision of the Court, or by the Court, if the Court (*c*) shall so order, on the petition of any member, authorized by three-fourths of the members present at a general meeting of the society specially called for the purpose, to present the same on behalf of the society, or on the petition of any judgment creditor for not less than fifty pounds, but not otherwise." A first observation upon this clause is that it does not mention, and the Act does not incorporate, the Companies Acts; but it is impossible to doubt that it is a winding-up under these Acts that is pointed to, and it has been so decided (*d*). Further, upon the wording of the clause it would seem that the words "voluntarily under the supervision of the Court" cannot be read disjunctively, and yet if they are not, there does not appear to be any power for such a society to wind up voluntarily in the sense in which that term is used in the Companies Acts, and if that be so, a supervision order, which is an order to continue a voluntary winding-up, is impossible. Sub-sect. 3 of the 32nd section above referred to, gives a power of dissolution "with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society;" but this, though analogous to, is not the same as the power of voluntary winding-up given by Companies Act, 1862, s. 129. Industrial and provident societies had, under sect. 17 of the Industrial and Provident Societies Act, 1862 (*e*), and have now under sect. 17 of the Act of 1876 (*f*), power to wind up voluntarily, but benefit building societies have been held not to be within the Industrial and Provident Societies Acts (*g*). It is conceived that there is a slip in the drafting of the Act, and that it has been forgotten that a supervision order necessarily pre-supposes a voluntary liquidation.

There is a case of *Sunderland Building Society* (*h*) reported upon this point. The writer has been so fortunate as to obtain the papers, including the short-hand notes of the judgments, and thus to ascertain the material facts and the grounds of the decision which are not to be found in the reports. The society was one incorporated under the Act of 1874. On the 17th June, 1887, the society in general meeting passed an extraordinary resolution for winding-up in the terms of sect. 129 (3), and appointed liquidators, and resolved that a Mr. Morgan, a member of the society, be authorized to present a petition for a supervision order. On the 20th June he did accordingly present a petition, and on the 2nd July the County Court made a supervision order. The application, which came by way of appeal to the Superior Court, was upon a summons issued by the liquidators in such winding-up. The Court (Field and Wills, JJ.), while holding that the validity of the winding-up order could not be questioned in that proceeding, did not rest their judgment on that, but decided affirmatively that the order was good. Their reasons for so holding are not so easily stated. The judgments leave one in doubt whether either judge was prepared to hold that a resolution for winding-up would have been good if not followed by a petition and a supervision order, for both found themselves upon the fact that the winding-up resolu-

(a) *Planet Benefit Society*, 14 Eq. 441; and see *Professional, &c., Building Society*, 6 Ch. 856.

(*b*) 37 & 38 Vict. c. 42.

(*c*) *i.e.* the County Court, see sect. 4 of that Act. *Jones* v. *Swansea Soc.*, 29 W. R. 382; 50 L. J. (Q. B.) 428; 44 L. T. 106.

(*d*) *Jones* v. *Swansea Soc.*, *l.c.*

(*e*) 25 & 26 Vict. c. 87.

(*f*) 39 & 40 Vict. c. 45.

(*g*) See note to s. 199, *infra*.

(*h*) 21 Q. B. D. 349; 37 W. R. 95.

tion was accompanied by the resolution to present a petition, and that the petition immediately followed, so that (*per* Field, J.) "to treat that as anything but one transaction is not possible." At the same time the Court plainly held that the order was a valid order, and it would seem impossible logically to arrive at this conclusion without affirming that a building society may wind up voluntarily whether the jurisdiction of the Court to make a supervision order is then invoked or not. Leave to appeal was asked and refused.

A confusion as to the nature of a supervision order similar to that in the Building Societies Act is to be found in sect. 22 of the Stannaries Act, 1887, which provides that a relinquishment of shares in a mining company in the Stannaries shall have no effect if delivered within six weeks immediately preceding the day on which a resolution to wind up the company shall be legally passed, or on which an order shall be made to wind up the same by or *subject to the supervision of* the Court. Obviously six weeks before date of supervision order must be either already covered by six weeks before voluntary resolution, or must be after winding-up commenced by voluntary resolution passed.

Scripholder.

An order has been made upon the petition of the transferee of a scrip certificate transferable by delivery, which entitled the holder to become a shareholder in respect of the shares therein mentioned, and in the meantime to receive dividends, he admitting himself to be a contributory, and undertaking to do all acts necessary to make himself a shareholder (*i*).

Power of Court.

83. Any judge of the High Court of Chancery may do in Chambers any act which the Court is hereby authorized to do; and the Vice-Warden of the Stannaries may direct that a petition for winding up a company be heard by him at such time and at such place within the jurisdiction of the Stannaries, or within or near to the place where the registered office of the company is situated, as he may deem to be convenient to the parties concerned, or (with the consent of the parties concerned) at any place in England; and all orders made thereupon shall have the same force and effect as if they had been made by the Vice-Warden sitting at Truro or elsewhere within the jurisdiction of the Court, and all parties and persons summoned to attend at the hearing of any such petition shall be compellable to give their attendance before the Vice-Warden by like process and in like manner as at the hearing of any cause or matter at the usual sitting of the said Court; and the registrar of the Court may, subject to exception or appeal to the Vice-Warden as heretofore used, do and exercise such and the like acts and powers in the matter of winding-up as he is now used to do and exercise in a suit on the Equity side of the said Court (*a*).

(*a*) Comp. Act, 1867, s. 12, *infra*.

(*i*) *Littlehampton Steamship Co.*, 34 Beav. 256; 2 D. J. & S. 521; and see *E. p. Capper*, 3 De G. & Sm. 1. As to contributories in scrip companies see *Ormerod's Case*, 5 Eq. 110, *supra*, p. 69, and *infra*, Table A. (8), note.

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By the Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 38:—

Hearing of Petition for Winding-up.] The provision of sect. 83 of the Companies Act, 1862, contained in second paragraph thereof, shall be amended, and read as follows: namely, that the Vice-Warden may direct that petitions to wind up a company shall be heard by him at such time or place as he may think fit within the Stannaries, or within or near to the place where the registered or other chief office of the company is situate, or if such office be distant 150 miles or more from Truro (measured by the public railways) then in London or Westminster; or with the consent of the party or parties petitioning, and of the company represented by its secretary, purser, or other proper officer, the hearing may be in any part of England; and all orders made by the Vice-Warden on such hearing in any of the above cases shall be as valid and effectual as if they had been made at Truro.

Commencement of winding-up by Court.

84. A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up (*a*).

(*a*) s. 130 as to voluntary winding-up.

When the order is made on more than one petition, the order, and therefore the commencement of the winding-up, dates from the earliest (*k*).

As to the commencement of a voluntary winding-up, and of a winding-up under supervision (sect. 147), see *post*, sect. 130.

If the order of events be: presentation of a petition for a compulsory order, resolution passed for voluntary winding-up, order on the petition to continue the winding-up under supervision, the commencement of the winding-up will be the date of the resolution to wind up voluntarily, not, under this section, the date of the presentation of the petition (*l*).

If a supervision order be superseded by a compulsory order, it has been said that the winding-up will date from the commencement of the winding-up under supervision—*i.e.*, from the resolution to wind up voluntarily—not from the presentation of the petition (*m*). But this case has been doubted (*n*).

Life Assurance Companies Act, 1872.

By the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 4, *infra*, where under the provisions of that section a "subsidiary" company is ordered to be wound up in conjunction with a "principal" company, the commencement of the winding up of the principal company is, save as otherwise ordered by the Court, the commencement of the winding up of the subsidiary company.

Court may grant injunction.

85. The Court may, at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the Court thinks fit (*a*); the Court may also at any time after the pre-

(*k*) *Kent v. Freehold Land Co.*, 3 Ch. 493.

(*l*) *Weston's Case*, 4 Ch. 20; *contra*, *Hydraulic Tube Drawing Co.*, 16 W. R. 572; 18 L. T. 205, Malins, V.C., which must be considered as overruled; and see s. 130.

(*m*) *United Service Co.*, 7 Eq. 76; and see s. 152.

(*n*) *Taurine Co.*, 25 Ch. Div. 118.

sentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company (β). Sect. 85.

(α) ss. 87, 163, 197, 201. Rules 15, 59, Form 9. Comp. (W. Up) Act, 1890, s. 4.
(β) ss. 92–97, Gen. Ord. Nov. 1862,

Winding-up by the Court.

Sects. 85, 197, and 201 give to the Court, in the interval between the presentation of a petition and an order upon it, a discretionary power to restrain proceedings against the company and (as respects sects. 197 and 201) against any contributory; while sects. 87, 198, and 202 peremptorily stay proceedings after an order has been made until the leave of the Court has been obtained to proceed with them.

A difference is to be observed between this section and sects. 197 and 201, that while, under this section, proceedings may be restrained on the application of company, creditor, or contributory, under sects. 197 and 201 this is to be done only on the application of a creditor. The proceedings to be restrained under sects. 197 and 201 are proceedings against any contributory or "against the company as hereinbefore provided." The result, therefore, would seem to be that proceedings against a contributory can be stayed only on the application of a creditor and not on that of the company or a contributory; but proceedings against the company may be stayed on application of company, creditor, or contributory, whether the company be formed under the Act, formed otherwise and registered under Part VII. of the Act, or be an unregistered company. For as regards an unregistered company the words at the end of sect. 204 do not exclude a company as to which there are winding-up proceedings pending though no order has been made, and consequently the beginning of the section renders applicable to unregistered companies the whole, except as expressly excepted, of Part IV. of the Act, including sect. 85 (*o*).

Winding-up under supervision.

By sect. 148 a petition for winding up under supervision, and by sect. 151 an order for winding up under supervision, are respectively, for the purpose of giving jurisdiction to the Court over actions and suits, to be deemed to be a petition and order for winding up by the Court.

Voluntary winding-up

By sect. 133 in a voluntary winding-up the creditors are to be paid *pari passu*; and by sect. 138 the Court may, on the application of the liquidators or a contributory, exercise all or any of the powers which it might exercise if the company were being wound up by the Court.

Actions (*p*) and executions (*q*) are therefore commonly restrained after voluntary winding-up commenced.

"The Court.

Before the Judicature Act the right course was to apply to the judge before whom the petition was presented, to stay actions wheresoever pending.

After the passing of the Judicature Act the practice was for some time unsettled. The Common Pleas Division in an early case (*r*) thought the Judge of the Chancery Division (being "the Court" defined by sect. 81 of this Act as modified by the Judicature Act) could still grant an injunction to stay, and on the ground of convenience preferred to leave it to him. In the same view orders were for some time granted in the Chancery Division to stay actions in the other Divisions (*s*), although Jessel, M.R., upon appli-

(*o*) *Rudow v. Great Britain Mutual Society*, 17 Ch. Div. 600.

(*p*) See *Keynsham Co.*, 33 Beav. 123, and other cases cited under this section, *infra*, *sub* tit. "Voluntary Winding-up."

(*q*) *Thomas v. Patent Lionite Co.*, 17 Ch. Div. 250.

(*r*) *Kingchurch v. People's Garden Co.*, 1 C. P. D. 45.

(*s*) *Needham v. Rivers Protection Co.*

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cation made to him in the winding-up for allowance of the costs of the above-mentioned application to the Common Pleas Division, had allowed them, being of opinion that the Judge of the Chancery Division had no jurisdiction to stay, and that the application was rightly made to the Court where the action was pending (*t*).

It is now settled that applications to stay must be made where the actions are pending (*u*). Such orders are, therefore, now granted in the Queen's Bench Division (*x*), and are made absolute in the first instance upon *ex parte* application (*y*). If there were several actions in the same Division, they might all be stayed on one summons (*t*).

After winding-up order made, the Judge of the Chancery Division having jurisdiction in the winding-up may control actions by transferring them under Order XLIX. r. 5. See sect. 87, *infra*.

Execution.

After judgment signed execution is still a proceeding in the action, and can be restrained only in the Court in which the action was brought (*z*).

Inferior Courts.

The High Court can no doubt restrain proceedings in inferior Courts. Thus an order has been made to restrain proceedings to recover penalties for alleged offences under this Act and the Life Assurance Companies Acts (a). And it can of course restrain distress for rates (*b*), rents (*c*), and the like.

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By sect. 163, where a company is being wound up by, or under the supervision of, the Court, any attachment, sequestration, distress, or execution, put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents.

But it was decided in 1864 (*d*) that this section is to be read with, and is controlled by, the 85th and 87th sections, and that the joint effect of these sections is to put the creditor who desires to proceed to execution after the winding-up order to the necessity of coming to the Court and asking for leave so to proceed; and whether he shall be allowed to proceed or not is a question for the discretion of the Court. It is difficult no doubt to see why the clear and precise provisions of sect. 163 should be read as if a distress were a "proceeding" within sect. 87, but the Court is now bound by the decision (*d*) and the many subsequent cases which have followed it (*e*).

In the interval between presentation of petition and order, it is conceived that the creditor may issue execution, or enforce an execution previously issued, provided he is not restrained (*f*), just as he may during the same interval proceed with an action until stopped under this section.

But sect. 163 takes effect from the commencement of the winding-up. If, therefore, an order is afterwards made, the execution is void (*g*), subject, it

(V.-C. M.), 1 Ch. D. 253; *Stapleford Colliery Co.* (V.-C. B.), W. N. 1875, 256; *City of London Club* (V.-C. H.), 34 L. T. 846.

(*t*) *People's Garden Co.*, 1 Ch. D. 44.

(*u*) *Artistic Colour Printing Co.*, 14 Ch. D. 502; *People's Garden Co.*, 1 Ch. D. 44; *South of France Pottery Works*, 37 L. T. 260; 25 W. R. 870; *Morriston Fuel Co.*, W. N. 1877, 20; *Garbutt* v. *Fawcus*, 1 Ch. Div. 155.

(*x*) *Walker* v. *Banagher Distillery Co.*, 1 Q. B. D. 129; *Rose* v. *Gardden Lodge Co.*, 3 Q. B. D. 235.

(*y*) *Masbach* v. *Anderson & Co.*, W. N. 1877, 252; 26 W. R. 100; 37 L. T. 440; *Everingham* v. *Co-operative Beer Co.*, W. N. 1880, 99.

(*z*) *Artistic Colour Printing Co.*, 14 Ch. D. 502.

(a) *Briton Medical Association*, 32 Ch. D. 503; 39 Ch. D. 61.

(*b*) *E.g. Wearmouth Crown Glass Co.*, 19 Ch. D. 640.

(*c*) See cases, *infra*.

(*d*) *Exhall Mining Co.*, 4 D. J. & S. 377.

(*e*) *Lancashire Cotton Co.*, *E. p. Carnelley*, 35 Ch. Div. 656. See also the judgments of Jessel, M.R., in *Traders' North Staffordshire Co.*, 19 Eq. 60; and *Universal Disinfector Co.*, 20 Eq. 162.

(*f*) See *Universal Disinfector Co.*, 20 Eq. p. 163.

(*g*) *Traders' North Staffordshire Co.*, *E.p. North Staffordshire Railway Co.*, 19 Eq. 60.

would seem, by virtue of sect. 87, to a discretion in the Court to ratify, if it should so think fit. Sect. 85.

That which is rendered void by sect. 163 is the "putting in force" an execution. By "putting in force" is meant levying execution, that is to say, the actual entry into possession on the part of the sheriff (*h*); but where an execution is perfected by seizure before the commencement of the winding-up, a sale after the commencement is not a "putting in force" within the 163rd section (*i*). A sale is, however, a "proceeding" under sect. 87, and if after winding-up order the creditor proceed to sell, he may be restrained from so doing (*k*). Where, after the sheriff was in, he received money for entrance to a theatre, the execution was "put in force" as to those moneys at the moment of receipt, and moneys received after petition presented were payable to the liquidator (*l*).

Execution against a company in liquidation.

The leading case on the subject of execution against a company in liquidation is *In re Great Ship Co.* (*i*), which was the case of an unregistered company, and fell, therefore, under sect. 201. In that case the principles which should guide the Court in the exercise of its discretion are thus stated by Turner, L.J.: "In my judgment the Court, in dealing with a question thus dependent on its discretion, is bound to look at the legal rights of the parties, and at the interests, not of one class of creditors only, but of each particular class of creditors, who may be affected by the decision at which it shall arrive. I think that there is nothing in this Act of Parliament which gives to the general creditors of this company any right to have their interests consulted in preference to the interests of the particular creditor whose case may come before the Court. I think it is the duty of the Court to hold an even hand between the interests of all the parties, and I take this section [the 201st] to have been introduced into the Act of Parliament very much with a view to meet cases in which there might have been unfair proceedings on the part of the creditor who is seeking to enforce those proceedings against the assets of the company. Above all, I think it would be the bounden duty of the Court, in considering the question as to the exercise of its discretion in granting an injunction in cases of this description, to see what would be its duty, or might probably be its duty, if the order to wind up had been actually made, and an application had been made to the Court by the creditor for leave to issue execution" (*m*). But again, in *Smith, Fleming & Co.'s Case* (*n*), his Lordship said: "The main purpose of the Act, as I understand it, is the collection and distribution of the assets of companies for the general benefit of their creditors, and amongst the creditors *pari passu*, and this discretion of the Court ought therefore, as I think, to be exercised, not for the benefit of any particular creditor or creditors, but for the benefit of the general body of creditors interested under the Act."

Sheriff in possession before petition presented;—

When a creditor of the company obtains judgment, and issues execution *bonâ fide*, and the sheriff is actually in possession before the presentation of the petition, the creditor will not, except under special circumstances, be restrained from realising his judgment (*o*); so, also, if the execution of the

(*h*) *London and Devon Biscuit Co.*, 12 Eq. 190, 193.

(*i*) *Great Ship Co., Parry's Case*, 4 D. J. & S. 63; 33 L. J. (Ch.) 245; 3 N. R. 181; 12 W. R. 139; 10 Jur. (N.S.) 3.

(*k*) *Perkins Beach Co.*, 7 Ch. D. 371. But the application must be made to the Court in which the action was brought. *Artistic Colour Printing Co.*, 14 Ch. D. 502.

(*l*) *Opera Lim.*, W. N. 1890, 104.

(*m*) 4 D. J. & S. 69.

(*n*) 1 Ch. 538, 545.

(*o*) *Great Ship Co., v. supra; Withernsea Brickworks*, 16 Ch. Div. 337; and see *E. p. Hawkins*, 3 Ch. 787, where a creditor had obtained payment, before the winding-up order, under a garnishee order obtained before the presentation of the petition.

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after petition presented.

The Act, however, makes no distinction whether the sheriff is or is not in possession at the commencement of the winding-up; the rule in this respect is only one which has been adopted in the discretion of the Court, and may in a proper case be disregarded.

Thus in *In re Bastow & Co.* (*t*) a creditor had issued a writ before the presentation of the petition; after its presentation, but before a winding-up order was made, execution was issued, and the creditor, acting *bonâ fide*, had obtained possession: he was allowed to levy execution under certain restrictions imposed by the Court. In that case the following circumstances weighed materially with the Court: (1) the petition was presented by the company, so that the winding-up was for their own convenience; (2) they had not, in the opinion of the Court, given the creditor such fair notice of their proceedings as he was entitled to; (3) it was stated that the assets would be sufficient ultimately to pay all the creditors in full, so that the question was only whether the execution creditor should be paid at once, or should wait until the completion of the winding-up.

So, where a company had vexatiously delayed its creditor, so that, in an action brought long before the commencement of the winding-up, he was not able to sign judgment until the day on which a winding-up petition was presented by the manager of the company in the character of a creditor, and execution was, therefore, not levied until after its presentation, an *ex parte* injunction which had been obtained on a second petition of later date presented by a possibly *bonâ fide* creditor was dissolved and execution allowed to be enforced (*u*).

So, in an exceptional case, where the creditor could over and over again have realised his judgment and execution, but for applications for indulgence made by the company, he was allowed the same rights as he would have had if he had sold. The petition was a creditor's petition presented at the company's instance on the 21st January. The *fi. fa.* was lodged with the sheriff the same day, and he seized on the 22nd. The company was insolvent (*x*).

So where judgment was signed 18th Nov., and the creditor delayed issuing execution on the representation of the company that they would pay and would not present a winding-up petition, and on the 27th Nov. a creditor's petition, and on the 28th Nov. a petition by the company was presented, leave was given to issue execution (*y*). But on this point this case has been doubted (*z*).

(*p*) *London Cotton Co.*, 2 Eq. 53; see, too, *Dublin Exhibition Palace, &c., Co.*, I. R. 2 Eq. 158.

(*q*) *Hill Pottery Co.*, 1 Eq. 649; and see *Dublin Exhibition Palace, &c., Co.*, I. R. 2 Eq. 158.

(*r*) *Plas-yn-Mhowys Coal Co.*, 4 Eq. 689; *Railway Steel Co., Re Taylor*, 8 Ch. D. 183, in which cases see form of order; *Pen-Allt Silver Lead Mining Co.*, 15 Sol. J. 714.

(*s*) *Millwood Colliery Co.*, 24 W. R. 898.

(*t*) 4 Eq. 681. This case may have to be reconsidered, see *Vron Colliery Co.*, 20 Ch. Div. 442, 445.

(*u*) *Imperial Steam, &c., Co.*, 16 W. R. 689; 37 L. J. (Ch.) 517; 18 L. T. 390.

(*x*) *Railway Steel Co., Re Taylor*, 8 Ch. D. 188; doubted in *Vron Colliery Co.*, 20 Ch. Div. 442.

(*y*) *Richards & Co.*, 11 Ch. D. 676.

(*z*) *Vron Colliery Co.*, 20 Ch. Div. 442.

If these cases can be supported, it must be, it is conceived, upon the particular circumstances which went to shew that the other creditors would not be injured. For there seems no principle in saying that the fund available for payment of the other creditors is to be diminished because the company delayed or deceived the judgment creditor. *Quære*, therefore, whether indulgence given at the request of the company, or delay caused by the company vexatiously, or even by false pretence, is any ground for giving leave to proceed with an execution (a).

Where, therefore, the dates were: 28th Dec. writ issued, 4th Jan. petition, 6th Jan. judgment without notice of the petition, 7th Jan. seizure under execution, 14th Jan. winding-up order, leave to proceed with the execution was refused (*b*). The petitioner was the chairman of the company, he was a paid-up shareholder, and had guaranteed and also given security for the company's overdraft, but he was not in fact, although he was in substance, a creditor: the petition was supported by creditors, and was treated as a creditor's petition (*c*). But even if the petition be presented by or on behalf of the company this would seem to supply no reason why the due administration of the assets should be interfered with by giving leave to proceed with an execution (*b*).

However, in *Rudow* v. *Great Britain Mutual Society* (*d*) leave was given. In that case there was at the date of the presentation of the winding-up petition an action pending by A. against the company and B.; pending the petition an order was made in the action that A. should pay B. his costs of the action and recover them from the company; no objection was made by the company that there was a pending petition, although under sect. 24 (5) of the Judicature Act, 1873, this would have been available as a defence. A. paid B. the costs: the company refused to repay them and sought to restrain A. from issuing execution. It was held that A. ought to be allowed to issue execution, for the company by their own act would otherwise have materially altered A.'s position by allowing an order to go under which A. would have to pay the company's debt and recover only a dividend.

Quære whether execution will now be restrained where judgment obtained after winding-up petition presented, for pendency of winding-up petition is by Judicature Act, 1873, s. 24 (5), a defence (*e*).

In the absence of special circumstances in favour of the execution creditor the Court will have regard to the object of the winding-up proceedings, viz., an equal distribution among all creditors (*f*), and will stay proceedings under the writ if execution be not actually issued before the presentation of the petition: or before voluntary winding-up commenced (*g*).

Thus, where the writ was in the hands of the sheriff three hours before the presentation of the petition, but possession was not actually taken till three hours after, further proceedings were stayed; the winding-up petition being presented by a *bonâ fide* creditor for the *bonâ fide* purpose of obtaining an order to distribute the assets equally among the creditors (*h*).

So, where there were two petitions, the one by the company's manager, presented 21st April, the other by a creditor, presented 1st May, and the

(a) *Vron Colliery Co.*, 20 Ch. Div. 442; and see *Withernsea Brickworks*, 16 Ch. Div. 337, 339; *Thérèse & Co.*, W. N. 1879, 31.

(*b*) *Vron Colliery Co.*, 20 Ch. Div. 442.

(*c*) *Cf. Gold Co.*, 11 Ch. Div. 701, 718.

(*d*) 17 Ch. Div. 600.

(*e*) 17 Ch. Div. 608, 610. But, *quære*, are other creditors to be prejudiced by the company's default?

(*f*) *v.* s. 133, and remarks of Turner, L.J., in *Smith, Fleming, & Co.'s Case*, 1 Ch. 538, 545, cited *supra*, p. 235.

(*g*) *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250.

(*h*) *London and Devon Biscuit Co.*, 12 Eq. 190.

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creditor signed judgment on 3rd May, issued execution on the 7th, and the winding-up order was made on the 8th, leave to proceed with the execution was refused (*i*).

And where the creditor signed judgment in the interval between presentation of petition (of which he had notice) and appointment of provisional liquidators, and subsequently issued a *fi. fa.*, under which the sheriff seized, and the Court thought he had not been improperly or unduly delayed or frustrated in his action, his judgment was set aside (*k*).

In the case of garnishee orders the judgment creditor is in fact made his own sheriff, and puts in his own execution as a landlord does in distraining for rent. And the act equivalent to the sheriff's taking possession is the service of the garnishee order on the garnishee. Where, therefore, a garnishee order *nisi* was obtained but not served before petition presented to wind up the judgment debtor company, the judgment creditor was not a secured creditor, and was restrained from proceeding against the garnishee to enforce the order (*l*).

If an application to stay an action be not made promptly after petition presented and the action go on to judgment and execution, the order to stay the execution may be made only on terms of payment into Court (*m*).

Judic. Act, 1875, s. 10. Bky. Act, 1869, s. 87.

After a conflict of judicial opinion (*n*) it is now decided (*o*) that sect. 87 of the Bankruptcy Act, 1869 [*cf.* Bankruptcy Act, 1883, s. 46 (1), (2)], which deprives an execution creditor of the fruits of his execution if the sheriff has notice of a bankruptcy within fourteen days after sale, is not made applicable to winding up by sect. 10 of the Judicature Act, 1875. The true effect of this section of the Judicature Act is discussed *infra*, sect. 158, note.

Execution issued after order.

It is clear that after winding-up order a creditor cannot issue or proceed with or put in force an execution without leave (*p*). There is no case in which leave to do any of these things has been given after order made, and *quære* whether leave would ever be given to issue or levy execution in respect of a debt incurred before the winding-up if execution had not been issued before the order (*q*). It is not easy to say what case would be sufficient to entitle a creditor to go on to get priority after the order, but if a creditor were advised that he had such a case, it is conceived that his right course would be between petition presented and order made to go on as quickly as may be (unless restrained) in the hope that the Court might subsequently ratify the execution.

Instances will readily occur to every one in which distress or execution, or that which is equivalent to execution, might be properly allowed after winding-up order where the debt was incurred after the order, *e.g.*, distress for rent of premises which the liquidators occupy for the convenience of the liquidation, and execution, or its equivalent, viz., payment in full, out of the assets in respect of costs and debts incurred by the liquidators in the liquidation for the benefit of the estate (*r*).

Crown debts.

The Crown is not mentioned in the Act, and consequently all rights of the Crown whether by way of distress or priority of payment remain unaffected (*s*).

(*i*) *Dimson's Fire Clay Co.*, 19 Eq. 202.

(*k*) *Railway Steel Co., Re Williams*, 8 Ch. D. 183.

(*l*) *Stanhope Silkstone Co.*, 11 Ch. Div. 160; *cf. Hamer* v. *Giles*, 11 Ch. D. 942; *E. p. Nelson*, 14 Ch. Div. 41, 45, 46.

(*m*) *Everingham* v. *Co-operative Beer Co.*, W. N. 1880, 99.

(*n*) See *Printing and Numerical Co.*, 8 Ch. D. 535 (Jessel, M.R.); *Railway Steel Co., Re Taylor*, 8 Ch. D. 183 (Hall, V.C.); *Richards & Co.*, 11 Ch. D. 676 (Fry, J.).

(*o*) *Withernsea Brickworks*, 16 Ch. Div. 337.

(*p*) ss. 87, 163.

(*q*) *Universal Disinfector Co.*, 20 Eq. 162.

(*r*) See *infra*.

(*s*) *Henley & Co.*, 9 Ch. Div. 469; 26 W. R. 885; *West London Commercial Bank*,

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And the same holds good still notwithstanding sect. 10 of the Judicature Act, 1875, and sect. 150 of the Bankruptcy Act, 1883 (*t*). The Crown is entitled to priority in payment of arrears of income tax (*u*) and to issue process to obtain payment in full in priority to other creditors (*t*).

Distress for rent:—

A distress for rent by the company's lessor upon the goods of a company in liquidation is, like any other proceeding, not void under sect. 163, but subject to the discretion of the Court by virtue of this section and the 87th section.

due before and after winding-up:—

And that discretion is exercised upon these principles, viz.: that for rent accrued due before the winding-up which is provable against the company's assets distress will not be allowed (*x*), but that rent accrued due after the winding-up in respect of premises retained for the convenience of the winding-up (*y*) will be treated as an obligation incurred for the benefit of the estate payable therefore in full, and that distress or payment in full out of the assets will be allowed (*z*). But further as to rent due before winding-up, if the lessor has a right of re-entry and seeks to exercise it, he may by this means obtain payment in full of rent due before winding-up, for if the company resist re-entry and desire to retain the property it can do so only upon the terms of complying with the legal obligation to pay the rent (a).

Upon the landlord coming to ask the Court to exercise the power given by sect. 87 lies the onus of shewing one of two things, viz., either that it is inequitable for the company or its liquidator to insist on sect. 163—that there is some special equity which entitles him to ask the Court to relieve him of the burden of sect. 163—or that the rent ought to be paid as one of the expenses of winding up (*b*).

apportionment of.

The Apportionment Act, 1870, applies to rent reserved under a lease (*c*), and where rent before winding-up is provable, and after winding-up is payable, it is to be apportioned as at the date of the presentation of the winding-up petition (*d*).

Distress for year's rent.

The 10th section of the Judicature Act, 1875, does not import into winding-up the right of distress for a year's arrears of rent which is given by the Bankruptcy Act. A landlord is not, by virtue of his right of distress, a "secured creditor" (*e*).

Distress by stranger to company;

If there is no privity between the lessor and the company, as, *e.g.*, if the company are only under-lessees or only equitable owners of the property, the lessor is not a creditor of the company at all, and cannot prove in the winding-up. His right of distress is as against the legal tenant, who is responsible for the rent, and if he finds goods on the land he is entitled

38 Ch. D. 364; and see *English Joint Stock Bank*, W. N. 1866, 199. *Quære*, *Regent United Stores*, 38 L. T. 130; W. N. 1878, 21.

(*t*) *Oriental Bank*, 28 Ch. D. 643.

(*u*) See note (*s*), p. 238.

(*x*) *Coal Consumers' Association*, 4 Ch. D. 625; *North Yorkshire Iron Co.*, 7 Ch. D. 661; *Traders' North Staffordshire Co.*, 19 Eq. 60; *Bridgwater Engineering Co.*, 12 Ch. D. 181; *South Kensington Stores*, 17 Ch. D. 161; *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250, 256.

(*y*) Not otherwise: *Oak Pitts Colliery Co.*, 21 Ch. Div. 322.

(*z*) *North Yorkshire Iron Co.*, 7 Ch. D. 661; *cf.* in bankruptcy, *E. p. Hale*, 1 Ch. D. 285.

(*a*) *Silkstone and Dodworth Co.*, 17 Ch. D. 158; *General Share Co.* v. *Wetley Brick Co.*, 20 Ch. Div. 260. Contrast *South Kensington Stores*, 17 Ch. D. 161, where the lessor did not seek to re-enter.

(*b*) *Lancashire Cotton Co.*, *E. p. Carnelley*, 35 Ch. Div. 656, 662, 666.

(*c*) *Swansea Bank* v. *Thomas*, 4 Exc. D. 94.

(*d*) *South Kensington Stores*, 17 Ch. D. 161.

(*e*) *Coal Consumers' Association*, 4 Ch. D. 625; *Bridgwater Engineering Co.*, 12 Ch. D. 181; *Thérèse & Co.*, W. N. 1879, 31; and see *Westbourne Grove Drapery Co.*, 5 Ch. D. 248.

Sect. 85. to distrain upon them none the less because they happen to be goods of the company (*f*).

Thus, where the lessors, in respect of a lease granted to trustees for the company (*g*), put in a distress for rent, on the same day as, but before, the winding-up order was made, they were allowed to proceed (*h*), and, as against the official liquidator, to realise their distress as well in respect of rent accrued due subsequent to the distress as in respect of that for which the distress was levied (*i*).

So where the company, being in possession under an agreement for an assignment from the lessee, remained in possession after a winding-up order, and left goods upon the land, the Court gave the lessor leave to pursue his right by distress for rent accrued due since the winding-up (*k*).

In *E. p. Clemence* (*l*), where there was no privity between the lessor and the company, and the lessor was therefore entitled to distrain, it was held that his right of distress was not affected by the fact that he had accepted as collateral security for his overdue rent a promissory note of the company. But *quære* whether this case was rightly decided (*m*). The lessor had by virtue of the promissory note the right to prove for the rent in the winding-up.

If the goods upon which it is sought to distrain are the company's goods but are mortgaged to debenture-holders to an amount exceeding their value, the lessor will be allowed to distrain, for in such case the goods belong not to the company but to the debenture-holders (*m*). And the debenture-holders cannot by offering to give up their security affect the right of the lessor (*m*) (*n*).

The ground of the above decisions is, that although the language of sect. 163 is general in forbidding distress against the company's estate or effects, yet that the section does not, so to speak, run with the effects so as to attach to them wherever they may be found, but applies only where the distress is on the effects as effects of the company (*o*). If the distress be by a person who distrains, not as creditor of the company but as creditor of a stranger against his debtor who happens to have goods of the company in his possession, the 163rd section does not apply (*p*), and the Court cannot render it applicable by giving the lessor leave to prove against the company (*q*).

Thus, for example, if the official liquidator chooses to leave goods of the company in the order and disposition of a bankrupt, or upon land where a landlord has a right to distrain, the rights of the trustee in the one case, or of the landlord under a distress for rent in the other, cannot be affected by the fact that the goods are the property of a company in liquidation.

(*f*) See *E. p. Heavan*, 6 Ch. 462; *Traders' North Staffordshire Co.*, 19 Eq. 60; *Regent United Service Stores*, 8 Ch. Div. 616.

(*g*) Where a lease is vested in persons in trust for the company, and they have made payments in respect of rent, &c., their right to be indemnified out of the trust property is the first charge upon it: *Exhall Coal Co., Re Bleckley*, 35 Beav. 449; *Pooley Hall Colliery Co.*, 21 L. T. 690; 18 W. R. 201.

(*h*) *Exhall Mining Co.*, 12 W. R. 727; 4 D. J. & S. 377; 10 Jur. (N.S.) 576; 4 N. R. 127.

(*i*) Same case, 13 W. R. 219; 11 L. T. 581; 34 L. J. (Ch.) 123.

(*k*) *E. p. Heavan*, 6 Ch. 462; see also *Regent United Service Stores*, 8 Ch. Div. 616; *Trimsaran Coal Co.*, W. N. 1876, 214.

(*l*) 23 Ch. D. 154.

(*m*) *New City Club Co.*, 34 Ch. Div. 646; *cf. Willmott* v. *London Celluloid Co.*, 31 Ch. D. 425; 34 Ch. Div. 147. Contrast *Artistic Colour Co., E. p. Fourdrinier*, 21 Ch. Div. 510.

(*n*) *Cf. Cannock and Rugeley Colliery Co., E. p. Harrison*, 28 Ch. Div. 363.

(*o*) See *Traders' North Staffordshire Co.*, 19 Eq. 60.

(*p*) *Lundy Granite Co., E. p. Heavan*, 6 Ch. 462.

(*q*) *Regent United Service Stores*, 8 Ch. Div. 616.

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by company's lessor;

But while *E. p. Heavan* (*r*) is thus no authority for right of distress against the company, there are *dicta* in that case which are valuable as shewing under what circumstances distress will be allowed as against the company for rent accrued after the winding-up. The principle will there be found that, if the company, for its own purposes, and with a view to the realisation of the property to better advantage, remain in possession of the estate of their lessor, so that he is not able to obtain possession of it, the Court will see that he receives the full value of his property, and will allow him to distrain upon the goods of the company or allow him payment in full, for rent accrued due since the winding-up (*s*).

If possession be retained "for the convenience of the winding-up" (*t*), the rent is looked upon as part of the expenses incurred in the winding-up; and by sect. 110 (see also sect. 144 as to a voluntary liquidation) these expenses may be paid in such order of priority as the Court thinks just.

But, if this be not so (*u*), or if possession was retained for the joint accommodation of landlord and tenant (*x*), the lessors can only prove for the amount of the rent. The facts that the liquidator left the company's plant and machinery where he found them, that he had them valued for sale, and that he took no steps to surrender to the landlord, are not enough to give a right to payment in full of rent accrued after winding-up (*y*).

In order to ascertain whether the possession retained by the liquidator is such as to entitle the landlord to payment in full, it appears that the test is, not whether the possession has been retained for the purpose of carrying on the business so as to gain benefit for the estate, nor whether the landlord has been kept out of possession without any power of finding his own remedy by re-entry (the former of which was supposed to be countenanced by *Re Progress Assurance Co.* (*z*) and the latter by *dicta* in *E. p. Heavan* (*r*)), but whether the company has in fact wished to retain possession for its own benefit, whether by present working or by disposing of the property to better advantage as a going concern (a).

Liquidator's liability for rent.

The liquidator does not, by taking or retaining possession, become personally liable for the rent, with only a right of indemnity out of the assets, for the company's property does not vest in him, and the occupation is not the occupation of the liquidator but of the company (*b*). And the same is true even where in the case of an unregistered company an order has been made under sect. 203 vesting in the official liquidator the property of the company; for it vests in him, not in his personal but in his official capacity (*c*). The liquidator is but the ministerial officer of the company which remains in existence until dissolution.

The case is materially different from that of a trustee in bankruptcy in that (1) the property does not vest in the liquidator, and (2) he has no right of disclaiming the lease. So that the decisions that a trustee in bankruptcy

(*r*) 6 Ch. 462.

(*s*) *Lundy Granite Co., E. p. Heavan*, 6 Ch. 462.

(*t*) See judgment of Mellish, L.J., in *E. p. Heavan*, 6 Ch. 462; *North Yorkshire Iron Co.*, 7 Ch. D. 661. *Cf. E. p. Arnal*, 24 Ch. Div. 26; *E. p. Good*, 13 Q. B. Div. 731.

(*u*) *Progress Co., E. p. Liverpool Co.*, 9 Eq. 370; *Kingstown Royal Marine Hotel Co.*, M.R. (Ir.), 15 W. R. 978.

(*x*) *Bridgwater Engineering Co.*, 12 Ch. D. 181; *Lancashire Cotton Co., E. p. Carnelley*, 35 Ch. Div. 656.

(*y*) *Oak Pits Colliery Co.*, 21 Ch. Div. 322.

(*z*) 9 Eq. 370.

(a) *North Yorkshire Iron Co.*, 7 Ch. D. 661; *E. p. Heavan*, 6 Ch. 462; *Coal Consumers' Association*, 4 Ch. D. 625; *Oak Pits Colliery Co.*, 21 Ch. Div. 322.

(*b*) *Wearmouth Crown Glass Co.*, 19 Ch. D. 640.

(*c*) *Graham* v. *Edge*, 20 Q. B. Div. 683; S. C. Ibid. 538.

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who takes actual possession of the bankrupt's leaseholds, and does not when called upon disclaim, is personally liable for the rent as from the date when he takes possession (*d*), and that the Bankruptcy Act, 1869, does not reserve to the trustee any right of election as to taking the lease, and that if he does not disclaim he is personally liable (*e*), and that the bankrupt's leaseholds vest absolutely in the trustee on his appointment without any election in him to accept or decline, and subject only to the power of disclaimer, and that if he neglects or is unable to disclaim, he is personally liable as from the date of his appointment (*f*), are, it is conceived, so far as they throw any light upon the question of a liquidator's liability, authorities in his favour. For they are founded on privity of estate and no disclaimer (*g*).

The case is different again from that of executor. The executor is an assign of the lease, and if he takes possession he is personally liable for subsequent rent up to the letting value of the holding (*h*).

Re-entry.

If the lessor has a right to re-enter for non-payment of rent, or by reason of the winding-up, and his application is for leave to distrain (or, which is the same thing, for payment of the rent in full), or for leave to re-enter, then the company can only resist the legal right of re-entry by complying with the legal obligation of paying in full the whole rent, whether accrued due before or after the winding-up (*i*). If the lease is at or above the rack-rent, and the lessor is not prepared to re-enter, he cannot get this advantage (*k*).

Where there is a proviso for re-entry "if the company shall be wound up," this means "if the company goes into liquidation," not "if and when it shall be finally wound up," and in such a case if a winding-up order is made the lessor is entitled, if he ask for it, to an order for delivery of possession, and he is not to be put to bring an action (*l*). In this case the Appeal Court gave the lessor no costs in the Court below, "for the liquidator could not give up possession without an order." But *quære*, why should the lessor bear his own costs of an application in which he succeeded, and which was rendered necessary by the company's liquidation?

Mortgagee with right of distress:—

Where a mortgage contained a power of distress over property not otherwise included in the security, "as a landlord might distrain in respect of rent," and there was an arrear of interest accrued due before the winding-up, the mortgagee was not allowed to distrain for it (*m*). The case was treated as one parallel with and governed by the considerations applicable to the case of a lessor: and it is to be observed that the power was to distrain as a landlord might in respect of rent.

or attornment clause.

Semble, however, that a mortgagee with an attornment clause who asks for leave to distrain for interest accruing after winding-up order is in a more unfavourable position than a landlord who asks leave to distrain for rent (*n*).

Rates.

Rates due before the winding-up had not before 51 & 52 Vict. ch. 62 priority. Judicature Act, 1875, s. 10, does not import into winding-up the 32nd section of the Bankruptcy Act, 1869 (*o*) [Bankruptcy Act, 1883, s. 40].

And where the rate is assessed before the winding-up for a period in the

(*d*) *E. p. Dressler*, 9 Ch. Div. 252.

(*e*) *Wilson* v. *Wallani*, 5 Ex. D. 155; and see *E. p. Brook*, 10 Ch. Div. 100.

(*f*) *Titterton* v. *Cooper*, 9 Q. B. Div. 473.

(*g*) See *Graham* v. *Edge*, 20 Q. B. Div. 683.

(*h*) *Strathmore* v. *Vane*, *Norcliffe's Claim*, 37 Ch. D. 128.

(*i*) *Silkstone and Dodworth Co.*, 17 Ch. D. 158; *General Share Co.* v. *Wetley Brick Co.*, 20 Ch. Div. 260; *New North Staffordshire Coal Co.*, W. N. 1884, 106.

(*k*) *South Kensington Stores*, 17 Ch. D. 161.

(*l*) *General Share Co.* v. *Wetley Brick Co.*, 20 Ch. Div. 260.

(*m*) *Brown, Bayley, and Dixon, E. p. Roberts*, 18 Ch. D. 649.

(*n*) *Lancashire Cotton Co., E. p. Carnelley*, 35 Ch. Div. 656.

(*o*) *Albion Steel Co.*, 7 Ch. D. 547; explained in *Printing and Numerical Co.*, 8 Ch. D. 535; and see s. 158, note.

course of which the winding-up commences, the whole rate is a debt of the company at the winding-up, and is provable: the rate cannot be apportioned and payment in full obtained of so much of the apportioned part as is attributable to the period after winding-up commenced. For the Apportionment Act does not apply, and inasmuch as the occupation both before and after winding-up is the same, namely, that of the company, and not of the company before and of the liquidator after winding-up, s. 211, sub-s. (3) of the Public Health Act, 1875, does not apply (*p*).

A rate made after the winding-up, upon premises of which the liquidators retain beneficial occupation "for the convenience of the winding-up," is no doubt payable in full (*q*).

In *Watson, Kipling, & Co.* (*r*), Kay, J., arriving at the conclusion that the occupation by the liquidator had not been beneficial, refused an application for payment in full of poor's rates and Local Board of Health rates made after liquidation commenced.

But in two cases (*s*) the Court of Appeal has held rates made after liquidation commenced to be payable in full. In the one, the liquidator had carried on the business under an order of the Court with a view to a sale as a going concern, and in the other had remained in occupation to complete pending contracts and for other purposes. *Semble*, the true test is whether there has been a beneficial occupation within the ordinary meaning of those words in cases as to rating (*t*).

Expenses of liquidation.

The principle is very intelligible that expenses incurred in the winding-up are payable and not provable; and it is upon that principle that the above cases are decided. For, as was said by Stuart, V.C., in *E. p. Levick* (*u*), although the purpose of the Act is that complete justice shall be done between all the creditors in paying them *pari passu*, yet this must mean creditors of the company at the time of the order for winding-up. And if the liquidators of the company, in realising or distributing the assets of the company, incur costs and expenses, these are costs and expenses incurred on behalf of the estate, that is, on behalf of the creditors, and ought, therefore, to be paid in full before the assets are distributed (*x*).

"If the debt or liability is incurred by the liquidator or by the company after the winding-up in the course of carrying on the business of the company, it must be paid in full. Such debts and liabilities are not debts and liabilities of the company in liquidation. They are debts and liabilities incurred subsequently to the liquidation" (*y*).

Costs incurred by company in liquidation.

It is on this principle that those cases have been decided in which a company in liquidation having been ordered to pay costs, it has been held that such costs are not to be proved as a debt in the winding-up, but are to be paid in full out of the assets of the company (*z*).

Thus, if the official liquidator (a), or the liquidator in a winding-up under supervision (*b*), proceed by action (a) (*b*), in the name of the company, and costs are given against the company, such costs are to be paid in full: and execution for them will not be restrained.

(*p*) *Wearmouth Crown Glass Co.*, 19 Ch. D. 640.

(*q*) *West Hartlepool Co.*, 34 L. T. 568; *Wearmouth Crown Glass Co.*, 19 Ch. D. 640.

(*r*) 23 Ch. D. 500.

(*s*) *Intern. Marine Co.*, 28 Ch. Div. 470; *National Arms Co.*, Ibid. 474; and see *Dry Docks Corporation*, 39 Ch. Div. 306.

(*t*) 28 Ch. Div. 482.

(*u*) *Bank of Hindustan, China, and Japan*, 5 Eq. 69.

(*x*) *Cf. E. p. Clark*, 7 Eq. 550.

(*y*) *Per* Fry, L.J., 28 Ch. Div. 473; and see Ibid. 480.

(*z*) As to priority of payment as between several claimants for costs, see s. 86.

(a) *Madrid Bank* v. *Pelly*, 7 Eq. 442.

(*b*) *E. p. Levick*, 5 Eq. 69; *E. p. Smith*, 3 Ch. 125.

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"The consequences of the decision [that execution could not be levied for such costs] would be that a liquidator, being armed with powers to bring whatever actions he thinks fit, might bring any number of groundless actions, which would be defeated one after another, and judgment would go for the defendant, and yet the defendant, when he came to levy for his costs by virtue of his judgment, would be told that his execution was void, and that he must go in and take the chance of obtaining a dividend under the process of winding-up" (*c*).

And there is no distinction in principle between the costs of an action which fails and the costs of an action which has been unsuccessfully defended.

And therefore, where an action was brought by leave against a company in liquidation, and the official liquidator defended by leave, and the plaintiff obtained a verdict which carried costs, he was held entitled to payment in full of his costs of the action, of the application for leave to bring the action, and of the application for the order establishing his right to payment in full (*d*).

"A company in winding-up ought to be dealt with as a matter of course like any other litigant, and if an action be brought or resisted for the benefit of the estate, and that action be brought fruitlessly or defended fruitlessly, then the estate, that is to say, the other creditors, ought, like everybody else, to be fixed with the costs to which they have improperly and unnecessarily put their opponent" (*e*).

There is a case before Lord Selborne (*f*), in which his Lordship gave leave to proceed with an action against the company commenced before the winding-up; "but any costs recovered by the plaintiff in the action could not be paid by the company in full, but would only be provable in the usual way." It is to be observed that these costs were in the main costs incurred before the supervision order was made, and as to costs subsequently incurred, the Court thought proper to let the action proceed on the terms that they should be provable only in the usual way.

In *Ship's Case* (*g*) a shareholder having successfully applied for rectification of the register, and the costs having been ordered to be paid by the company, an application for their immediate payment was refused, and it was said there was no reason why the creditor for costs should be paid before the other creditors.

So immediate payment of costs has been refused to an alleged contributory when the official liquidator's summons to put him on the list has been dismissed with costs (*h*).

If these cases were to be understood as deciding that the creditors for costs are to stand in all respects on a level with general creditors, it would be difficult to reconcile them with the principles just stated, which seem as applicable when an alleged contributory, as when any one else, is the adverse litigant. But it is conceived that this is not the intention. As between several creditors for costs in winding-up there is (except as regards only the petitioner for the order (*i*)) no priority (*h*), and to order immediate payment to one such creditor might be to leave others unpaid. But when payment is made, it is conceived that these costs ought to be paid in full, with priority over the general creditors.

Creditors' action in voluntary winding-up.

But the scope of the Act is to bring all claims within the winding-up

(*c*) *Per* Cairns, L.J., *E. p. Smith*, 3 Ch. 125, 130.
(*d*) *Bailey and Leetham's Case*, 8 Eq. 95.
(*e*) *Per* James, V.C., 8 Eq. 97.
(*f*) Sitting for M.R., *Joseph Peace and Co.*, W. N. 1873, 127.
(*g*) 13 W. R. 1016.
(*h*) *Marlborough Club Co., E. p. Percival*, 6 Eq. 519; *cf. Dimson's Fire Clay Co.*, 19 Eq. 202; *Cape Breton Co.* v. *Fenn*, 17 Ch. Div. 198, 205.
(*i*) See *infra*, p. 251.

and to prevent the creditors of the company from enforcing their demands by actions. The intention of the Act, where there is a resolution passed to wind up voluntarily, is (sect. 133) that all the creditors shall be paid *pari passu*, and the Court will therefore interfere by injunction to restrain one creditor from seizing an undue share of the assets for his own benefit. And, if a creditor commence or proceed with an action for his debt after the winding-up commences, he can at most only add his costs to his debt (*k*).

Such costs are, in fact, in the nature of costs of proof, which, under Rule 27 of Gen. Order, Nov. 1862, are to be added to the debt.

The creditor will, moreover, be allowed even to prove only for costs incurred before he had notice of the winding-up (*l*), unless they are costs incurred in an action which the Court considers he was entitled to bring (*m*).

A creditor who brings an action after notice of the resolutions is, apart from special circumstances (*m*), guilty of incurring costs most uselessly, and the action will be stayed, and order made for payment by the creditor of the costs of the motion and the action (*n*).

Thus, where a creditor commenced an action after a resolution to wind up voluntarily, the Court restrained the action, the liquidators being required to give the creditor access to the proceedings, and gave costs to the creditor down to the time when he had notice of the winding-up, such costs to be added to his debt (*o*).

In *In re Life Association of England* (*p*) the action was commenced *before* the resolution for a voluntary winding-up, and was stayed on the same terms as to costs.

In *In re Sablonière Hotel Co.* (*q*), the creditor commenced his action on the same day as the resolution to wind up voluntarily was confirmed. He was a shareholder, and had notice of the resolution. He afterwards signed judgment. On the application of the liquidator execution was restrained, but without costs, as no execution was in fact issued. It does not appear from the report of this case what was done with the costs of the action.

In *Re Hull Forge Co., Ex parte Mitchell* (*r*), the creditor commenced his action in the interval between the passing and the confirmation of the resolution to wind up voluntarily. Notice was subsequently given him of the resolution, but he nevertheless afterwards signed judgment. A motion to restrain the sheriff from levying execution was refused, the Master of the Rolls considering himself bound by *In re Great Ship Co.* (*v. supra*, p. 235).

But where, a claim being disputed by the liquidators, the creditor gave them notice that, unless they took out a summons under sect. 138 to obtain an adjudication upon the claim, he should bring an action, and they failed to take out a summons, and he accordingly did bring an action, and obtained a verdict, execution was restrained, and he was allowed only to prove for his debt and costs (*s*).

(*k*) *Keynsham Co.*, 33 Beav. 123; *Life Association of England*, 34 L. J. (Ch.) 64; 10 Jur. (N.S.) 762; 12 W. R. 1069; *Peninsular Banking Co.*, 35 Beav. 280; *Poole Firebrick Co.*, 17 Eq. 268; *Thurso New Gas Co.*, 42 Ch. D. 486, 491.

(*l*) *East Kent Shipping Co.*, 18 L. T. 748; *Keynsham Co.*, 33 Beav. 123; 11 W. R. 926; *Life Association of England*, 12 W. R. 1069; 10 Jur. (N.S.) 762; 34 L. J. (Ch.) 64; *Rose* v. *Gardden Lodge Co.*, 3 Q. B. D. 235.

(*m*) *Poole Firebrick Co.*, 17 Eq. 268. *Quære*, the facts in *Peninsular Banking Co.*, 35 Beav. 280.

(*n*) *East Kent Shipping Co.*, 18 L. T. 748.

(*o*) *Keynsham Co.*, 33 Beav. 123; 11 W. R. 926; *Peninsular Banking Co.*, 35 Beav. 280.

(*p*) 10 Jur. (N.S.) 762; 12 W. R. 1069.

(*q*) 3 Eq. 74, *Thurso New Gas Co.*, 42 Ch. D. 486.

(*r*) M.R., July 5, 1866; see 36 L. J. (Ch.) 337.

(*s*) *Poole Firebrick Co.*, 17 Eq. 268.

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Walker v. *Banagher Distillery Co.* (*t*) and *Rose Gardden Lodge Co.* (*u*), are other cases in which actions have been stayed after voluntary winding-up commenced. If after notice of the winding-up and an offer to allow the plaintiff to prove for his debt and costs he goes on with his action, the Court may refuse to allow him to add to his debt his costs of an application to restrain the action, and may, on the other hand, make him pay the company's costs (*u*).

It is a hardship on a creditor that, while sect. 138 gives him no power to apply to the Court in the winding-up to adjudicate upon his debt, he is restrained if he seeks access to the Court by action.

If the liquidator will not admit his proof he has no alternative but to commence an action, which will either be stayed upon the terms of the liquidator doing that which he ought to have done in the first instance, or, if it goes on to judgment, will leave the creditor to add his costs to his debt. In neither case will the creditor be indemnified in respect of costs. If the debt is disputed it appears that the right course is to bring an action (*x*): but in any other case it would seem that unless sect. 138 can be somehow rendered available for a creditor, his only remedy would be to petition for a compulsory order or supervision order under sects. 145, 147. Possibly if he called upon the liquidator to bring his claim before the Court under sect. 138 and the liquidator refused, it might be considered that his rights were being prejudiced within sect. 145.

Certain actions will be allowed to go on: these will be found mentioned under sect. 87.

Actions restrained when petition about to be heard.

If a winding-up petition is about to be heard, actions by creditors against the company will be restrained on motion *ex parte* until after the petition has been disposed of, on the applicant giving the usual undertaking as to damages (*y*). The same practice is followed in the Queen's Bench Division (*z*).

Provisional liquidator.

The Comp. (W. Up) Act, 1890, s. 4, provides that on a winding-up order being made the official receiver shall, by virtue of his office, become the provisional liquidator, and sect. 4 (5) empowers the Court to appoint the official receiver provisional liquidator at any time after presentation of petition and before winding-up order. It is singular that, notwithstanding this, the last sentence of sect. 85 of this Act is not modified. Is there or is there not still power in the Court to appoint under this section, *i.e.*, to appoint any one, or is the only power that in the Winding-up Act, viz., to appoint the official receiver?

As to the practice of the Court in appointing a provisional liquidator the following notes may still be useful:—

A provisional liquidator was not in general appointed before the hearing of the petition, unless the company was shewn to be insolvent (a) or unless the petition was presented by the company itself, or shewn to be unopposed (*b*).

But in a case of urgency the Court would appoint a provisional liquidator without the company's consent, to take possession of and protect the assets upon his undertaking to give security forthwith (*c*).

A provisional liquidator has been appointed after the presentation of a

(*t*) 1 Q. B. D. 129.
(*u*) 3 Q. B. D. 235.
(*x*) *Inventors' Association*, 2 Dr. & Sm. 553.
(*y*) *London and Suburban Bank*, 19 W. R. 950; 25 L. T. 23.
(*z*) *Masbach* v. *Anderson & Co.*, W. N. 1877, 252; 26 W. R. 100; 37 L. T. 440.
(a) *Railway Finance Co.*, 14 W. R. 754; 14 L. T. 507.
(*b*) *Cilfoden Benefit Building Society*, 3 Ch. 462; *Emmerson's Case*, 2 Eq. 231, 236; *West Worthing, &c., Co.*, 18 L. T. 849.
(*c*) *Hammersmith Town Hall Co.*, 6 Ch. D. 112.

petition by a clerk to whom an arrear of salary was due, on his application; but the Court hesitated to make the appointment on the application of a person with so small an interest, and appointed with liberty for any person to apply to vary the appointment (*d*).

After the presentation of a petition for winding up a life assurance company, and before answering the inquiry directed by the preliminary fiat pursuant to the Life Assurance Companies Act, 1870, s. 21, whether a *primâ facie* case for entertaining the petition has been established, a provisional liquidator would not be appointed on the *ex parte* application of the petitioner (*e*).

A provisional liquidator is not entitled to appear on the hearing of the petition (*f*); but, *quære*, he ought to be served with any proceedings taken in the winding-up (*g*).

The appointment of a provisional liquidator is not only provisional but contingent also in this sense, that it operates to protect the property for an equal distribution only in the event of an order for compulsory winding-up being made. If no such order is made the appointment ought not to interfere with the rights of third parties (*h*).

Course to be pursued by Court on hearing petition.

86. Upon hearing the petition the Court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally, and may make an interim order, or any other order that it deems just (*a*).

(*a*) Gen. Order, Nov. 1862, Rules, 6, 7, Forms 3–5.

Unopposed.

The practice as to taking winding-up petitions as unopposed varies in the different branches of the Court. Inasmuch as no one can tell whether or not creditors or contributories may appear to oppose, every such petition ought in strictness to be taken as opposed, but on the other hand, as they are very frequently unopposed, it is convenient to clear them out of the list of opposed petitions. It would be a convenient practice to pass them over when the unopposed are taken, and then to take them (or at any rate such of them as turn out to be unopposed) before the opposed list is begun.

Adjournment of hearing.

A petition will not, if it can be avoided, be adjourned or ordered to stand over, because a winding-up order, if ultimately made, will relate back to the presentation of the petition, and affect acts done in the interval (*i*).

But if the Court is satisfied that an immediate order is not only not necessary, but that the petitioner (if he be a creditor) may possibly by reason of the petition standing over get paid earlier than he would under a winding-up order, an immediate order will be refused, and the company will be allowed time (*k*).

Who will be heard.

The only persons entitled to be heard upon the petition are the company, its creditors and contributories (*l*); and although the Court may, in its discretion, hear other persons who have an interest in the matter, in order to

(*d*) *Rockall Fishery Co.*, 11 W. R. 84.

(*e*) *London and Manchester Association*, 1 Ch. D. 466.

(*f*) See note to next section.

(*g*) See *Cambrian Railway Co., E. p. Coleman*, 3 De G. & Sm. 139.

(*h*) *Dry Docks Corp.*, 39 Ch. Div. 306, 314.

(*i*) *Metropolitan Railway Warehousing Co.*, 15 W. R. 1121; 17 L. T. 108; *Metropolitan Saloon Omnibus Co., E. p. Hawkins*, 28 L. J. (Ch.) 830; *Albion Bank*, W. N. 1866, 388; 15 W. R. 148; 15 L. T. 346; but see, as to cases of disputed debt, s. 79.

(*k*) *Brighton Hotel Co.*, 6 Eq. 339; *Western of Canada Oil Co.*, 17 Eq. 1; *St. Thomas' Dock Co.*, 2 Ch. D. 116; and see *ante*, p. 210.

(*l*) *Bradford Navigation Co.*, 5 Ch. 600.

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learn what public grounds there are in favour of, or in opposition to, the winding-up (*m*); yet such persons can be heard only as *amici curiæ*, and have no *locus standi* to appeal against the decision (*n*).

At the hearing of the petition any creditor or shareholder will be heard to support or oppose: but this does not apply to applications made in the winding-up. Thus, upon an application in the winding-up which was opposed on behalf of the company, the Court refused to hear individual creditors in support (*o*).

Order:—

The order which will be made under different circumstances is discussed in different parts of this work (*p*).

supplemental:

Where a company had been partly wound up under an order made before the commencement of this Act, a supplemental order was, in a proper case, made under this Act, founded on the previous order, and adopting what was rightly done under it (*q*).

post-dating.

A winding-up order is to be advertised within twelve days after its date (*r*) where from delay in obtaining the order the time had expired, leave was given to post-date the order (*s*). But leave will not be given except in the presence of all parties (*t*).

Amendment of petition.

The petition may by leave be amended at the hearing, as, *e.g.*, where the petitioner came as a creditor, by stating that he was a creditor only in respect of money advanced by him as a member (*u*): and in several instances leave has been given to amend a demurrable petition.

Costs.

With regard to the costs of the petition, a general rule was laid down by Romilly, M.R., in *In re Humber Ironworks Co.* (*x*) (not following *In re Marlborough Club Co.* (*y*), before Kindersley, V.C.), as follows:—

(1.) Where the Court refuses to make the order, shareholders or creditors supporting the petition will not have their costs; shareholders, directors, or others opposing the petition will not have their costs, unless personally assailed by a charge which is disproved (*z*); the company opposing the order will have their costs from the petitioner (a).

(2.) Where the Court makes the order, no costs will be given to persons who appear to oppose the petition (*b*); and shareholders or creditors who, together or separately, appear to support the petition, will get one set of costs between them (*c*), and only one; the costs of the petitioner and the company will be given out of the estate.

This rule was reviewed by Kindersley, V.C., in *In re European Banking Co., Ex parte Baylis* (*d*), where his Honour said, that if the rule laid down by the Master of the Rolls was, as he understood, that where the Court makes the

(*m*) *Bradford Navigation Co.*, 9 Eq. 80; 10 Eq. 331.

(*n*) *Bradford Navigation Co.*, 5 Ch. 600.

(*o*) *British Nation Assurance*, 14 Eq. 492, 501, *quære* the head-note in that case; *cf. E. p. Cotterell*, 32 L. J. (Ch.) 66; 11 W. R. 13; 8 Jur. (N.S.) 1083; 7 L. T. 241; *Adansonia Fibre Co., Miles' Claim*, 9 Ch. 635, 637, n.; and see *infra*, s. 124, note.

(*p*) See Index "Winding-up Order," and ss. 79, 80, 82, 91.

(*q*) *Carpmael's Case* (Eur. Arb.), L. T. 95.

(*r*) Gen. Ord. Nov. 1862, Rule 6.

(*s*) *Doncaster Building Society*, 11 W. R. 459; *East Cambrian Gold Mining Co.*, 12 L. T. 587.

(*t*) *Disderi & Co.*, 18 L. T. 870.

(*u*) *Queen's Benefit Building Society*, 6 Ch. 815; *White Star Co.*, 48 L. T. 815.

(*x*) 2 Eq. 15.

(*y*) 1 Eq. 216.

(*z*) See also *Anglo-Greek Steam Co.*, 2 Eq. 1, 11.

(a) See also *General Exchange Bank*, 12 Jur. (N.S.) 465; 14 W. R. 826; 14 L. T. 582; *Times Life Assurance Co., E. p. Nunneley*, 18 W. R. 404; 39 L. J. (Ch.) 297; 23 L. T. 181; *Madras Coffee Co.*, 17 W. R. 643, 645; *Hop and Malt Exchange Co.*, W. N. 1866, 222.

(*b*) *Imperial Mercantile Credit Association*, W. N. 1866, 257.

(*c*) Lord Westbury vehemently repudiated this practice in the Eur. Arb.: *Gardiner's Case* (Eur. Arb.), L. T. 63; 17 Sol. J. 464.

(*d*) 2 Eq. 521.

order the shareholders who support the petition should have one set of costs among them, and likewise the creditors who support the petition should have one set of costs among them, he to that extent concurred in the rule; but he held that, on the same principle, where the petition is dismissed with costs, the shareholders who appear to oppose the petition should have one set of costs among them, and likewise the creditors who appear to oppose should have one set among them; and the order in that case, dismissing the petition with costs, provided for payment of costs accordingly.

In *In re Oriental Commercial Bank* (*e*), before Wood, V.C., an order having been made on the petition, all parties served were allowed their costs, one set for the creditors, and one for the contributories. The meaning of the note of this case must be that the company and any one else who was served had their costs, and that the creditors and contributories (who of course are not served) were each to have one set of costs between them.

The rule as to service is given by Gen. Order, Nov. 1862, Rule 3. If the petitioner unnecessarily serves creditors or contributories, no doubt he would have to pay their costs (*f*).

In *In re Albion Bank* (*g*), Stuart, V.C., refused to lay down any rule as to paying only one set of costs, and held that the circumstances of each case should be considered; and in that case an affidavit having been filed on the part of the company, which shewed that the bank was in a most satisfactory condition, and which had not been answered by the petitioner, although there had been ample opportunity for answering it, the petitioner was ordered to pay the costs of all parties.

The case last mentioned was approved in *In re Anglo-Egyptian Navigation Company* (*h*) by James, V.C., and it was held that although, where the petition is dismissed, the general rule is to give not more than one set of costs to the same class of persons opposing (*i*), yet that this is but a general rule, and that the Court will be guided by the particular circumstances of each case; and one set of costs was there given to the opposing shareholders in addition to those of the company.

So where some of the creditors and shareholders joined in the petition, and others appeared separately, and, it is supposed, supported the petition, Malins, V.C., said there was no occasion for their separate appearance, and refused their costs (*k*).

And in *Re Star and Garter Hotel Co.* (*l*), Bacon, V.C., refused to give costs to shareholders opposing a petition which was dismissed, on the ground that the rule laid down in *Re Humber Ironworks Co.* (*m*) was to be followed, and that, the petition not affecting the shareholders' interests, they ought not to have appeared.

The usual order as to costs which is now commonly made gives costs to the petitioner if the petition succeeds, and to the company if it fails, and further gives one set of costs to the contributories, and one to the creditors who support the winning side. If the petition succeeds, these costs are given out of the company's estate: if it fails, they are given against the petitioner.

(*e*) W. N. 1866, 283; 14 L. T. 755; on app. W. N. 1866, 312; 15 L. T. 8.

(*f*) See *Hop and Malt Exchange Co.*, W. N. 1866, 222; *Imperial Mercantile Credit Assurance*, Ibid. 257.

(*g*) W. N. 1866, 388; 15 W. R. 148; 15 L. T. 346.

(*h*) 8 Eq. 660.

(*i*) See also *European Life Assurance Society*, 10 Eq. 403; *London and Suburban Bank*, 19 W. R. 88; 23 L. T. 447; *Irrigation Co. of France, E. p. Fox*, 6 Ch. 176, 195; *Albert Life Assurance Co.*, 6 Ch. 381.

(*k*) *City Glass Co.*, W. N. 1874, 116.

(*l*) 28 L. T. 258; W. N. 1873, 74.

(*m*) 2 Eq. 15, *v. supra.*

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There is no exception to deprive of their costs creditors appearing on a shareholders' petition which fails. They are invited by the petitioner to appear by the advertisement of the petition, and if he fails he must pay their costs (*n*).

But the creditor is not entitled to his costs as a matter of right: he must shew a reasonable ground for appearing. The Court will not give costs where the creditor has really appeared for no purpose except to ask for costs (*o*).

And where a petitioner abandoned his petition four days after its presentation, without having served it on the company, and gave the company and an alleged creditor who applied for a copy of the petition notice of the abandonment, neither the company nor the creditor were allowed costs (*p*).

Where successive petitions were presented in ignorance of prior petitions, the Court in making the order allowed one set of costs on all the petitions (*q*).

If costs are multiplied by parties represented by the same solicitor unnecessarily appearing separately, they will not be given out of the company's estate (*r*).

Secured creditor.

Judicature Act, 1875, s. 10, has not affected the right of a secured creditor in respect of his costs of appearing on the petition. The creditor is not bound to elect whether he will give up or retain his security until the time for proof arrives (*s*).

Creditor's petition withdrawn.

Where a creditor presented a petition for a winding-up order, and his debt, which was disputed by the company, having been established at law, was paid by the company, he was, upon withdrawing his petition, held entitled to his costs (*t*).

Petition dismissed.

Where, at the wish of a majority of shareholders anxious to continue the business, a shareholder's petition is dismissed, the dismissal, if at the time of the presentation of the petition there was a *bonâ fide* case for petitioning, may be without costs (*u*). But the petitioner cannot receive costs (*x*).

Provisional liquidator.

A provisional official liquidator is not, although served, entitled to appear on a winding-up petition, and if he appear his costs will be refused. He is in the position of a receiver *pendente lite* (*y*).

In *Re Times Life Assurance* (*z*) the company was ordered to pay the costs of the provisional liquidator properly incurred up to the time an offer was made to pay the debt of the petitioning creditor, and his proper costs of appearance, but the case last referred to was not cited.

The provisional liquidator's costs have also been allowed under the following circumstances. Winding-up petitions were presented before Kindersley, V.C., and before Stuart, V.C. A provisional liquidator was appointed by Kindersley, V.C., and counsel was then instructed to appear (*semble* for the provisional liquidator) before Stuart, V.C., to inform the Court of the appointment, and oppose any order which would interfere with it. The

(*n*) *New Gas Co.*, 5 Ch. Div. 703; *Diamond Fuel Co.*, W. N. 1878, 11.

(*o*) *Hull and County Bank*, 10 Ch. D. 130; *Walkham United Mines*, W. N. 1882, 134.

(*p*) *Quartz Hill Co.*, W. N. 1882, 27.

(*q*) *Owen's Patent Wheel Co.*, 29 L. T. 672; 22 W. R. 151; W. N. 1873, 226.

(*r*) *Military Tailoring Co.*, W. N. 1877, 248; 26 W. R. 75; 47 L. J. (Ch.) 141.

(*s*) *Carmarthen Coal Co.*, W. N. 1875, 243; 45 L. J. (Ch.) 200; *cf. Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681; and see *ante*, p. 224.

(*t*) *Railway Finance Co.*, 14 W. R. 785; 14 L. T. 507; see further *supra*, p. 226, 227.

(*u*) *Great Northern Copper Mining Co.*, 14 W. R. 705. In *London Suburban Bank*, 15 Eq. 274, Malins, V.C., dismissed the petition without costs.

(*x*) *Tyneside Society*, W. N. 1885, 148.

(*y*) *General International Agency Co.*, 36 Beav. 1; 13 W. R. 363; 34 L. J. (Ch.) 337; 5 N. R. 265.

(*z*) 9 Eq. 382.

petition before Stuart, V.C., was then transferred to Kindersley, V.C., and on the hearing was dismissed with costs. The petitioner was ordered to pay the costs of the provisional liquidator (a).

Petitioner's costs are a first charge,

Where a winding-up order is made on a petition, it is an order for the benefit of every one concerned (sect. 82), and the petitioner's costs (including his costs of establishing his debt if disputed (*b*)) are, therefore, a first charge on the estate, and must be paid in full in priority to any costs of the official liquidator (*c*).

free from set-off.

And where the petitioner is a shareholder, and subsequently becomes liable as a contributory in respect of calls in the winding-up, he is entitled to his costs without any set-off by the company of moneys due from him in respect of such calls; for the costs are, in fact, paid to the solicitor, and if no costs of obtaining the winding-up order were paid until the liability of the contributory to calls had been ascertained, and then the one were set off against the other, it would be difficult for a contributory to come for a winding-up order at all (*d*).

Rule applies only to petitioner's costs.

But the rule as to priority applies only to the costs of the petitioner, and if in the course of the winding-up orders are made for the payment of costs out of the estate, the persons to whom costs are awarded have no priority over other persons who are also entitled to costs merely because one order bears earlier date than another (*e*).

As to costs ordered to be paid by a company in liquidation, see also, *supra*, p. 243.

Creditor's costs after offer to pay.

A creditor who proceeds to bring a winding-up petition to a hearing after an offer to pay (*f*), or to secure (*g*) his debt and costs, will not be allowed costs incurred after such offer, or will be ordered to pay all costs of the petition incurred since the offer was refused (*h*).

Appeal.

The order made on a winding-up petition is of course subject to appeal in the usual manner; but if the ground of appeal be that the order is bad because founded on a debt which does not bind the company, the application should be made by motion to discharge the order (*i*). Where, however, the ground of appeal was that the association being illegal for want of registration could not be wound up under the Act, the winding-up order was discharged on appeal from the order (*k*).

The company by its directors may appeal from the order notwithstanding that a liquidator has been appointed (*l*); but in such a case if there be no one joined so as to be personally responsible for costs, an application for security for costs will be entertained (*l*).

It is conceived that any creditor or contributory may appeal although he be not petitioner. Thus where the petitioner was satisfied with a supervision order which had been made, the order was discharged upon the appeal of shareholders other than the petitioner (*m*).

The Appeal Court refuses to hear creditors or contributories appearing to support an appeal, although creditors are allowed to appear and oppose a

(a) *European Banking Co., E. p. Baylis*, 2 Eq. 521.
(*b*) *Universal Non-Tariff Co.*, W. N. 1875, 54; and see *Forbes' Claim*, 19 Eq. 485.
(*c*) *Audley Hall Cotton Spinning Co.*, 6 Eq. 245.
(*d*) *General Exchange Bank*, 4 Eq. 138.
(*e*) *Marlborough Club Co., E. p. Percival*, 6 Eq. 519.
(*f*) *Times Life, &c., Co.*, 9 Eq. 382.
(*g*) *Imperial Guardian Society*, 9 Eq. 447; and see *Home Assurance Association*, 12 Eq. 59.
(*h*) See also *supra*, p. 227.
(*i*) *E. p. Williamson*, 5 Ch. 309.
(*k*) *Padstow Association*, 20 Ch. Div. 137.
(*l*) *Diamond Fuel Co.*, 13 Ch. Div. 400.
(*m*) *Silkstone Fall Colliery Co.*, 1 Ch. Div. 38.

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petitioner's appeal and if successful will get their costs (*n*). And costs have been given to shareholders who appeared below but were not served with the appeal (*o*).

If upon appeal the petition be dismissed, any proceedings taken under the order will be discharged (*p*).

Costs.

Where the company nominally, but in fact the directors, appealed against a winding-up order, and the petition of appeal was dismissed, it was not merely dismissed with costs, for the effect would have been to give the directors their costs out of the assets, but the order was that the respondent should have his costs out of the assets, no order as to the costs of the appellants (*q*).

Directors may be restrained by injunction from paying out of the company's assets costs which they have in fact incurred in opposition to the company (*r*).

Application to vary or discharge order.

Under the old practice if an order had been irregularly or improperly obtained, an application to vary or discharge it might be made to the judge by whom it was made.

Thus where an order had been obtained upon a petition which concealed material facts (*s*), and where a supervision order had been made upon a voluntary winding-up which turned out to be invalid (*t*), the order was discharged upon motion.

If, however, by reason of delay in making the application, costs had been incurred under the order, the Court would not discharge it unless the applicant would undertake to pay those costs (*u*).

The Court has no jurisdiction to order payment out of the assets of costs incurred under a winding-up order which is afterwards discharged as void (*x*).

Quære, whether a petitioner who has improperly obtained an order upon a petition concealing material facts can, upon its being discharged, be made to pay costs incurred by contributories under it (*y*).

The application to vary or discharge must, if made on the merits, have been the subject of a regular re-hearing, even though all parties consented to a different course. Where the petition had been dismissed, and the company were afterwards ready to consent to an order, the Court refused to make it except upon a petition of re-hearing (*z*).

The application might be made by motion with notice (*u*).

And where an irregular order (viz., a supervision order upon an invalid voluntary winding-up) was discharged, and a fresh order (viz., a compulsory order) made, fresh advertisements of the petition were not required on service and consent of all parties entitled to be served (a).

As to superseding a supervision order by a compulsory order, see *infra*, s. 152, note.

Under the procedure introduced by the Judicature Act a judge cannot re-hear an order made by himself or another judge: the power to re-hear is part of the appellate jurisdiction transferred to the Court of Appeal (*b*).

(*n*) *New Gas Co.*, 5 Ch. Div. 703.
(*o*) *New Callao Co.*, 22 Ch. Div. 484, 494.
(*p*) *E. p. Williamson*, 5 Ch. 309.
(*q*) *National Savings Bank Association*, 1 Ch. 547; *Diamond Fuel Co.*, 13 Ch. Div. 400.
(*r*) *Smith* v. *Duke of Manchester*, 24 Ch. D. 611.
(*s*) *E. p. Barnett*, 1 De G. & Sm. 744; *cf. Clarke's Case*, 1 K. & J. 22.
(*t*) *Patent Floor Cloth Co.*, 8 Eq. 664.
(*u*) *Clarke's Case*, 1 K. & J. 22.
(*x*) *Plumstead Water Co.*, *E. p. Harding*, 11 W. R. 99; 8 Jur. (N.S.) 1140; 7 L. T. 550; 32 L. J. (Ch.) 145; 1 N. R. 40.
(*y*) *E. p. Barnett*, 1 De G. & Sm. 744.
(*z*) *North Wales Slate Supply Co.*, 18 W. R. 403; 21 L. T. 818.
(a) *Patent Floor Cloth Co.*, 8 Eq. 664. So in *Shields Marine Insurance Co.*, W. N. 1867, 296.
(*b*) *St. Nazaire Co.*, 12 Ch. Div. 88.

But if the order has not been passed and entered, the judge may deal with his own order (*c*).

Two companies cannot, for convenience' sake, because their affairs are much mixed up together, be included in one winding-up order, though separate lists of contributories be made out for each company (*d*). Two companies cannot be included in one winding-up order.

But by the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 4, *v. infra*, in the case of amalgamated life assurance companies, where the "principal" company is being wound up, the Court shall order the "subsidiary" company to be wound up in conjunction with the "principal" company, and make provision with a view to such companies being wound up as if they were one company, subject as therein mentioned. And where any subsidiary company and principal company are being wound up by different branches of the Court, the Court to which appeals from such branches lie shall make an order directing in which branch the winding-up shall be carried on. Life Assurance Companies Act, 1872.

Where there were in different branches of the Court two concurrent petitions for winding-up, and the one which had been presented last came on for hearing first, an application that it might be transferred to the other branch of the Court to be heard with the petition first presented was refused, and an order made on the petition last presented. Subsequently the petition first presented was transferred to the Court in which the order was made, and at the hearing the petitioner was allowed his costs (*e*). Two petitions in different branches of the Court.

If a first petition is improperly intercepted by a collusive second petition, it is conceived that the right course is for the first petitioner to procure his petition to be transferred to the judge who has made the order, and apply for the carriage of it (*f*).

Where a petition was pending in one branch of the Court, and a provisional liquidator had been appointed, but the petitioner had failed to prosecute the petition, a winding-up order was granted in the *interim* on another petition in another branch of the Court (*g*).

When petitions are presented in different branches of the Court the regular course is to transfer to that branch of the Court to which the first petition is attached (*h*). Transfer.

If an order is made in one branch of the Court, a petitioner whose petition is pending elsewhere may, by appearing when the order is made, succeed in procuring the order to be made on both petitions, upon his undertaking to transfer to that branch. But this could only be done by consent, for the judge has not the petition before him. If this is not done he must transfer his petition to that branch, and bring it on there for hearing (*i*).

Where several petitions are presented under circumstances which justify their presentation, as where the later petitioners were in ignorance of the prior petitions (*k*), and where the first petition was or might be collusive (*l*), the practice is to make one order on all the petitions, and then the usual rules as to costs apply. Several petitions.

Where there were two petitions, the one by a paid-up shareholder, the

(*c*) *Crown Bank*, 44 Ch. D. 634, 648.

(*d*) *Shields Marine Association, E. p. Lee and Moore*, 16 W. R. 69; 17 L. T. 308; W. N. 1867, 265, 296.

(*e*) *British and Foreign Gas, &c., Co.*, 13 W. R. 649; 12 L. T. 368; 11 Jur. (N.S.) 559.

(*f*) *Cf.* in bankruptcy, *E. p. Mason*, 14 Ch. Div. 71.

(*g*) *Consolidated Bank*, 14 L. T. 656.

(*h*) *West Hartlepool Co.*, 10 Ch. 629.

(*i*) See *Marron Bank Co.*, 38 L. T. 140; W. N. 1878, 12.

(*k*) *Owen's Patent Wheel Co.*, 29 L. T. 672; 22 W. R. 151; *London and Australian Agency Corporation*, 29 L. T. 417; 22 W. R. 45.

(*l*) *United Service Co.*, 7 Eq. 76; and see *Humber Ironworks Co.*, 2 Eq. 15; *Commercial Discount Co.*, 32 Beav. 198.

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other by shareholders who had paid only the deposit, one order was made on both petitions, and the conduct of the winding-up given to the paid-up shareholder (*m*).

Where a first petition after being advertised and coming on for hearing stood over *sine die*, and six months afterwards a creditor in ignorance of its existence presented another petition, he was allowed his costs (*n*). A second petitioner is entitled to his costs down to the time when he first becomes aware of the first petition (*o*).

But a second petition, if unnecessary on account of an earlier petition having been presented, will be dismissed with costs (*p*); and further, each of several petitions will be looked at separately on its own merits; and if an order would not have been made upon it, dealing with it as the only petition presented, it will equally be dismissed with costs, whether objectionable as a second petition or not (*q*).

Actions and suits to be stayed after order for winding-up.

87. When an order has been made for winding up a company under this Act no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose (*a*).

(*a*) ss. 163, 198, 202.

Effect of section.

This section has been already, in a great measure, discussed under sect. 85; and it will there be seen that, notwithstanding sect. 163, the Court may in its discretion allow a creditor to proceed to levy execution, notwithstanding that the company is being wound up.

Leave not obtained.

After a winding-up order has been made, however, any further proceedings are to be absolutely put a stop to, until leave has been obtained from the Court.

And therefore, where a winding-up order was made and an official liquidator appointed, and on the same day a writ of *fi. fia.* was issued by a judgment creditor, on which execution was levied two days afterwards when the official liquidator was in possession, further proceedings were, on the application of the official liquidator, restrained by the Court as a matter of course, for the Act gives no option. It was impossible for the judgment creditor to proceed except by leave obtained from the Court, on an application of which notice had been given (*r*).

Before the Judicature Act it was held at law that the omission to obtain leave to proceed with an action could not be taken advantage of by plea to the further maintenance of the action: but must be the subject of an application to the Court in which the winding-up was proceeding (*s*).

Transfer of actions.

By Order XLIX. R. 5, "When an order has been made by any judge of the Chancery Division for the winding up of any company, or for the administration of the assets of any testator or intestate, the judge in whose

(*m*) *Constantinople and Alexandria Hotel Co.*, 13 W. R. 851.

(*n*) See *Marron Bank Co.*, 38 L. T. 140; W. N. 1878, 12.

(*o*) *General Financial Bank*, 20 Ch. Div. 276.

(*p*) *Joint Stock Coal Co.*, 8 Eq. 146; *Accidental and Marine Insurance Co., E. p. Rasch*, 36 L. J. (Ch.) 75; 15 L. T. 173; *Empire Assurance Corporation*, 16 L. T. 341; and see *supra*, pp. 227, 228.

(*q*) *European Banking Co., E. p. Baylis*, 2 Eq. 521.

(*r*) *Waterloo Life, &c., Insurance Co.*, 31 Beav. 689; 11 W. R. 159.

(*s*) *Gray* v. *Raper*, L. R. 1 C. P. 694; *Graham* v. *Edge*, 20 Q. B. D. 538, 683; and see *Henderson* v. *Peruvian Railway Co.*, 16 L. T. 297; *Jones* v. *Yates*, 3 Y. & J. 373; *Piercy* v. *Roberts*, 1 M. & K. 4; *Lee* v. *Sangster*, 2 C. B. (N.S.) 1.

Court such winding-up or administration shall be pending shall have power without any further consent to order the transfer to such judge of any cause or matter pending in any other Court or Division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered as the case may be." Sect. 87.

The motion for transfer may be made *ex parte* (*t*).

This rule is an amendment of the former rule. Under the old rule (Order LI. R. 2a) a judge who had made an order on one petition could not transfer to his own branch of the Court another petition pending elsewhere, for a petition was not an "action" (*u*); neither could he transfer an action from another judge of the Chancery Division (*x*). Under the present Rule he can do both.

Suit in foreign country.

Sects. 87 and 163 apply only to the Courts in this country, for Parliament never legislates respecting strictly foreign Courts, and is not to be considered to be legislating respecting colonial or Indian Courts, unless they are expressly mentioned (*y*), and therefore a suit may be brought against a company in liquidation, in, for instance, an Indian Court, without leave first obtained, although, if cause were shewn to the Indian Court why the suit should be stayed, it would entertain the application, and do what was just and right to assist the English Court in winding up the company (*z*).

But this is not so as regards Scotland and Ireland. The Act relates to the whole of the United Kingdom, and over proceedings taken anywhere within the United Kingdom the legislature has the power of giving the Court jurisdiction. The words "suit, action, or other proceeding" are general, and are to be limited only of necessity in cases where the Court from want of power could not enforce its order if made. By sect. 122, an English order can be enforced in Scotland or Ireland. In the case, therefore, of a company being wound up in England, the English Court can and will restrain proceedings in Ireland (a) or Scotland (*b*).

Property in a foreign country.

And *semble*, a proceeding against the company in respect of property in a foreign country is within the Act. The fact that the property is out of the jurisdiction does not prevent the application of the Act (*c*).

When a company has in this country been ordered to be wound up, judgment creditors who are in this country and have proved under the winding-up will not be allowed to attach property in India belonging to the company (*d*).

The Court has jurisdiction to restrain a British subject from taking proceedings in a foreign Court (*e*).

Action:—against company and third party;

Leave will be given to proceed with an action against third parties, to which the company is a necessary party (*f*), the plaintiff undertaking not to enforce against the company any judgment he may obtain, without the leave of the Court:—*e.g.*, where the bill was filed against a company and a third party for

(*t*) *Landore Siemens Steel Co.*, 10 Ch. D. 489; *Field* v. *Field*, W. N. 1877, 98; *Whitaker* v. *Robinson*, W. N. 1877, 201.

(*u*) *National Funds Co.*, 25 W. R. 23.

(*x*) *Madras Irrigation Co.*, 16 Ch. D. 702.

(*y*) *Per* Mellish, L.J., *E. p. Scinde Railway Co.*, 9 Ch. 557, 560.

(*z*) *Bank of Hindustan* v. *Premchand*, 5 Bomb. H. C. Rep. 83.

(a) *International Pulp Co.*, 3 Ch. D. 594.

(*b*) *Middlesborough Firebrick Co.*, W. N. 1885, 7; 52 L. T. 98; *Hermann Loog & Co.*, *Ramsay's Case*, 36 Ch. D. 502; *Thurso New Gas Co.*, 42 Ch. D. 486; *Queensland Merc. Co.*, W. N. 1888, 62.

(*c*) *South Eastern of Portugal Railway Co.*, 17 W. R. 982.

(*d*) *Oriental Inland Steam Co.*, *E. p. Scinde Railway Co.*, 9 Ch. 557; 30 L. T. 317; 31 L. T. 5; 22 W. R. 622, 810.

(*e*) *North Carolina Estate Co.*, W. N. 1889, 53.

(*f*) *Cf.* in bankruptcy, *E. p. Smith, Re Collie*, 2 Ch. Div. 51.

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an account of promotion money alleged to have been received by him from the company (*g*); so where the bill was filed by a shareholder in a company to restrain the company from amalgamating itself with another company, which had, since the resolution for amalgamation, been ordered to be wound up, and both companies were made defendants (*h*); and again, where, in ignorance of winding-up resolutions having been passed, a shareholder commenced an action against the company and the directors for rescission of his contract to take shares, on the ground of misrepresentation, and for repayment and indemnity (*i*).

Marshall v. *Glamorgan Iron Co.* (*k*) is an instance of leave being given to file a bill against the company and third parties after the winding-up.

But, except as above, leave to institute or proceed with an action will only be given where some question arises which cannot properly be determined in the winding-up, and for whose determination an action is requisite.

Thus, where the bill was for an order to strike the plaintiff out of the register on the ground of misrepresentation, leave to proceed with the suit was refused, for the question would more properly be determined on motion under sects. 35, 98, in the winding-up (*l*).

by mortgagee for foreclosure;

Again, where first mortgagees, not in possession of the legal estate, applied for leave to file a bill for foreclosure, inteuding to obtain a receiver, make some arrangement with the subsequent incumbrancers, and keep the mine which was the subject of the mortgage going till it could be sold to advantage, Romilly, M.R., refused leave on the ground that the relief could be equally obtained in the winding-up (*m*), but on appeal leave was given (*n*).

Another instance of a bill for foreclosure filed after the winding-up will be found referred to in *Marshall* v. *Glamorgan Iron Co.* (*o*).

And it is now settled that, except under special circumstances, a mortgagee will have leave, as a matter of course, to continue a foreclosure action, unless the company offer to give him at once foreclosure or sale as the case may be, that is, practically offer him at once judgment in his action (*p*). The mortgagee is indepeudent of the winding-up proceedings, and his action is to enforce a claim, not against the company, but to his own property (*p*).

But *quœre* whether this applies to a mortgagee of the undertaking, for his security is on that which would be realised in the winding-up (*q*).

If the mortgagee desires a sale, the Court is not disposed to give the conduct of the sale to the company on the allegation that they can sell to greater advantage than the mortgagee can. The answer is, that if the company want the control of the property they had better redeem. The company have no equity to interfere with the mortgagee's right to sell (*r*).

The following are other cases in which leave has been given:

to restrain trespass, and praying damages;

A suit had been commenced against a company to restrain trespass and

(*g*) *McEwen* v. *London, Bombay, &c., Bank*, 15 L. T. 495; W. N. 1866, 407; 15 W. R. 245; *Hagell* v. *Currie*, W. N. 1867, 75; S. C., 2 Ch. 449.

(*h*) *Re Marine Investment Co.*, 14 L. T. 535.

(*i*) *Hall* v. *Old Talargoch Lead Co.*, 3 Ch. D. 749; but see *ante*, p. 123, as to this case.

(*k*) 7 Eq. 129.

(*l*) *Wilson* v. *Natal Investment Co.*, 36 L. J. (Ch.) 312; W. N. 1867, 68; see, however, *Hall* v. *Old Talargoch Co.*, 3 Ch. D. 749.

(*m*) *St. Cuthbert Lead Smelting Co.*, 35 Beav. 384; W. N. 1866, 84.

(*n*) S. C., W. N. 1866, 91.

(*o*) 7 Eq. at p. 133; *et v. Perry* v. *Oriental Hotels Co.*, 5 Ch. 420.

(*p*) *Lloyd* v. *Lloyd & Co.*, 6 Ch. Div. 339; and see *Campbell* v. *Compagnie Générale*, 2 Ch. D. 181; *Pound, Son, and Hutchins*, 42 Ch. Div. 402. Distinguish *Brown, Bayley, & Dixon, E. p. Roberts*, 18 Ch. D. 649; *Cambrian Mining Co., E. p. Fell*, W. N. 1881, 125; 29 W. R. 881.

(*q*) *Jones* v. *Swansea Soc.*, 29 W. R. 382; 50 L. J. (Q. B.) 428; 44 L. T. 106.

(*r*) *Longdendale Cotton Co.*, 8 Ch. D. 150.

praying damages, and an injunction had been granted against the company. A winding-up order was then made. On the application of the plaintiffs, who contended that they could not prove under the winding-up unless their rights were admitted or established, general leave was given them to carry on the suit as they might think fit (*s*).

to enforce specific performance:—

In a vendor's suit to enforce specific performance against a company interrogatories were filed before the winding-up, but there was a delay in putting in the answer, and no answer was put in before the commencement of a voluntary winding-up, which was continued under the supervision of the Court. Leave was given to enforce an answer; and on an answer having been put in denying the contract and alleging fraud, leave was given to proceed with the suit (*t*).

of contract to cancel shares;

Leave has been given to file a bill against a company and third parties to enforce specific performance of an agreement, one term of which provided for the cancellation of the plaintiff's shares (*u*).

to enforce lien for unpaid purchase-money.

Leave has been given to file a bill to enforce a vendor's lien for unpaid purchase-money (*x*).

COMMON LAW ACTIONS.

Actions upon bills of exchange have been allowed to proceed where they turned upon mutual dealings and questions of fact, which required to be thoroughly sifted (*y*).

H. recovered judgment against a company, and afterwards obtained a garnishee order against S., an alleged debtor to the company. S. denied that he was so indebted. H. then, by leave, brought an action against S., and pending the proceedings the company was wound up. A motion by the official liquidator for an injunction to restrain the proceedings at law was refused, but it was ordered that in case H. should recover a verdict he should not put in force any execution against the estate of the company in the hands of S. (*z*).

Where a verdict had been taken by consent for the plaintiffs subject to the decision of certain points by certain engineers, and to the opinion of the Court of Exchequer to be taken on a special case, and the plaintiff, if he succeeded, was to have his costs, leave was given to proceed with the action, as the better course (a).

Leave has been given to bring an action of ejectment (*b*).

Admiralty proceedings.

The arrest of a ship under proceedings in Admiralty is a "sequestration" within sect. 163, and void if made after the commencement of the winding-up at the instance of a creditor who can prove in the winding-up. The proper mode of enforcing a maritime lien, as for wages, is by a proceeding in the winding-up, and not by a proceeding *in rem* in the Admiralty Court (*c*).

But if a stranger to the winding-up is a necessary party to the proceedings, then since he cannot be compelled to come in under the winding-up jurisdiction, leave will be given in the winding-up to proceed in Admiralty. Thus where the proceeding was to enforce against a ship which was in the possession of mortgagees a master's lien for the expense of necessaries supplied to the ship, leave was properly given to proceed in the Admiralty Court (*d*).

(*s*) *Wyley* v. *The Exhall Coal Mining Co.*, 33 Beav. 539.
(*t*) *Thames Plate Glass Co.* v. *Land and Sea Telegraph Co.*, 11 Eq. 248; 6 Ch. 643.
(*u*) *Marshall* v. *Glamorgan Iron Co.*, 7 Eq. 129.
(*x*) See *Blakely* v. *Dent*, 15 W. R. 663.
(*y*) *E. p. Bateman*, 15 W. R. 118, 245.
(*z*) *United English, &c., Insurance Co.*, 5 Eq. 300.
(a) *Joseph Peace and Co.*, W. N. 1873, 127.
(*b*) *Strand Hotel Co.*, W. N. 1868, 2.
(*c*) *Australian Direct Co.*, 20 Eq. 325.
(*d*) *Rio Grande Steamship Co.*, 5 Ch. Div. 282.

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Inquiry under Tramway Acts. Costs.

An inquiry before a referee under sect. 42 of the Tramways Act, 1870, is not a proceeding against the company; and further, being a statutory inquiry, could not be stayed under this section (*e*).

The costs of the action, if given against the company, are in general payable in full out of the assets, not provable only in the winding-up (*f*).

Examination in winding-up of plaintiff in action.

Where leave is given to continue an action, the plaintiff or defendant in the action will not be relieved from liability to examination before a special examiner in the winding-up, and from answering questions relating to the matters in dispute in the action (*g*).

Appeal from discretion.

Where leave to proceed has been given by the judge in whose Court the winding-up is going on, the Court of Appeal will not interfere with his discretion (*h*); leave has, however, been given by the Court of Appeal when it was refused below (*i*).

Third party co-defendant cannot stay proceedings.

A stranger to the company who is co-defendant with the company in a suit is not entitled, on the ground that no order for leave to proceed has been obtained, to have further proceedings in the suit stayed (*k*).

"The Court."

"The Court" in this section meant before the Judicature Act that branch of the Court in which the winding-up order was made (*l*).

Practice.

Leave has been given, on an *ex parte* motion, to file a bill against a company in liquidation, the Court observing that the official liquidator could, if he thought fit, move to have it discharged (*m*). But it is not the right practice to move *ex parte* (*n*).

It has been said that application for leave to proceed ought to be made by summons in chambers (*o*), although, as will be seen from the cases cited, it has been often made upon motion.

Under the old practice it was not sufficient to produce the bill which the applicant wished to file; he had to support it by a short affidavit verifying such of the allegations as were within his knowledge, and stating his belief of the truth of the other allegations (*p*). Similar evidence would no doubt be required now.

Action against directors.

No jurisdiction is given by the section to stay actions against directors in respect of claims made against them by the contributories (*q*).

Action against liquidators.

Quære whether an action against a liquidator in his official capacity (*e.g.*, the liquidator of an unregistered company in whom property of the company has been vested under sect. 203) is within this section (*r*).

Copy of order to be forwarded to registrar.

88. When an order has been made for winding up a company under this Act, a copy of such order shall forthwith be forwarded by the company to the Registrar of Joint Stock Companies,

(*e*) *Pontypridd Tramways Co.*, W. N. 1889, 86.

(*f*) See *supra*, p. 243.

(*g*) *E. p. Bateman*, 15 W. R. 118, 245; 15 L. T. 263, 495; *Massey* v. *Allen*, 9 Ch. D. 164.

(*h*) *Thames Plate Glass Co.* v. *Land and Sea Telegraph Co.*, 6 Ch. 643.

(*i*) *St. Cuthbert Lead Smelting Co.*, 35 Beav. 384; W. N. 1866, 84, 91; *McEwen* v. *London, Bombay, &c., Bank*, 15 L. T. 495; W. N. 1866, 407; 15 W. R. 245; *Strand Hotel Co.*, W. N. 1868, 2.

(*k*) *Wells* v. *Estates Investment Co.*, 15 W. R. 762.

(*l*) *Wilson* v. *Natal Investment Co.*, 36 L. J. (Ch.) 312; W. N. 1867, 68; 15 L. T. 658; and see *Thames Plate Glass Co.* v. *Land and Sea Telegraph Co.*, 6 Ch. 643.

(*m*) *Williams* v. *Bristol Marine Insurance Co.*, 39 L. J. (Ch.) 504.

(*n*) *Western and Brazilian Telegraph Co.* v. *Bibby*, W. N. 1880, 145; 42 L. T. 821.

(*o*) *Hagell* v. *Currie*, W. N. 1867, 75.

(*p*) *St. Cuthbert Lead Smelting Co.* (No. 2), W. N. 1866, 154.

(*q*) *New Zealand Banking Corporation, E. p. Hankey*, 21 L. T. 481; W. N. 1869, 226.

(*r*) *Graham* v. *Edge*, 20 Q. B. D. 538, 683.

who shall make a minute thereof in his books relating to the company. Sect. 89.

89. The Court may at any time after an order has been made for winding up a company, upon the application by motion of any creditor or contributory of the company, and upon proof to the satisfaction of the Court that all proceedings in relation to such winding-up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit. Power of Court to stay proceedings.

The application of an alleged contributory will not be entertained unless he admits himself to be a contributory (*s*). Staying proceedings.

In a voluntary winding-up continued under the supervision of the Court, the liquidators had paid all debts and had money in hand sufficient for current expenses. A meeting of shareholders was then held at which resolutions were passed in favour of staying the proceedings under the liquidation and resuming the business. In accordance with the request of the meeting, a petition was presented under sects. 89 and 138 by the chairman of directors, who was also a contributory, praying that the proceedings in the winding-up might be stayed, that the liquidators might be ordered to pay the costs of the petition, and to transfer all the property of the company to the directors, and might thereupon be discharged from further liability. The Court made an order as prayed, and gave to one shareholder, who opposed the petition, fourteen days within which to elect whether he would remain a member of the company or would retire, and if he elected to retire referred it to chambers to ascertain the value of his interest in the property, such value to be paid him by the petitioner (*t*).

And so the resuming of business by a company which had gone into liquidation has been approved by the Court in other cases.

Thus, where the M. Company had transferred its property and business to the M. Corporation, and had gone into liquidation, and then the M. Corporation failing to perform its undertaking to satisfy the company's debts, the company had to pay a debt of large amount, the Court, under the circumstances, sanctioned an agreement whereby the company was to take over the corporation's assets, pay its debts, and realise what it could towards the discharge of the sum which it had been compelled to pay (*u*).

And again, where a winding-up order had been made on the petition of debenture-holders, a scheme of re-construction also at the instance of debenture-holders was approved, under which the liquidation was to continue for certain purposes only, the debts other than those secured by the debentures were to be paid, new capital created, and business resumed (*x*).

Two petitions to wind up a company were presented by shareholders on the 16th of February, 1872; on the 19th of February a resolution was passed to wind up voluntarily, and continue the winding-up under supervision; on the 2nd of March a compulsory order was made on the petitions; on the 6th of March the resolution of the 19th of February was confirmed. A motion was subsequently made under this section by the parties who had presented Staying compulsory order.

(*s*) *Continental Bank*, 15 W. R. 548; 16 L. T. 112; and see *supra*, p. 198.

(*t*) *South Barrule Slate Quarry Co.*, 8 Eq. 688; *cf. Marine Investment Co., E. p. Poole's Executors*, 8 Ch. 702.

(*u*) *Marine Investment Co., E. p. Poole's Executors*, 8 Ch. 702; and see s. 161, note, where the facts are more fully stated.

(*x*) *Western of Canada Oil Co.*, W. N. 1874, 148.

Sect. 90. one of the petitions that all proceedings under the compulsory order of the 2nd of March might be stayed, and the voluntary liquidation continued under the supervision of the Court. It was stated that the company was solvent, and the only reason for winding up was that it was found impossible to carry on the business profitably. Romilly, M.R., made the order, the costs of the application to be paid out of the assets of the company (*y*).

A motion in the winding up of a company (with respect to which there was a bill before Parliament to refer all matters in dispute in the liquidation to an arbitrator), that proceedings might be stayed until further order, and in particular that the official liquidators might be restrained from taking, prosecuting, or proceeding with any action or suit relating to the winding-up, was dismissed with costs (*z*).

But the section is commonly used for re-construction purposes (a) where, for instance, the company wants to raise further capital to pay its debts and go on again. The further capital cannot be created and issued in the winding-up, and yet the winding-up cannot be stayed so far as relates to the payment of debts. The difficulty is met by taking an order under this section staying all proceedings in the winding-up, except for the necessary purposes (*e.g.* ascertaining and satisfying the debts), and directing meetings of the members to vote the new capital, elect a new board of directors, and so on.

Discharging compulsory order.

Where the proper majority of creditors had agreed to a composition, the Court sanctioned the arrangement and discharged the winding-up order (*b*). *Quære:* was this right: after the winding-up order was discharged was the composition binding on the minority under the Joint Stock Companies Arrangement Act, 1870?

Staying voluntary winding-up.

Under this section and sect. 138 proceedings in a voluntary winding-up may be stayed (*c*).

Effect of order on share capital of company limited by guarantee.

90. When an order has been made for winding up a company limited by guarantee, and having a capital divided into shares, any share capital that may not have been called up shall be deemed to be assets of the company and to be a debt (in England and Ireland of the nature of a specialty (*a*)) due to the company from each member to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the Court.

(*a*) ss. 75, 134.

Court may have regard to wishes of creditors or contributories.

91. The Court (*a*) may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings (β) of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs for the purpose of ascertaining their wishes, and may

(*y*) *Bristol Victoria Pottery Co.*, W. N. 1872, 85.

(*z*) *European Assurance Society*, W. N. 1872, 85, affirmed on appeal.

(a) *Cf.* in bankruptcy, *E. p. Carr*, W. N. 1886, 187.

(*b*) *Patent Automatic Knitting Co.*, W. N. 1882, 97.

(*c*) *Steamship Titian Co.*, W. N. 1888, 17; *Schanschieff Electric Synd.*, W. N. 1888, 166.

appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court. In the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories, to the number of votes conferred on each contributory by the regulations of the company (γ). Sect. 91.

(α) See Comp. (W. Up) Act, 1890, s. 13. Comp. (W. Up) Act, 1890, ss. 6, 23.
(β) Gen. Order, Nov. 1862, Rules 45–47. (γ) s. 149.

This section is not confined to questions arising after the winding-up order has been made, nor to the manner in which, or the terms upon which an order shall be made, but it is equally applicable before making a winding-up order, when the petition is before the Court (*d*).

It gives the Court complete discretion to refuse an order (*e*), or to direct the petition to stand over (*f*) upon terms (*g*), and to exercise its discretion with reference to all the surrounding circumstances.

The effect which will be given to the wishes of creditors and contributories has already been considered in several places under the several sections to which the particular matters in question referred. It may be convenient to collect here some of the cases in respect of winding-up petitions which have been already discussed under sect. 79.

SHAREHOLDERS' PETITIONS.

ORDER MADE *against wish of majority of shareholders;*

„ matters requiring investigation; overwhelming influence on the part of one shareholder; resolution for voluntary winding-up passed but not confirmed (*h*).

„ company *de facto* unable to pay its debts—two petitions presented, one by shareholder the other by execution creditor (*i*).

„ assets and management very unsatisfactory; in default of a resolution for voluntary winding-up, compulsory order to be made (*k*).

„ no profit for the last four years; substratum of company gone (*l*).

„ company had no assets and no debts, had not in four years commenced business, majority would not consent to voluntary winding-up (*m*). It appears that the order in this case was never drawn up or acted upon, and in a similar case, Bacon, V.C., dismissed the petition (*n*).

„ *at wish of majority of shareholders (in value);*

„ although opposed by a minority, and company very small (*o*).

(*d*) *Western of Canada Oil Co.*, 17 Eq. 1.
(*e*) *Langley Mill Co.*, 12 Eq. 26; *Planet Benefit Building Society*, 14 Eq. 441, 450; *Uruguay Central Railway Co.*, 11 Ch. D. 372, 383; *Chapel House Colliery Co.*, 24 Ch. Div. 259; *et v. supra*, pp. 210, 211.
(*f*) *Brighton Hotel Co.*, 6 Eq. 339; *Western of Canada Oil Co.*, 17 Eq. 1.
(*g*) *St. Thomas' Dock Co.*, 2 Ch. D. 116.
(*h*) *West Surrey Tanning Co.*, 2 Eq. 737.
(*i*) *Ex parte Spartali and Tabor*, 14 L. T. 726.
(*k*) *British Oil and Cannel Co.*, 15 L. T. 601.
(*l*) *Great Northern Copper Mining Co.*, 17 W. R. 462; 20 L. T. 264.
(*m*) *Tumacacori Mining Co.*, 17 Eq. 534.
(*n*) *New Gas Generator Co.*, 4 Ch. D. 874.
(*o*) *In re Sanderson's Patent*, 12 Eq. 188.

Sect. 91. PETITION TO STAND OVER:

A shareholder's petition may no doubt be ordered to stand over, but, in an unlimited company at least (*p*), the considerations stated in *Electric Telegraph Co. of Ireland* (*q*) are not without weight, viz., that if the shareholder shew his right to an order the Court will consider whether, by ordering the petition to stand over, his liabilities will not be increased.

„ *at wish of majority of policy-holders;*

„ Mutual Life Assurance Society: majority desired reduction of contracts under Life Assurance Companies Act, 1870, s. 22; petition ordered to stand over till meeting of policy-holders held (*r*).

ORDER REFUSED *at wish of majority of shareholders;*

„ as between shareholders the Act creates by sect. 129 a domestic tribunal to whom is intrusted the power of determining on the liquidation of the company. The Court will not readily withdraw the decision of the question from them (*s*).

„ company had suspended business for more than a year owing to the depression of trade and with the approval of the great majority of the shareholders: there was no inability to carry on the business and no intention to abandon the undertaking: one-eighth against four-fifths desired a winding-up (*t*).

" the Court will not in general interfere where a *bonâ fide* resolution has been passed for a voluntary winding-up (*u*); *e.g.*

(i.) petition presented by shareholders who were also creditors (*x*).

(ii.) petition presented by the only dissentient shareholder (*y*).

(iii.) petition presented by a fully paid-up shareholder (*z*).

(iv.) petition presented by the only dissentient shareholder suggesting irregularities but not plainly alleging fraud (a).

(v.) *Semble:* the fraud alleged must be fraud in obtaining the resolution for voluntary liquidation: fraudulent transactions in the promotion of the company are not sufficient (*b*).

if in such a case an order is made, the Court will incline rather to a supervision than to a compulsory order (*c*).

(*p*) See *supra*, p. 208 (*k*).
(*q*) 22 Beav. 471.
(*r*) *Great Britain Mutual Society*, 16 Ch. Div. 246.
(*s*) *Langham Skating Rink Co.*, 5 Ch. Div. 669; *Gold Co.*, 11 Ch. Div. 701, 710; *Middlesborough Assembly Rooms*, 14 Ch. Div. 104.
(*t*) *Middlesborough Assembly Rooms*, 14 Ch. Div. 104.
(*u*) See ss. 147, 149.
(*x*) *Madras Coffee Co.*, 17 W. R. 643.
(*y*) *Union Hill Silver Co.*, 22 L. T. 400.
(*z*) *Irrigation Co. of France, Ex parte Fox*, 6 Ch. 176.
(a) *Petersburg Gas Co.*, 33 L. T. 637.
(*b*) *Sir John Moore Mining Co.*, W. N. 1877, 183; *Gold Co.*, 11 Ch. Div. 701; *Haven Gold Mining Co.*, 20 Ch. Div. 151; but see *Northumberland Banking Co.*, 2 De G. & J. 357, 378.
(*c*) *General International Agency Co.*, 36 Beav. 1; 13 W. R. 363; 34 L. J. (Ch.) 337.

ORDER REFUSED *at wish of majority of shareholders*—continued.

„ the Court will even allow the petition to stand over, to consider the question of voluntary winding-up:—

thus: where a majority of shareholders and almost all the creditors desired a voluntary winding-up, under which a firm would take over the company's assets and pay the debts, the Appeal Court discharged a compulsory order, and directed the petition to stand over with liberty to call a meeting (*d*).

meeting directed to be held; resolution passed to continue business (*e*).

„ petitioner's interest and liability very small (*f*).

„ although business not actively commenced in two years and a half (*g*).

CREDITORS' PETITIONS.

The wishes of a majority of creditors will be first considered whether a company shall be wound up compulsorily or voluntarily (*h*), or in exceptional cases whether it shall be wound up at all (*i*). As between himself and other creditors, a creditor is not entitled *ex debito justitiæ* to a compulsory order (*k*).

ORDER REFUSED *at wish of majority of creditors;*

„ resolution for voluntary winding-up having been passed (*l*).

voluntary winding-up in progress, and nothing to shew that creditor was in any way prejudiced (*m*).

„ no voluntary winding-up in progress: creditor a debenture-holder whose interest was in arrear entitled *pari passu* with others: held £600 against £142,700 who opposed: nothing to be gained by winding-up order (*n*).

PETITION TO STAND OVER *at wish of large majority of shareholders;*

„ there being a reasonable hope of an arrangement being made to carry on the company (*o*).

„ the same indulgence refused (*p*).

„ *at wish of majority of debenture-holders;*

„ there being reason to believe that the debts would be paid (*q*).

„ the assets being already charged to their full value, so that there was nothing to be got under a winding-up order (*r*).

„ *at wish of majority of creditors;*

„ petitioners were secured creditors who alleged that their security was insufficient: the majority of the creditors

(*d*) *City and County Bank*, 10 Ch. 470.
(*e*) *Great Northern Copper Mining Co.*, 14 W. R. 705.
(*f*) *London Surburban Bank*, 6 Ch. 641. *Professional, &c., Society*, 6 Ch. 856.
(*g*) *Petersburg Gas Co.*, W. N. 1874, 196.
(*h*) *Oriental Commercial Bank*, 14 L. T. 755; 15 L. T. 8; *Lonsdale Vale Ironstone Co.*, 16 W. R. 601.
(*i*) *Uruguay Central Railway Co.*, 11 Ch. D. 372; and see *ante*, s. 79, note.
(*k*) *West Hartlepool Co.*, 10 Ch. 618; *Uruguay Central Railway Co.*, 11 Ch. D. 372; *Great Western Coal Co.*, 21 Ch. D. 769; *Chapel House Colliery Co.*, 24 Ch. Div. 259.
(*l*) *Langley Mill, &c., Co.*, 12 Eq. 26; *cf. Horbury Bridge Co.*, W. N. 1879, 51.
(*m*) *Universal Drug Supply Association*, W. N. 1874, 125.
(*n*) *Uruguay Central Railway Co.*, 11 Ch. D. 372; *cf. Chapel House Colliery Co.*, 24 Ch. Div. 259.
(*o*) *Brighton Hotel Co.*, 6 Eq. 339.
(*p*) *Home Assurance Association*, 12 Eq. 112.
(*q*) *Western of Canada Oil Co.*, 17 Eq. 1.
(*r*) *St. Thomas' Dock Co.*, 2 Ch. D. 116.

Sect. 92. PETITION TO STAND OVER *at wish of large majority of shareholders*—continued.
opposed, and assigned good reason for their opposition: the petition was ordered to stand over instead of being dismissed really for the protection of the other creditors, so that in case the petitioners took steps to enforce their security it could be brought on again (*s*).

ORDER MADE *against the wish of the company and some creditors*;
„ but there is nothing in the report to shew that there was not a majority of creditors in favour of the order (*t*).
„ *against wish of company*;
voluntary winding-up had been going on for more than a year, but no dividend paid—petitioner was a single creditor but to the amount of three-fourths of the debts (*u*).
„ suspicions of fraud: at request of company petitioner allowed petition to stand over, and afterwards discovered that company had executed bill of sale of its effects to one of the directors (*x*).

ORDER MADE *against wish of majority of debenture-holders*;
„ the petition had by order stood over for three months, and nothing had been done (*y*).

See further sects. 145, 147, 149.

Company clearly insolvent.

If a company is clearly insolvent, the assets belong to the creditors rather than to the members, and the creditors are therefore entitled to have the control of the business; and as it is only through the medium of a winding-up that they can have such control, an order will in such a case be made on their petition (*z*).

Meeting.

Where the Court has no power to make a winding-up order, it has no power to direct a meeting to be held (a). It may direct a meeting to consider in what way the company shall be wound up (*b*), but if a case is not made for winding-up it cannot direct a meeting to consider whether the company would like to be wound up or not (*c*).

Official Liquidators.

Appointment of official liquidator.

92. For the purpose of conducting the proceedings in winding up a company, and assisting the Court therein, there may be appointed a person or persons to be called an official liquidator or official liquidators (*a*); and the Court having jurisdiction may appoint such person or persons, either provisionally (β) or otherwise, as it thinks fit, to the office of official liquidator or official liquidators; in all cases if more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act hereby required or authorized to be done by the official

(*s*) *Great Western Coal Co.*, 21 Ch. D. 769.
(*t*) *General Rolling Stock Co.*, 34 Beav. 314; 13 W. R. 423.
(*u*) *Manchester Queensland Cotton Co.*, 15 W. R. 1070; 16 L. T. 583.
(*x*) *London and Provincial Starch Co., E. p. Adams*, 16 L. T. 474.
(*y*) *Western of Canada Oil Co.*, 17 Eq. 1.
(*z*) *Isle of Wight Ferry Co.*, 2 H. & M. 597; *Lonsdale Vale Ironstone Co.*, 16 W. R. 601.
(a) *Joint Stock Coal Co.*, 8 Eq. 146.
(*b*) *City and County Bank*, 10 Ch. 470; *West Hartlepool Co.*, Ibid. 618.
(*c*) *Langham Skating Rink Co.*, 5 Ch. Div. 669.

liquidator is to be done by all or any one or more of such persons. *The Court may also determine whether any and what security* (γ) *is to be given by any official liquidator on his appointment* (δ); if no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed to be in the custody of the Court. Sect. 92.

(α) Gen. Ord. Nov. 1862, Rules 8–19; and see ss. 133, 150–152.
(β) s. 85. Comp. (W. Up) Act, 1890, s. 4.
(γ) Gen. Ord. Nov. 1862, Rule 10; Comp. (W. Up) Act, 1890, s. 4 (3).
(δ) The words in italics are repealed by Comp. (W. Up) Act, 1890.

Liquidator.

The earlier part of this section is not repealed or altered by the Comp. (W. Up) Act, 1890 (except as to the title "official," s. 4 (31), but the whole scheme of appointment is in fact affected by that Act.

On the winding-up order being made the official receiver (sect. 4) becomes *ipso facto* provisional liquidator, and continues such until he or another person becomes liquidator. Any person other than the official receiver who is appointed liquidator is styled "liquidator," not "official liquidator." The official receiver is to call meetings (sect. 6), to determine whether or not application is to be made to the Court to appoint a liquidator in the place of the official receiver, and the Court may make any appointment or order required to give effect to such determination. It seems to be assumed that the Court will not use its power under sect. 92 of this Act except for the purpose of sect. 6 of that Act.

The liquidator (other than the official receiver) cannot act as liquidator until he has notified his appointment to the registrar of joint-stock companies and given security to the satisfaction of the Board of Trade (Comp. (W. Up) Act, 1890, sect. 4 (3)).

Conduct of particular matters.

Where there are several liquidators there is jurisdiction to give the conduct of any particular matter to one of them (*d*).

Appointment at the hearing.

The official liquidator might before the Comp. W. Up Act, 1890, be appointed at the hearing of the petition (*e*); but he was not so appointed except by consent (*f*); and the settled practice was in all cases to direct a reference to chambers (*g*). For if the appointment were ever made at the hearing, every creditor or contributory would have to appear to see that the matter was referred to chambers, or that a proper appointment was made.

Provisional appointment.

A provisional liquidator may be appointed at any time after petition presented and before the first appointment of liquidators (*h*). If a provisional liquidator had been appointed before the winding-up order he was before the Comp. W. Up Act, 1890, commonly continued until liquidators were appointed after advertisement, &c. (*i*). But a provisional liquidator might be appointed after the order, and for a limited purpose, *e.g.*, to receive and give a discharge for costs ordered to be paid to the company (*k*).

Who should be appointed.

It is desirable that liquidators should be disinterested persons. As a general rule the appointment of a shareholder would be improper (*l*).

(*d*) *Midland Land Corporation*, W. N. 1887, 58.
(*e*) *London, Bombay, and Mediterranean Bank*, 1 Ch. 525; *South Kensington Stores*, W. N. 1880, 199.
(*f*) *Commercial Discount Co.*, 32 Beav. 198; 11 W. R. 353; 1 N. R. 416; and see *Minima Organ Co.*, 11 W. R. 530; 8 L. T. 109; and Gen. Order, Nov. 1862, Rule 8.
(*g*) *General Financial Bank*, 20 Ch. Div. 276.
(*h*) s. 85, where see notes, p. 246.
(*i*) Gen. Order, Nov. 1862, R. 8, *et seq.*
(*k*) *Langham Skating Rink Co.*, 6 Ch. D. 102.
(*l*) *Northumberland and Durham District Banking Co.*, 2 De G. & J. 508. As to the

Sect. 92.

The secretary of the company, being cognisant of its affairs, is a proper person to be appointed (*m*): but where there are matters requiring investigation an independent liquidator will be taken.

Court of Appeal will not interfere in the appointment;

The Court of Appeal will not, except on a question of principle, interfere to disturb the appointment when a judge has, in the exercise of his discretion, appointed a liquidator. If since the appointment new facts had been discovered which shewed that the primary judge was deceived, and that he had made an improper appointment, application ought before the Judicature Act to have been made to him to reconsider the case (*n*). It may now in such a case be necessary to go to the Court of Appeal (*o*).

except upon a question of principle.

But where in the appointment is involved a question of principle, an appeal from the appointment of the judge will be entertained. Thus, in the analogous case of appointment of receiver, where a liquidator had been appointed in a winding-up under supervision, and subsequently an equitable mortgagee of property of the company filed a bill to enforce his security,

Receiver.

and obtained an order for a receiver, and the judge appointed a person, other than the liquidator, to be receiver, the appointment was, on appeal, discharged, and the liquidator appointed, there being no personal objection to the liquidator (*p*).

Where the winding-up is compulsory or under supervision, it is considered unreasonable that there should be two persons, each of them responsible to the Court, appointed, the one as liquidator and the other as receiver, and the practice seems to be to appoint the liquidator receiver, or allow him to act as receiver, even though a receiver has been appointed before the appointment of liquidator (*q*).

This practice is adopted by the Comp. (W. Up) Act, 1890, for sect. 4 (6) provides that the official receiver may be appointed receiver for debenture-holders or other creditors.

But a mere voluntary liquidator will not necessarily be receiver, and special circumstances as to the preservation of the property would no doubt always be taken into consideration (*r*).

Moreover, if the question is not whether a receiver appointed by the Court at the instance of mortgagees and a liquidator appointed by the Court shall be the same persons or different persons, but whether a receiver appointed by mortgagees for themselves under a power in their security shall or not have possession, the considerations are entirely different. If a mortgagee has power to appoint and does appoint his own receiver, he is entitled to possession by that receiver, and with the appointment of the person the Court has nothing to do. In such a case, therefore, the Court would under proper safeguards direct the liquidator to give possession to the mortgagees' receiver (*s*).

Wishes of creditors, &c.

By sect. 91, in a compulsory winding-up, and by sect. 149 in a winding-up

appointment where a supervision order is superseded by a compulsory order, see s.152.

(*m*) *London and Australian Agency Corporation*, 29 L. T. 417; 22 W. R. 45.

(*n*) *International Contract Co.*, 1 Ch. 523, where a creditor, and *London, Bombay, &c., Bank*, 1 Ch. 525, where two directors had been appointed; and see *Railway Finance Co.*, 14 W. R. 956; *London Quays and Warehouses Co.*, 3 Ch. 394; *Cookes* v. *Cookes*, 2 D. J. & S. 526; *Merchant Traders Co.*, 15 Jur. 981; and cases next cited.

(*o*) *St. Nazaire Co.*, 12 Ch. Div. 88.

(*p*) *Perry* v. *Oriental Hotels Co.*, 5 Ch. 420 (Giffard, L.J.)

(*q*) *Campbell* v. *Campagnie Générale*, 2 Ch. D. 181; *Tottenham* v. *Swansea Zinc Co.*, W. N. 1884, 54; 32 W. R. 716; 53 L. J. (Ch.) 776; 51 L. T. 61; *Wilmott* v. *London Celluloid Co.*, W. N. 1885, 29; *Giles* v. *Nuthall*, W. N. 1885, 51.

(*r*) *Boyle* v. *Bettws Colliery Co.*, 2 Ch. D. 726.

(*s*) *Pound, Son, and Hutchins*, 42 Ch. Div. 402.

under supervision (in which latter section the appointment of liquidators is specifically mentioned), the Court may have regard to the wishes of the creditors and contributories in matters relating to the winding-up. At the wish therefore of a very large majority of the unsecured creditors, two creditors have been appointed liquidators in place of the petitioner's nominee (*t*). And at the wish of the creditors a liquidator appointed by the shareholders has been removed (*u*).

And, as has already been pointed out, the Comp. (W. Up) Act, 1890, requires meetings of creditors and contributories to be called to determine whether application shall be made to the Court to appoint a liquidator in the place of the official receiver.

Who will be appointed.

To avoid the discreditable contests which sometimes arose in the matter of the appointment of liquidators, it is understood that a rule was at one time laid down and acted upon very efficaciously by the late Lord Justice Giffard, when Vice-Chancellor, that no one should have the costs of an application for the appointment of official liquidators but he who applies and succeeds, and then only the ordinary costs of an ordinary application (*x*).

The general rule of the Court is that, *cæteris paribus*, the person who is nominated by the petitioner will be appointed (*y*). But some judges have since declined to adopt this rule (*z*).

Some remarks upon this rule will be found in the case of *In re Northern Assam Tea Co.* (a) before Lord Hatherley, L.C., and Giffard, L.J., where the laying down of any hard-and-fast rule that the nominee of the petitioner shall have a preference is disapproved, as throwing out an additional bait for trafficking in winding-up petitions. But nevertheless the official liquidator, who had there been appointed by Romilly, M.R., being personally qualified for the office, the Court of Appeal refused to interfere to disturb the appointment.

This case was followed by *In re Albert Average Assurance Association* (*b*), in which Romilly, M.R., remarking on the judgments of the Lord Chancellor and Lord Justice Giffard in the case last mentioned, said that he was unable to find in that case any rule at all upon the subject, and stated the rule on which he should act for the future as follows: "When the petitioner nominates a fit, proper, and respectable person, I shall adopt him *cæteris paribus*, that is to say, unless there is a very strong feeling against him, or unless there is something that may throw a doubt upon his fitness; and if the chief clerk, after examining the case, acts upon that principle, then when it is referred to me I shall affirm his decision, after looking, of course, into the case for myself, as I am bound to do. I shall not feel myself bound to give the preponderance to the creditors if it is a creditors' winding-up, or to the shareholders, if it is a shareholders' winding-up, but I shall, *cæteris paribus*, appoint the petitioner's nominee, defining *cæteris paribus* in the manner I have explained" (*c*).

This case was carried on appeal before James, L.J., who held that the rule

(*t*) *Association of Land Financiers*, 10 Ch. D. 269.

(*u*) *Oxford Building Co.*, 49 L. T. 495.

(*x*) See *London and Northern Insurance Corporation*, 16 W. R. 965; 19 L. T. 144, where Giffard, V.C., said that he would under no circumstances allow the costs of a contest in such a case.

(*y*) See *General Provident Insurance Co.*, 17 W. R. 42; 19 L. T. 45 (Malins, V.C.), where it was said that the choice of the official liquidator by the person having the carriage of the winding-up order would not be interfered with except on the ground of personal disqualification.

(*z*) *E.g. Hoyland Colliery Co.*, W. N. 1884, 13.

(a) 5 Ch. 644.

(*b*) Ibid. 597, n.

(*c*) Ibid. 598, n.

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thus stated was one which it was competent for a judge to lay down for his own guidance, and that it would be competent for another judge to lay down for his guidance a different rule; and that in neither case would the Court of Appeal interfere if the rule were, in its opinion, such as a judge might lay down for that purpose (*d*).

The rule thus stated is that which is now generally followed (*e*), but subject to this qualification that, according as the assets are or are not more than sufficient to pay the debts and costs, the question will be treated as one in which the wishes of the shareholders in the former case and the creditors in the latter are to be first consulted.

The judge cannot delegate to his chief clerk his judicial functions; and, therefore, if the matter of an appointment is brought before the judge he is bound to look into the matter for himself, and form his own opinion upon it (*f*); but, provided he do so, the Court of Appeal will not interfere with his discretion as to the degree of weight he thinks fit to give to the conclusion come to by his chief clerk (*g*).

Amalgamated companies.

Where the W. Society had been amalgamated with the A. Company, and that company having gone into liquidation, an order was subsequently obtained for winding up the W. Society, it was held that one of the liquidators of the A. Company was the most proper person to be appointed liquidator of the W. Society; and that, where the interests of the two companies might be in conflict, directions might be given for appointing separate solicitors to represent them (*h*).

In the European Arbitration Lord Westbury refused to appoint a separate liquidator for one of the absorbed companies (*i*).

But where, the B. Society having been amalgamated with the E. Society, a compulsory order was made on the 12th of January, 1872, to wind up the E. Society; and on the 8th of February, 1872, official liquidators were appointed; and in the interval, viz., on the 18th of January, the B. Society passed a resolution to wind up voluntarily and appointed liquidators; a summons by the only dissentient shareholder of the B. Society to remove the voluntary liquidators appointed at the meeting of the 18th of January, and substitute for them the liquidators of the E. Society, was refused (*k*).

Life Assurance Companies Act, 1872.

By the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 4, *v. infra*, where, in the case of amalgamated life assurance companies, a "subsidiary" company is ordered to be wound up in conjunction with a "principal" company, the Court may by the same or any subsequent order appoint the same person to be liquidator for the two companies.

Supervision order superseded by compulsory order.

As to the appointment of liquidators when a supervision order is superseded by a compulsory order, see sect. 152, *infra*.

Voluntary winding-up superseded by compulsory order.

Where a company is already in voluntary liquidation it was at one time said that a compulsory order would in general continue the voluntary liquidator as official liquidator (*l*). But this was not the practice before the Comp. (W. Up) Act, 1890, and of course is not so after that Act.

Stannaries Act, 1869.

By the Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 33, it was enacted that—

Duties of Registrar in liquidation of a Company.] Where an order is

(*d*) 5 Ch. 597.

(*e*) See some observations upon this rule, *ante*, p. 228.

(*f*) *Agriculturist Cattle Insurance Co.*, 3 D. F. & J. 194.

(*g*) *Albert, &c., Association*, 5 Ch. 597.

(*h*) *Western Life Assurance Society, E. p. Willett*, 5 Ch. 396; *cf. Perry* v. *Oriental Hotels Co.*, 5 Ch. 420.

(*i*) *E. p. Dyke* (Eur. Arb.), Reil. 12; L. T. 10.

(*k*) *British Nation Assurance Society, E. p. Henderson*, 14 Eq. 492.

(*l*) *London and Mediterranean Banking Co.*, 15 W. R. 33; 15 L. T. 153.

made for the winding-up of a company in the Court (*m*), whether the same be a registered or unregistered company (*n*), and no official liquidator is appointed, the registrar shall have authority, with the sanction of the Vice-Warden, to perform all the ordinary duties of an official liquidator, and to exercise all the powers assigned by the Companies Act, 1862, to such liquidator, so far as such duties or powers are not incompatible with his official duties as registrar. Sect. 93.

Provided always, that the registrar shall not in such case be called upon to give any such security as may be required of an official liquidator under sect. 92 of the last-mentioned Act, unless the Lord-Warden of the Stannaries or the Vice-Warden by some general rule of the Court shall otherwise order, nor shall he be entitled to any remuneration for the performance of the said duties other than the salary now received by, or that may hereafter be assigned to him in his official character of registrar; nor shall it be necessary for him to use the name or style of official liquidator, nor any other style than that of registrar, unless it shall become necessary for him to take out letters of administration to any deceased contributory; and in proving a debt due from any contributory who shall have become a bankrupt within the intent and meaning of sect. 87 (*o*) of the Companies Act, 1862, a certificate of the debt signed by the registrar, with the seal of the Court attached, shall be accepted in the Court of Bankruptcy as sufficient proof of such debt as against the estate of the bankrupt without requiring the oath or affidavit of the registrar:

Provided also, that the registrar, in the performance of such duties and exercise of such powers, shall not be liable to any penalty prescribed by the said Companies Act, 1862, and imposed on official liquidators as such, or become personally liable in respect of any act done or proceeding taken by him by the order or authority, or with the sanction of the Vice-Warden acting in his judicial character.

Resignations, removals, filling up vacancies, and compensation.

93. Any official liquidator may resign or be removed by the Court on due cause shewn (*α*); and any vacancy in the office of an official liquidator appointed by the Court shall be filled by the Court (*β*). There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct; and if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs (*γ*).

(*α*) *Conf.* s. 141.

(*β*) ss. 141, 150; Gen. Order, Nov. 1862, Rule 16; Comp. (W. Up) Act, 1890, s. 4 (4).

(*γ*) s. 133 (3); Gen. Order, Nov. 1862, Rule 18; Comp. (W. Up) Act, 1890, s. 27 (3).

Removal of liquidator.

The creditors are entitled to regulate their own proceedings, and where there is a deficiency of assets, and the official liquidator insists on prosecuting an action contrary to the wish of the majority of creditors, this will be a sufficient ground for removing him (*p*).

(*m*) *i.e.*, the Court of the Vice-Warden.

(*n*) See s. 3 of the Act.

(*o*) This must mean s. 77.

(*p*) *Tavistock Ironworks Co.*, 19 W. R. 672; 24 L. T. 605.

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Remuneration of official liquidators;

"REGULATIONS as to the mode of remunerating Official Liquidators adopted by the Master of the Rolls and the Vice-Chancellors, and sanctioned and approved by the Lord Chancellor.

"Every application by an official liquidator for remuneration must be supported by an affidavit shewing the number of hours devoted by him and his clerks respectively to the business of the liquidation.

"In fixing the amount of the remuneration the judge will, subject as hereinafter mentioned, be guided by the following scale:—

"*Liquidators.*

						Per day of eight hours.
Group A.	Class I.	Where the assets divisible (*q*) among the unsecured creditors shall not amount to			£500	£1
Group B.	„ II.	Where they shall amount to	£500	and not to	2,000	2
	„ III.	„	2,000	„	5,000	3
	„ IV.	„	5,000	„	10,000	4
	„ V.	„	10,000	„	50,000	6
Group C.	„ VI.	„	50,000	„	100,000	8
	„ VII.	„	100,000	„	500,000	10
	„ VIII.	„	500,000	and over		12

Clerks.

	1st Class.	2nd Class.	3rd Class.	
	s. d.	*s. d.*	*s. d.*	
Group A.	2 0	1 6	1 0	per hour.
„ B.	3 0	2 6	1 0	„
„ C.	3 6	2 6	1 0	„

"If in the special circumstances of any liquidation it shall at any time, or from time to time, appear to the judge that it is proper to place it on a higher or lower class, he will so place it accordingly.

"If it shall appear to the judge that in the special circumstances of any liquidation it is proper to add to or deduct from the amount of remuneration provided by the scale, he will make such addition or deduction accordingly.

"If during the progress of a liquidation it shall appear to the judge expedient so to do, he will sanction payments to the liquidator on account of his remuneration.

"For this purpose the judge will estimate the amount of such remuneration as well as circumstances will admit, and will pay to the liquidator either the whole of such estimated remuneration or such part thereof as to the judge shall seem reasonable" (*r*).

This regulation is not a General Order, binding on the judges, under any statute, but is a guide to the judges in the exercise of their discretion in fixing the remuneration of liquidators (*s*).

Where in the liquidation a sale is made of the assets of the liquidating company to a new company in consideration of shares in the new company credited with so much paid up to be allotted to the shareholders of the old company, the amount so credited may properly be taken into account as "assets divisible" under the regulation (*s*).

In a liquidation, the transactions in which took place before the date of the regulation above set out, it was held that:

(*q*) *i.e.*, assets free to be divided; in other words, all the property of the company after discharging incumbrances, not assets actually divided: *Mysore Reefs Co.*, 34 Ch. Div. 14.

(*r*) This regulation is given in 3 Ch. lxiv.

(*s*) *Mysore Reefs Co.*, 34 Ch. Div. 14.

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1. Payment by percentage is not imperative on the Court, and where the assets are very large, is not admissible.

2. The amount of remuneration will not be increased or diminished in consideration of the liquidator having realised the assets at a profit or a loss.

3. The basis of the estimate of the amount of remuneration will be the time and labour employed in the liquidation (*t*).

of joint liquidators.

The Court will not interfere to determine the proportion in which the remuneration ascertained to be due to joint liquidators shall be divided between them (*u*).

Style and duties of official liquidator.

94. The official liquidator or liquidators shall be described by the style of the official liquidator or official liquidators (*α*) of the particular company in respect of which he is or they are appointed, and not by his or their individual name or names; he or they shall take into his or their custody, or under his or their control, all the property, effects, and things in actions to which the company is or appears to be entitled, and shall perform such duties in reference to the winding up of the company as may be imposed by the Court (*β*).

(*α*) Comp. (W. Up) Act, 1890, s. 4 (3).

(*β*) In the case of an unregistered company, a vesting order may be obtained; s. 203.

Liquidator is a trustee for the creditors.

The effect of a winding-up order is to constitute the liquidator a trustee (*x*) of the property of the company for the creditors of the company who were creditors at the time of the winding-up (see ss. 98, 133). The order, therefore, prevents the Statute of Limitations from running against a creditor neglecting to prove his debt within the proper time (*y*).

"There is by this section (sect. 98) imposed upon the assets of the company, wherever they may be at the time of the winding-up, a trust to be applied in discharge of the liabilities of the company" (*z*).

(See, however, sect. 107, as to a creditor who does not prove within the time limited for that purpose.)

The duty, therefore, of the liquidator is to ascertain what were the liabilities of the company at the date of the winding-up, and time will be given him for this purpose.

Taxation of bill of costs.

So that where more than twelve months had elapsed since the delivery of the company's solicitor's bill of costs, but the twelve months expired after the winding-up commenced, the liquidator was nevertheless entitled to have the bill taxed (a).

In the case referred to the bill had been delivered three months before the winding-up, a further bill was delivered after the winding-up, and after twelve months from the second delivery both bills were taxed. Malins, V.C., there said:—"The winding-up makes a complete change in the relative position of all parties as regards a company, and I must treat the case as if the rights of all parties had remained just as they were at the time of the winding-up" (a).

(*t*) *Agra and Masterman's Bank, Cannan's Claim*, 7 Eq. 102.

(*u*) *Langham Hotel Co.*, 17 W. R. 463; 20 L. T. 163.

(*x*) See also *Black & Co.'s Case*, 8 Ch. 254, 262.

(*y*) *General Rolling Stock Co., Joint Stock Discount Co.'s Claim*, 7 Ch. 646; 26 L. T. 755 (M.R.).

(*z*) *Per* Lord Cairns, *Delhi Bank's Case* (Alb. Arb.), 15 Sol. J. 923, 924; and see and consider *Re Medical Trust Fund*, 15 Sol. J. 840, where it was said that on the winding-up all claims and demands mature immediately.

(a) *Marseilles Extension Railway Co.*,

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Liquidator's representative character.

The liquidator represents at the same time both the creditors and the company, and a question of considerable nicety sometimes arises as to how far he can enforce the rights of the creditors as independent of, and paramount to, those of the company, and how far he can enforce them only in right of the company. The result of the decisions and *dicta* on this subject, which are noticed elsewhere (*b*), is perhaps this, that although the liquidator is substituted for, and enforces the rights of creditors in right of the company, yet that (1) the winding-up order calls into existence new rights and new liabilities which did not exist before, and (2) that equities which might have been set up against the company cannot prevail against the liquidator as representing the creditors (*c*).

Money paid by mistake of law.

If money have been paid to a liquidator under mistake of law he, being an officer of the Court, would no doubt, like trustee in bankruptcy, be ordered to refund (*d*).

Bankruptcy and winding-up.

The resemblances and distinctions between bankruptcy and winding-up will be found noticed on the following points in the cases referred to:—Set-off (*e*); rights of secured creditors (*f*); application of rule in *Ex parte Waring*, 19 Ves. 345 (*g*); application of Bills of Sale Act, 1878 (*h*); no double proof in respect of same debt (*i*); right of surety to recover proportion of dividend (*k*).

Discovery from the liquidator.

The liquidator is in the position of a receiver and manager of partnership assets (*l*), appointed by the Court; and as an officer of the Court his duty is to hold an even and impartial hand between all the individuals whose interests are involved in the winding-up. But, except where he represents the company as a party litigant, he cannot be called upon to make discovery at the instance of either creditors or contributories. By sect. 156 an order may be obtained for the inspection by the creditors and contributories of the books of the company, and it will be the duty of the liquidator to give to a person searching the books not only access, but every assistance and facility in finding out which are the relevant books and papers which he requires, but it is not his duty to search the books in order to make discovery at the instance of every person interested in every question arising (*m*). And he cannot be called upon to make an affidavit of documents (*n*).

Thus where the question at issue is, whether the statutory requisites exist for placing a person on list B., and if so, what is the extent of his liability, this is a question with which the existing company has no concern, and the liquidator cannot be called upon to make discovery in the matter (*m*).

But where the liquidator represents the company as a party litigant (since the company can only sue or be sued through his agency), as where there is in the winding-up an action or a proceeding which is in substance, though

E. p. Evans, 11 Eq. 151; *cf. De Bay* v. *Griffin*, 10 Ch. 291. *Quære*, *Liverpool Household Stores*, W. N. 1889, 48.

(*b*) *Supra*, pp. 118, 119, 142, and *infra*, p. 273.

(*c*) Consider also *E. p. Paine and Layton*, 4 Ch. 215.

(*d*) *E. p. Simmonds*, 16 Q. B. Div. 308; *Dixon* v. *Brown*, 32 Ch. D. 597.

(*e*) *Smith & Co.'s Case*, *Gledstanes & Co.'s Case*, 1 Ch. 538, 543; *Anderson's Case*, 3 Eq. 337, 339; *Mersey Steel Co.* v. *Naylor*, *Benzon & Co.*, 9 Q. B. Div. 648; 9 App. Cas. 434; *Lee and Chapman's Case*, 26 Ch. D. 624; 30 Ch. Div. 216; *Eberle's Hotel Co.* v. *Jonas*, 18 Q. B. Div. 459.

(*f*) *Kellock's Case*, 3 Ch. 769; *cf. Stone* v. *City and County Bank*, 3 C. P. Div. 282, 303.

(*g*) *Hickie & Co.'s Case*, 4 Eq. 226.

(*h*) *Marine Mansions Co.*, 4 Eq. 601, 610; *Stockton Iron Co.*, 10 Ch. D. 335, 342. The Bills of Sale Act, 1882, applies to incorporated companies: *Attenborough's Case*, 28 Ch. D. 682.

(*i*) *Oriental Commercial Bank, E. p. European Bank*, 7 Ch. 99.

(*k*) *Gray* v. *Seckham*, 7 Ch. 680.

(*l*) See also *Marine Mansions Co.*, 4 Eq. 601, 610.

(*m*) *Contract Corporation, Gooch's Case*, 7 Ch. 207.

(*n*) *Mutual Society*, 22 Ch. Div. 714.

not in form, an action by or against the company, then the adverse party has a right to deal with the liquidator as the litigant, and obtain from him the same measure of discovery in the same manner as he would from any other litigant (*o*)—as, *e.g.*, where the proceeding is one by an alleged contributory for relief on the ground that he has been induced to become a shareholder by fraudulent misrepresentations (*p*).

In contributory cases, then, the rule is this, that an alleged A. contributory can (*p*), while an alleged B. contributory cannot (*q*), require discovery from the liquidator. And this is the reason for the difference, that as against the A. contributory the liquidator, as representing the company, is a party litigant, while as against the B. contributory he is not. In shewing the liability of an A. contributory all the other A. contributories, *i.e.*, the existing company, are interested; in shewing the liability of a B. contributory the existing company, being primarily liable for everything, is not interested at all. It is a question with which creditors only are concerned, and in the contest the company, as represented by its liquidator, is not to be treated as a litigant.

It will be observed that the distinction thus drawn is another authority for the proposition that the liquidator represents the creditors only in right of the company (*r*).

Where the liquidator files one affidavit against several respondents and some part only relates to some one of them, he cannot be compelled to point out to that respondent what part of the affidavit is relevant to the case against him (*s*).

Discovery can of course be obtained from the liquidator in his personal as distinguished from his representative character upon a proper case being shewn (*t*).

Liquidator's liability for costs:—

The liquidator's personal liability for costs of litigation must be regarded from two wholly different points of view; viz. (A.) as between himself and the adverse litigant, and (B.) as between himself and the estate.

(A.) As regards the former, and first as regards actions which the liquidator prosecutes or defends in the name of the company. Under the older Acts when the official manager sued or defended in his own name he was personally liable for costs, and if an action in which he was plaintiff was dismissed, the order as to costs as between him and the adverse litigant was a personal order against him (*u*): *secus*, where he was defendant (*x*). So where the motion of the official manager was refused with costs, the order was against him personally (*y*). The order was of course without prejudice to the official manager getting the costs out of the estate if the judge who had the control of the winding-up thought proper to give them. Under the present Acts when the liquidator does not sue or defend in his own name but in that of the company, *quære* there is no jurisdiction to order the liquidator who is not a party litigant to pay costs, any more than directors of a going company could be ordered to pay costs. The remedy of the adverse litigant, if he be defendant, is to get security for costs under sect. 69: and if he be plaintiff he litigates of course at his own risk.

(*o*) *Gooch's Case*, 7 Ch. 207, 212.
(*p*) *Barned's Banking Co., E. p. Contract Corporation*, 2 Ch. 350.
(*q*) *Contract Corporation, Gooch's Case*, 7 Ch. 207.
(*r*) See *supra*, pp. 118, 272.
(*s*) *Mutual Society*, 22 Ch. Div. 714.
(*t*) *Sir John Moore Gold Co.*, 37 L. T. 242.
(*u*) *Official Manager of Grand Trunk Railway* v. *Brodie*, 9 Hare, 823; 3 D. M. & G. 146; *Official Managers of Consols Insurance* v. *Wood*, 2 Dr. & Sm. 353; 13 W. R. 492.
(*x*) See 3 D. M. & G. 150, 151.
(*y*) *Caldwell* v. *Ernest*, 27 Beav. 39.

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But secondly, as regards the proceedings in the liquidation which the liquidator takes in his own name the reasons given in the cases above referred to, and particularly in the judgment of Kindersley, V.C., in *Official Managers of Consols Insurance* v. *Wood* (*z*), seem as applicable under the present as under the former Acts to shew that where the liquidator is applicant, *i.e.*, is in a position equivalent to that of plaintiff, and fails, the proper order is, as between himself and the adverse litigant, that he do pay the costs, without prejudice to any application that as between him and the estate they be allowed out of the estate. This was the form of order adopted by Cairns, L.J., in *Sichell's Case* (a). It is true that in *Bentley's Case* (*b*) Fry, J., refused to make the order in that form, but the point was not argued. The fact is that in general the assets are sufficient, and an order for payment out of the estate is not objected to.

The rule now adopted in the Appeal Court, as will be seen presently, is never to make an order for payment of costs out of the estate, but to make the liquidator personally liable, leaving the question whether he shall be recouped out of the estate or not to be decided by the judge who has control of the winding-up. This involves the principle that the liquidator is personally liable (*c*), and this principle is, it is conceived, as applicable in a Court of first instance as on appeal. But in the Court of first instance the judge may determine at once as between liquidator and estate whether to allow the costs out of the estate or not, and if he think proper so to allow them and the adverse litigant (there being sufficient assets) does not object, then commonly the order is for payment, not by the liquidator personally, but out of the estate.

(B.) Whether as between liquidator and estate liquidator should be allowed costs or not is of course quite another question. It involves not only costs which the liquidator is ordered to pay, but his own costs also. It is a question to be determined by the judge upon a consideration of whether the proceedings in which the costs have been incurred were proper or not (*d*).

In determining this question the Court will bear in mind that while the liquidator is to be treated as a person who as a general rule is entitled to his costs of the liquidation properly incurred, yet he is a paid agent bound to discharge his duties with reasonable care and skill, and that therefore he may be deprived of costs for a mistake which would not be sufficient to disentitle an ordinary gratuitous trustee to costs (*e*).

An appeal will lie as to the liquidator's costs under Order LV. (*e*). Liquidators are not to be left to conduct litigation at their own risk as to costs in the event of failure (*e*).

on appeal.

On appeal there are again the same two questions as to costs, viz., (A.) as between liquidator and adverse litigant, and (B.) as between him and estate.

(A.) As to the former, where a liquidator's appeal is dismissed with costs, the order will be that the liquidator do pay the costs (*f*), the intention being that he is to pay them, whether he do or do not get them out of the estate (*g*).

Where the liquidator is respondent in a successful appeal it is conceived that the proper order is still against him personally for costs (*h*), notwith-

(*z*) 13 W. R. 492.

(a) 3 Ch. 119, 124. See also *Campbell's Case*, 4 Ch. D. 470, 475.

(*b*) 12 Ch. D. 850, 857.

(*c*) See *Ferrao's Case*, 9 Ch. 355; *E. p. Angerstein*, 9 Ch. 479; *Pitts* v. *La Fontaine*, 6 App. Cas. 482, 486.

(*d*) *Cf. E. p. Harper*, 20 Ch. Div. 685.

(*e*) *Silver Valley Mines*, 21 Ch. Div. 381.

(*f*) *E. p. Littledale*, 9 Ch. 257, 262; *Orgill's Case*, 21 L. T. 221; *Cambrian Steam Packet Co.*, 4 Ch. 112, 117.

(*g*) *Ferrao's Case*, 9 Ch. 355; *cf. E. p. Angerstein*, Ibid. 479.

(*h*) See *Pitts* v. *La Fontaine*, 6 App. Cas. 482, 487.

standing that in *E. p. Stapleton* (*i*), where trustee in bankruptcy was respondent to a successful appeal, a personal order was refused, James, L.J., saying, "The order will be for the payment of costs out of the estate, not by the trustee personally. The trustee is not the appellant."

(B.) As between liquidator and estate the Lords Justices at one time laid it down as a general rule that, where on appeal the liquidator supports unsuccessfully the decision of the Court below, his costs of the appeal will be allowed out of the estate; where he appeals and is unsuccessful it will be left to the Court below to determine whether they shall come out of the estate (*k*).

But the practice of the Court of Appeal now is to refuse to determine whether costs shall be allowed out of the estate or not (*l*). Thus the Court has refused to give to the liquidator appearing as respondent in a successful appeal his costs out of the estate, holding that, although he was entitled to his costs out of the estate unless there was some reason to the contrary, yet that he would be left to apply for them to the Court having the conduct of the winding-up (*m*).

This is a rule, however, which had not always previously been followed (*n*). And it seems that in bankruptcy the order may be for payment out of the estate, and not by the trustee personally (*o*). It is clear that a trustee in bankruptcy may be personally liable for costs (*p*); and so may executor continuing his testator's action (*q*).

If a liquidator desiring to appeal wishes to be safe as to costs he should apply to the judge for leave to appeal. The practice of Jessel, M.R., was, if he thought it a proper case for appeal, to give leave; if improper, to direct the application to stand over till the result of the appeal was known, or to give leave, reserving the question whether the costs of the appeal should be borne by the estate. If a liquidator appealed without leave, and the appeal failed, as a general rule his Lordship refused the costs (*r*).

Costs as between the liquidator and his solicitor.

The solicitor appointed by the liquidator has no claim against the liquidator personally for the costs of the winding-up (*s*) any more than the solicitor of a voluntary liquidator has (*t*). The solicitor gives credit to the assets of the company, and if they are insufficient he must lose the difference (*s*).

Of course this is quite different from the case of costs which the liquidator is ordered to pay to an adverse litigant (*u*). An adverse litigant has nothing to do with the sufficiency of the assets, and is not in the position of the solicitor who has contracted to act for the company with recourse to the company's assets for payment (*s*). The costs of an adverse litigant therefore the liquidator may be ordered to pay personally, with right of indemnity of course out of the company's assets, if the costs have been properly incurred.

Where costs are given to be paid by the liquidator out of the estate, then in case the assets are insufficient to pay these costs and the costs of the winding-up, the former are entitled to payment in priority (*x*).

(*i*) 10 Ch. Div. 586.

(*k*) *Robinson's Case*, 4 Ch. 322, 335; *Stringer's Case*, Ibid. 475, 493; *Ship's Case*, 13 W. R. 599; 12 L. T. 256; 11 Jur. (N.S.) 331; *cf. E. p. James*, 9 Ch. 609, 616.

(*l*) See 21 Ch. Div. 387, 392.

(*m*) *Wescomb's Case*, 9 Ch. 553.

(*n*) See, *e.g.*, *Sichell's Case*, 3 Ch. 119; *Bush's Case*, 6 Ch. 246.

(*o*) *E. p. Stapleton*, 10 Ch. Div. 586, 590.

(*p*) *E. p. Sheard*, 16 Ch. Div. 110; and see *E. p. Emmanuel*, 17 Ch. Div. 35, 43; *Pitts* v. *La Fontaine*, 6 App. Cas. 482.

(*q*) *Boynton* v. *Boynton*, 4 App. Cas. 733.

(*r*) *City Investment Co.*, 13 Ch. Div. 475, 483; *Silver Valley Mines*, 21 Ch. Div. 381, 389.

(*s*) *Anglo-Moravian Co., E. p. Watkin*, 1 Ch. Div. 130.

(*t*) See note to s. 144.

(*u*) *Grand Trunk Railway Co.* v. *Brodie*, 3 D. M. & G. 146, and cases just mentioned above.

(*x*) *Home Investment Soc.*, 14 Ch. D.

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Loans by liquidators.

No liquidator ought ever to advance any of the moneys in his hands as liquidator upon loan or otherwise to make a profit thereby; such a proceeding is highly improper (*y*).

Powers of official liquidator.

95. The official liquidator shall have power, with the sanction of the Court (*a*), to do the following things:

To bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company (β):

To carry on the business of the company, so far as may be necessary for the beneficial winding up of the same (γ):

To sell the real and personal and heritable and movable property, effects, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels (δ).

To do all acts, and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal:

To prove, rank, claim, and draw a dividend in the matter of the bankruptcy or insolvency or sequestration of any contributory, for any balance (ε) against the estate of such contributory, and to take and receive dividends in respect of such balance, in the matter of bankruptcy or insolvency or sequestration, as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors:

To draw, accept, make, and indorse any bill of exchange or promissory note in the name and on behalf of the company (ζ), also to raise upon the security of the assets of the company, from time to time, any requisite sum or sums of money; and the drawing, accepting, making, or indorsing of every such bill of exchange or promissory note as aforesaid on behalf of the company, shall have the same effect with respect to the liability of such company as if such bill or note had been drawn, accepted, made, or indorsed by or on behalf of such company in the course of carrying on the business thereof:

To take out, if necessary, in his official name, letters of administration to any deceased contributory (η), and to do in his official name any other act that may be necessary for obtaining payment of any moneys due from a contributory or from his estate, and which act cannot be conveniently done

167; *Dominion of Canada Plumbago Co.*, 27 Ch. Div. 33, not following *Dronfield Silkstone Co.*, 23 Ch. D. 511.

(*y*) *Re Anon.*, 15 L. T. 170; and see Gen. Order, Nov. 1862, Rules 36–41.

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in the name of the company; and in all cases where he takes out letters of administration, or otherwise uses his official name for obtaining payment of any moneys due from a contributory, such moneys shall, for the purpose of enabling him to take out such letters or recover such moneys, be deemed to be due to the official liquidator himself:

To do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets (θ).

(α) s. 96; Gen. Order, Nov. 1862, Rules 48–50; Comp. (W. Up) Act, 1890, s. 12.
(β) This does not apply to proceedings in the winding-up. The liquidator may take such proceedings without leave: *Silver Valley Mines*, 21 Ch. D. 387. See s. 203, as to vesting order in case of unregistered company. This is now controlled by Comp. (W. Up) Act, 1890, s. 12 (1).
(γ) s. 153; *et. v.* s. 131; Comp. (W. Up) Act, 1890, s. 12 (1).
(δ) s. 161; Gen. Order, Nov. 1862, Rule 32.
(ε) See note to s. 75.
(ζ) s. 47; Gen. Order, Nov. 1862, Rule 48.
(η) ss. 76, 105.
(θ) See further, ss. 159–162.

With this section must now be read sect. 12 of the Comp. (W. Up) Act, 1890.

Where an unregistered company has no power to sue and be sued in a common name, a vesting order may be obtained under sect. 203; but the liquidator of an unregistered company may sue in his own name to enforce payment of a call by a contributory (z), and may sue in his own name on behalf of the company in those cases in which in a going concern if unincorporated two or three shareholders may sue on behalf of themselves and all other shareholders of the company other than the defendants; as where an action is instituted against the directors to compel them to make good losses occasioned by their misconduct (a); and, *semble*, the sanction of the Court may be inferred from the general authority given to liquidators on their appointment (z). Action.

In the winding-up uuder supervision (b) of a joint stock banking company it was held that the liquidators had no power to bind the company by a new contract to pay the depositors an increased rate of interest (c). Carrying on business.

The power to carry on the business is only "so far as may be necessary for the beneficial winding up of the same." The "necessity" is to be determined by the Court having regard to all the circumstances of the case, and includes what may be called a "mercantile necessity," or something which under all the circumstances will be highly expedient (d). But a continuance of the business in a creditors' liquidation, not with a view to winding up, but with a view to re-construction, and as an attempt to render the shares of value, is not within the section at all, and will not be allowed although supported by the majority of the creditors (d). In this case it was left open whether there was any limit to the power of the Court to permit the liquidator to enter into new contracts, or to carry on the business with a view to a sale as a going concern.

The words in the Bankruptcy Act, 1883, s. 57 (1), are identically the

(z) *Turquand* v. *Kirby*, 4 Eq. 123.
(a) *Turquand* v. *Marshall*, 6 Eq. 112; 4 Ch. 376.
(b) In which the liquidators have the same powers as are given by this sect.; see ss. 133 (7), 151.
(c) *East of England Banking Co.*, 6 Eq. 368; 4 Ch. 14.
(d) *Wreck Recovery Co.*, 15 Ch. Div. 353.

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same as those of this Act, and in bankruptcy it has been held that the majority of the creditors cannot authorize the carrying on of the business, because they expect to make a profit. It is only for the purpose of administration and realisation that the business can be continued, and if a majority carry a resolution which goes beyond this, the minority are entitled to a declaration that it is *ultra vires* and invalid (*e*).

Where the liquidating company had leased railway waggons for a term of years upon the terms that they should repair them, the continued performance of the contract was of course within the section (*f*).

Where the liquidator enters into a contract such as falls within the ordinary business of the company, the onus is upon the person who asserts that it was not required for the beneficial winding up of the company to shew that this is so (*g*). And a contract not required for the beneficial winding up may be binding between the company and the person with whom it is made, although as between the shareholders in the company and its officers it may be open to objection (*h*).

The costs of carrying on the business are not necessarily chargeable as costs of preservation in priority to the claims of debenture-holders, where the debenture-holders have not been consulted as to whether the business should be continued or not (*i*). If there is business of the company to be managed abroad, *semble*, the proper course is not that the liquidator should give a power of attorney to some person there, but that an appointment should be made of a receiver and manager to act there (*k*). But, *quære*, what was the jurisdiction to appoint a receiver and manager. It is believed that this practice was not generally followed.

Admissions by liquidator inadmissible.

A liquidator stands towards the creditors and contributories in the position of a trustee, and has no power to bind by admissions his *cestuis que trust.* And, therefore, in a suit to set aside the amalgamation of two companies, it was held that the facts must be regularly proved, and that admissions by the liquidators were not sufficient (*l*).

Sale.

A claim by the company against its directors for misfeasance is a "thing in action" which may be sold under this section, and where all the estate property and effects of the company were sold to one who was in fact a trustee for the managing director, proceedings by the liquidator, except for the benefit and with the consent of the purchasing director, were restrained (*m*).

Where a limited colliery company had raised capital under deeds by which powers of distress and entry and of appointing a receiver were given to the lenders, it was held that on a sale of the colliery by the liquidators in the winding-up the lenders were not necessary parties to the conveyance (*n*).

As to how far the Court has jurisdiction under this section to sanction the re-construction of a company by a sale of the assets to a new company, see *In re Agra and Masterman's Bank* (*o*), and *In re Albert Life Assurance Co.* (*p*); and see sects. 159, 160, 161, and Joint Stock Companies Arrangement Act, 1870, s. 2.

(*e*) *E. p. Emmanuel*, 17 Ch. Div. 35.

(*f*) *British Wagon Co.* v. *Lea*, 5 Q. B. D. 149.

(*g*) *Hire Purchase Co.* v. *Richens*, 20 Q. B. Div. 387.

(*h*) *Bateman* v. *Ball*, 56 L. J. (Q. B. D.), 291; and see *Hire Purchase Co.* v. *Richens*, 20 Q. B. Div., 387, 389.

(*i*) *Regent's Canal Ironworks Co., E. p. Grissell*, 3 Ch. Div. 411.

(*k*) *Steel Co. of Canada*, W. N. 1885, 79.

(*l*) *Empire Corporation*, 17 W. R. 431; 20 L. T. 103.

(*m*) *Park Gate Wagon Co.*, 17 Ch. Div. 234.

(*n*) *Sankey Brook Coal Co., Re Radley & Bramall*, 12 Eq. 472. As to cases of floating security in the case of going companies, see *ante*, p. 168.

(*o*) 15 W. R. 554; 15 L. T. 408; 12 Eq. 509, n.

(*p*) 6 Ch. 381.

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In sanctioning a scheme of re-construction the Court will have regard to the wishes of a majority of creditors and shareholders deliberately expressed upon full information given, against the opposition of a dissentient minority (*q*).

Bankruptcy.

In the case of the bankruptcy of a contributory, who is also a creditor of the company, the debt must be set off against calls (*r*).

Quære, the liquidator ought not to go in and prove without the direction of the Court (*s*).

This section is, by virtue of sect. 204, as applicable to an unregistered company wound up under sect. 199 as to a registered company; and, therefore, in the bankruptcy of a contributory of an unregistered company the liquidator is not precluded from proving for the estimated amount of future calls on the ground that joint creditors cannot prove against the separate estate of a partner in competition with the separate creditors (*t*).

A bankruptcy notice must be in the name of the company, not of the liquidator (*u*).

Bills of exchange.

In giving its sanction in respect of any of the acts specified in this section the Court will have regard, (i.) to the answer to the question whether the act, in respect of which its sanction is asked for, will or not operate to the prejudice of the estate; and (ii.) to the main purpose of the Act, viz., the collection and distribution of the assets for the general benefit of the creditors, and amongst the creditors *pari passu*; exercising its discretion not for the benefit of any particular creditor, but for that of the general body of creditors interested under the Act.

Moreover, by sect. 98, the first duty of the Court is to cause the assets of the company to be collected and applied in discharge of its liabilities.

On these principles, then, the Court will empower the liquidator to indorse bills in order to negotiate them.

And where a company held bills accepted by A., payable in six months, and A. held dishonoured acceptances of the company, the liquidator was allowed to negotiate A.'s bills; and it was held that A. had no present right of set-off, and no right to have the bills retained by the liquidator until a right of set-off arose (*x*).

But where a company had entered into a contract for goods to be paid for by the acceptances of the company, the Court would not sanction the giving, by the liquidator, of acceptances which would be worth nothing, but allowed the persons with whom the contract was made to prove for damages, the contract not having been completed (*y*).

A motion under sect. 35 must be made in the name of the company, not of the liquidator (*z*).

Official name.

Under the 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108, the official manager was not a creditor in respect of moneys due for calls from a contributory, so as to be entitled to be a petitioning creditor for an adjudication of bankruptcy against him (a); but *quære* whether under this section the official liquidator is not the right person to petition.

(*q*) *Imperial Mercantile Credit Association*, 12 Eq. 504.

(*r*) See s. 75, *supra*.

(*s*) See *Life Assurance Treasury, E. p. Pepper*, 1 H. & M. 755; 11 W. R. 820.

(*t*) *E. p. Ball, Re Adams*, 10 Ch. 48.

(*u*) *E. p. Winterbottom*, 18 Q. B. D. 446.

(*x*) *Smith, Fleming, & Co.'s Case, Gledstanes and Co.'s Case*, 1 Ch. 538; and see s. 158.

(*y*) *Ebbw Vale Co.'s Claim*, 8 Eq. 14.

(*z*) *E. p. Kintrea*, 5 Ch. 95; *cf. E. p. Winterbottom*, 18 Q. B. D. 446.

(a) *Williams* v. *Harding*, L. R. 1 H. L. 99; *cf. E. p. Muirhead*, 2 Ch. Div. 22; *E. p. Harris*, 2 Ch. D. 423. As to petition by a corporation, see *Re Calthrop*, 3 Ch. 252.

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Discretion of official liquidator.

96. The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court (*a*), and where an official liquidator is provisionally appointed (*β*) may limit and restrict (*γ*) his powers by the order appointing him.

(*a*) Comp. (W. Up) Act, 1890, s. 12.
(*β*) s. 85; Comp. (W. Up) Act, 1890. s. 4.
(*γ*) *cf.* s. 151.

In *Rochdale Property Co.* (*b*) will be found a form of order giving an official liquidator power to do all acts without the previous sanction of the Court: thus giving to a compulsory winding-up the effect of a winding-up under supervision. The converse case is to be found in *London Quays and Warehouses Co.* (*c*). An order in general terms under this section will not be readily made (*d*).

Compromise.

Whether or not a general sanction includes a power to compromise, see *Re South Eastern of Portugal Railway Co.* (*e*).

Compromises are properly dealt with by sect. 160 (*infra*); but whether an order to sanction a compromise be made under this section, or under sect. 160, there must be such evidence before the Court as will enable it to exercise a judicial discretion in the matter (*e*).

Appointment of solicitor to official liquidator.

97. *The official liquidator may, with the sanction of the Court, appoint a solicitor or law agent to assist him in the performance of his duties* (*a*).

(*a*) Gen. Order, Nov. 1862, Rule 68, Form 12.

This section is repealed by the Comp. (W. Up) Act, 1890: and see sect. 12 (4) of that Act.

It is an invariable rule that a liquidator who is a solicitor shall not employ his partner as his solicitor in the winding-up, unless he be willing to act without remuneration (*f*).

The liquidator is not personally responsible to the solicitor for the costs of the winding-up (*g*).

If the solicitor gives the liquidator notice, under the Solicitors Remuneration Act, 1881, that he elects to be paid under Sch. II. and not according to the scale charge, the liquidator ought to obtain the directions of the judge as to whether he should employ the solicitor on the more expensive footing. If this is not done the bill will be taxed on the scale charge (*h*).

Ordinary Powers of Court.

Collection and application of assets.

98. As soon as may be (*a*) after making an order for winding up the company, the Court (*β*) shall settle a list of contributories (*γ*), with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act (*δ*),

(*b*) 12 Ch. D. 775.
(*c*) 3 Ch. 394. See *infra*, s. 151, note.
(*d*) *Britannia Building Soc.*, W. N. 1890, 170.
(*e*) 17 W. R. 760, 809; 20 L. T. 800; 21 L. T. 220.
(*f*) *Universal Private Telegraph Co.*, 19 W. R. 297; 23 L. T. 884.
(*g*) *Anglo-Moravian Co., E. p. Watkin*, 1 Ch. Div. 130; see *ante*, p. 275.
(*h*) *United Kingdom Association*, 40 Ch. D. 471.

and shall cause the assets of the company to be collected, and applied in discharge of its liabilities (ε). Sect. 98.

(α) s. 38.
(β) Comp. (W. Up) Act, 1890, s. 13.
(γ) s. 38; Gen. Order, Nov. 1862, Rules 29–31.
(δ) s. 35. An application on the part of the company must be made in the name of the company, not of the liquidator: *E. p. Kintrea*, 5 Ch. 95.
(ε) *i.e.*, as they exist at the date of the winding-up, ss. 94, 133. *United Ports Co., E. p. Etna Co.*, 36 L. T. 457. There is no jurisdiction to order payment out of the assets of something which is not a debt of the company; *e.g.*, costs of an action by shareholders prosecuted, but not by leave, after winding-up commenced: *Hull Central Drapery Co.*, 15 Ch. Div. 326.

List of contributories.

The list of contributories will consist of the A. list of present members, and (if necessary) the B. list of past members, who have ceased to be members within a year of the commencement of the winding-up. As to the times at which these lists will respectively be settled, see sect. 38.

Rectification of the register:

The reference here made to a rectification of the register is not intended to enable the Court to rectify it *ex mero motu suo*, but means that the Court may exercise the judicial power conferred by the 35th section, having regard to who is the applicant and to all the circumstances of the case (*i*).

After a winding-up order has been made, the power of rectification given to the Court by sect. 35 is not cut down and reduced to a mere power of rectification in the settlement of the list of contributories; but it is open to a contributory, after the order has been made, and before the list of contributories has been settled, to move for rectification under this section and the 35th section (*k*). And, *semble*, the register may be rectified as to date so as to affect the B. list of contributories (*l*).

In *In re Scottish and Universal Finance Association, Buckridge's Case* (*m*), applications to rectify the register after a winding-up order had been made were, under the circumstances, adjourned to chambers to be dealt with when the list of contributories was being settled.

In a winding-up under supervision.

Whether the liquidator in a voluntary winding-up continued under supervision has power to rectify the register of shareholders without applying to the Court, *quære* (*n*).

In contributory cases who must be present.

Where an alleged contributory contests his liability, and asserts that, by reason of a transfer or otherwise, some one else is liable in his stead, he ought in general to bring before the Court the person whose name he says ought to be substituted for his own.

Lord Westbury in the European Arbitration laid this down as follows: "If I apply to have my name taken off the list of contributories on the ground that I was not the owner of the shares at the time when I was put upon the list, but had *bonâ fide* transferred them to somebody else, and that that other person was my representative, then I must prove these facts unless they are admitted, and I can prove them only by having that other person in Court to have the fact established. . . . It would be very different if there was an application to the company to take the name off on this ground—that everything had been completed between you and another person, and that your name had not been taken off by the company by reason of their not performing some formal matter which it was requisite for them to do in order to give final completion to your contract" (*o*).

(*i*) *Sichell's Case*, 3 Ch. 119; and see s. 35.
(*k*) *Breckenridge's Case*, 2 H. & M. 642; *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 80; *Ward and Henry's Case*, 2 Eq. 226; 2 Ch. 431.
(*l*) *Anglo-Indian Co., Grey's Case* W. N. 1888, 137, 211.
(*m*) 13 W. R. 677; 12 L. T. 796.
(*n*) *Gilbert's Case*, 5 Ch. 559.
(*o*) *Thomas Brown's Case* (Eur. Arb.), L. T. 103; 17 Sol. J. 289.

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And accordingly in several cases his Lordship refused to proceed in the absence of the transferee (*p*).

But it is not fatal to the claim of a transferor to be taken off the list, that there is no transferee to be put on, if the circumstances of the case justify an order.

Thus, where the transferee was dead and had no legal personal representative, a transferor whose name had been left on the register through the default of the company, was taken off the list of contributories, although there was no one to put on in his place (*q*).

And so, if the transferee cannot be found, no doubt an order might be made (*r*).

The name of an infant transferee has been taken off the register of shareholders (*s*) and off the list of contributories (*t*) in the absence of the transferor.

And where S. transferred to an infant, and the infant transferred to A., and, the last transfer not being registered, the infant's name was on the register when the winding-up commenced, the name of S. was substituted for that of the infant on the register by an order made in the absence of A. (*u*).

Costs.

The costs of a contest by a person disputing his liability as a contributory and failing must, except under very special circumstances, be paid by such contributory (*x*).

Although there have been cases in which, both upon a successful application by the liquidator to put a person on the list (*y*), and upon an unsuccessful application by a contributory to get his name taken off (*z*), no costs have been given.

Where the decision turned upon the construction of a new statute, the contributory's costs of a successful summons by the liquidator to put him on the list have even been allowed out of the estate (a); but the leaning is against diminishing the assets by allowing out of them costs of unsuccessful resistance by contributories, and therefore, even when their case was a grievously hard one, they have been ordered to pay the costs of an unsuccessful application on their part (*b*).

If, however, the case is a representative case, the decision in which will decide a large class of similar cases, the costs of all parties will be given out of the estate (*c*), and solicitor and client costs even have been (*d*) but ought not to be (*e*) given.

This, however, is a course which applies only to the first hearing, and not to the costs of a successful appeal (*f*).

If the alleged contributory successfully dispute his liability, he will, in a proper case, receive his costs out of the estate (*g*).

(*p*) *Read's Case* (Eur. Arb.), Reil. 19; L. T. 10; *Minshall's Case* (Eur. Arb.), L. T. 29; *Thomas Brown's Case* (Eur. Arb.), L. T. 103; 17 Sol. J. 289; and see *Joshua Murgatroyd's Case* (Eur. Arb.), L. T. 115; 18 Sol. J. 28.

(*q*) *Fyfe's Case*, 4 Ch. 768.

(*r*) In *Corfield's Case*, W. N. 1873, 186, the transferor's name was replaced, the Court holding on the evidence that the transferee was fictitious.

(*s*) *Wilson's Case*, 8 Eq. 240.

(*t*) *W. H. Bentinck's Case* (Eur. Arb.), L. T. 143; 18 Sol. J. 224 (Lord Romilly).

(*u*) *Curtis' Case*, 6 Eq. 455.

(*x*) *Gower's Case*, 6 Eq. 77; *Birkbeck Life Assurance Co., Barry's Representatives' Case*, 2 Dr. & Sm. 321; 13 W. R. 380; 5 N. R. 299; *Musgrave and Hart's Case*, 5 Eq. 193; *Andrews' Case*, 3 Ch. 161.

(*y*) *Mallorie's Case*, 15 W. R. 52; 15 L. T. 236; 36 L. J. (Ch.) 40; *Fletcher's Case*, 16 W. R. 75; 37 L. J. (Ch.) 49; 17 L. T. 136.

(*z*) *Gregg's Case*, 15 W. R. 82; *Purdey's Case*, 16 W. R. 660.

(a) *Cleland's Case*, 14 Eq. 387.

(*b*) *E. p. Oakes and Peek*, 3 Eq. 576, 633.

(*c*) *Walker's Case*, 2 Eq. 554; *cf. E. p. Jeaffreson*, 11 Eq. 109.

(*d*) *Part's Case*, 10 Eq. 622.

(*e*) *Mutual Society*, 18 Ch. D. 530.

(*f*) *Sichell's Case*, 3 Ch. 119; *Cork and Youghal Railway Co.*, 4 Ch. 748.

(*g*) *Nation's Case*, 3 Eq. 77; *Ship's Case*,

Where, in a contest between two persons as to which is the contributory, both are equally solvent, the liquidator should appear by one counsel only, and take no part in the argument. The unsuccessful party will, *semble*, be ordered to pay the costs (*h*).

Where the liquidator's costs are not payable by any other party before the Court, he will take them out of the estate if properly incurred. As to his costs of an appeal, however, see *supra*, p. 275.

Laches on part of shareholder.

A person whose name has been wrongly placed on the list of contributories does not, by delaying in making application to have it removed, thereby raise an equity against his right to relief, at any rate where no loss is occasioned to the estate by the delay (*i*), although if the question has been the subject of judicial decision he may be precluded from appealing by the usual rules as to time (*k*) (*secus* with the register of shareholders, *v. supra*, pp. 121, 130).

Parliamentary deposit.

The Board of Trade warrant for the abandonment of an undertaking under the Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), and the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 31, sub-s. 3, commonly provides that the money secured by the bond conditioned for the completion of the undertaking shall be applied as assets of the company.

By sect. 5 of the Railways Abandonment Act, 1869 (32 & 33 Vict. c. 114), it is enacted to the effect that where the warrant provides as above the Court may if it think fit direct that the money shall not be applicable for payment of debts incurred on account of the promotion of the company.

The money secured by the bond thus becomes assets of a peculiar kind, subject to a discretion in the Court as to its application in paying debts of promotion.

The rule 28 of the Board of Trade Rules (*l*), and by the common form section generally inserted in private Acts authorizing undertakings (*m*), the deposit after payment of compensation (if any) "shall either be forfeited to her Majesty . . . or in the discretion of the Court if . . . the company is insolvent and [or] has been ordered to be wound up or a receiver has been appointed shall wholly or in part be paid . . . to such receiver or to the liquidator or liquidators of the company or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof."

The deposit thus becomes assets if the Court think fit to make it such (*n*).

The intention of the provisions of the Railways Abandonment Acts is, that the money secured by the bond shall be available to pay creditors, subject to this qualification, that creditors whose debts were incurred in promotion shall not be paid out of the pockets of their co-promoters. While, therefore, the solicitor and the parliamentary agent may be paid out of these assets if they were not promoters (*o*), [although it does not follow that they will be so paid if their services resulted in no more than bringing into existence a paper company (*p*),] they will not be so paid if they were (*q*).

And as respects the cases in which, under the Board of Trade Rules and the common form section above mentioned, the Court has a discretion in

13 W. R. 450; 12 L. T. 728; *Emmerson's Case*, 2 Eq. 231; 1 Ch. 433; *Coates' Case*, 17 Eq. 169; and see *Lowe's Case*, 9 Eq. 589.

(*h*) *Musgrave and Hart's Case*, 5 Eq. 193.

(*i*) *Shewell's Case*, 2 Ch. 387; *Fyfe's Case*, 4 Ch. 768; *Hart's Case*, 6 Eq. 512; *Nelson's Case*, W. N. 1874, 196; and see s. 35.

(*k*) *Elham Valley, Dickson's Case*, 12 Ch. D. 298.

(*l*) See 6 Ch. D. 486, n.

(*m*) See 2 Ch. D. 373.

(*n*) See *e.g. Manchester and Milford Railway Co.*, W. N. 1881, 125; *Uxbridge Railway Co.*, 43 Ch. Div. 536.

(*o*) *Re Kensington Station Act*, 20 Eq. 197.

(*p*) *Birmingham and Lichfield Junction Railway Co.*, 28 Ch. D. 652.

(*q*) *Brampton and Longtown Railway Co.*, 10 Eq. 613; *Barry Railway Co.*, 4 Ch. Div. 315.

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rendering the deposit assets, the intention is, (1) that the promoters are not by any subterfuge or device to get the deposit back directly or indirectly if the work is not done; (2) that the creditors only are to be considered and not the shareholders; and (3) that the only creditors to be considered are meritorious creditors who are not responsible for the failure of the undertaking (*r*). The deposit therefore can only be resorted to if the assets of the company, including the uncalled capital, are insufficient to pay the debts (*s*), and for the payment of *bonâ fide* creditors coming with a meritorious claim (*r*), otherwise the Crown will take.

In *Birmingham and Lichfield Junction Railway Co.* (*t*) a meritorious creditor tried in vain to reach the deposit under very singular circumstances. The Board of Trade had refused a warrant of abandonment on the ground that the Abandonment Acts applied only to railways authorized before 1867. The creditor could not therefore petition for a winding-up order under 32 & 33 Vict. c. 114, s. 4. He therefore presented a petition for a receiver, relying on *Manchester and Milford Railway Co.* (*u*), but as the company had never done anything the M.R. held there was no "undertaking" of which he could appoint a receiver. Ultimately the Crown presented a petition (*x*), and an order was taken, the Crown not opposing, for an inquiry as to meritorious debts and for their payment out of the deposit.

In *Uxbridge Railway Co.* (*y*) the Court found its way to holding that a special Act which provided that "the company shall proceed to wind up their affairs" was an "order to wind up" the company, and thus escaped the difficulty in *Birmingham and Lichfield Junction Railway Co.* (*t*).

(As to the debts which may be proved against the company in the winding-up and the payment of interest, see sect. 158.)

Provision as to representative contributories.

99. In settling the list of contributories the Court (*α*) shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or being liable to the debts of others; it shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, nevertheless such heirs or devisees may be added as and when the Court thinks fit (*β*).

(*α*) Comp. (W. Up) Act, 1890, s. 13.
(*β*) ss. 76, 106; Gen. Order, Nov. 1862, Rules 29–31.

Power of Court to require delivery of property.

100. The Court (*α*) may, at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to or into the hands of the official liquidator (*β*), any sum or balance (*γ*), books, papers (*δ*), estate or effects which happen

(*r*) *Lowestoft Tramways Co.*, 6 Ch. D. 484.
(*s*) *Bradford Tramways Co.*, 2 Ch. D. 373; 4 Ch. Div. 18.
(*t*) 18 Ch. D. 55; and see *West Lancashire Railway Co.*, W. N. 1890, 165.
(*u*) 14 Ch. D. 645.
(*x*) 28 Ch. D. 652.
(*y*) 43 Ch. Div. 536.

to be in his hands for the time being, and to which the company is *primâ facie* entitled (ε). Sect. 101.

(α) Comp. (W. Up) Act, 1890, s. 13.
(β) s. 103.
(γ) *Cf.* s. 165; Comp. (W. Up) Act, 1890, s. 10.
(δ) *Cf.* s. 115.
(ε) Gen. Order, Nov. 1862, Form 13.

Trustee. This section is applicable only to the contributories and officers of the company, and ought not to be extended to include other persons.

Thus, a creditor who, after a winding-up petition has been presented, has obtained payment of money of the company under a garnishee order, is not a "trustee" within the section (ζ).

Banker. And where a sum of £5000 had been improperly paid out of the funds of the company to the bankers of the company in consideration of their allowing the company to open an account with them, but such payment appeared on the evidence to have been made, not directly, but indirectly, out of the funds of the company, it was held that the summary jurisdiction of this section could not be exercised to make the bankers repay the money (a).

Broker. *Quære*, whether an application against the broker in *Zulueta's Claim* (b) could have been made under this section.

Limits of section. But if the case can be brought within the section, there can be little doubt that the disposition of the Court would be to put a liberal construction on this, as on the 101st and 165th sections, in order to bring within the winding-up jurisdiction any question properly cognizable, and thus avoid a double process (c). An order has been made upon a director to deliver possession of a colliery which he had contracted to sell to the company (d).

Under the Act of 1856 it was held that the proper mode of recovering in the winding-up assets of the company in the hands of contributories was by a proceeding in the winding-up, and not by a suit (e).

Order *ex parte*. The Court will not make an order *ex parte* for the delivery of documents by the manager of a company to the official liquidator (f).

Power of Court to order payment of debts by contributory. 101. The Court may, at any time after making an order for winding up the company, make an order (α) on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents to the company, exclusive of any moneys which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this Act (β); and it may, in making such order when the company is not limited, allow to such con-

(ζ) *United English and Scottish Assurance Co., E. p. Hawkins*, 3 Ch. 787; and see *Hollinsworth's Case*, 3 De G. & Sm. 102; *Cox's Case*, 3 De G. & Sm. 180, which were decided under the Winding-up Act, 1848. As to a railway company carrying goods of the company, and claiming a lien for carriage, *Northfield Iron Co.*, 14 L. T. 695; W. N. 1866, 253.

(a) *Imperial Land Co. of Marseilles, In re National Bank*, 10 Eq. 298.

(b) 5 Ch. 444.

(c) See note to s. 165.

(d) *Oakwell Collieries Co.*, W. N. 1879, 65.

(e) *Cardiff Coal Co.* v. *Norton*, 2 Eq. 558; 2 Ch. 405.

(f) *Commercial Union Wine Co.*, 35 Beav. 35.

Sect. 101. tributory by way of set-off any moneys due to him or the estate which he represents from the company, on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit (γ):

Provided that when all the creditors of any company whether limited or unlimited are paid in full, any moneys due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls (δ).

(α) Gen. Order, Nov. 1862, Form 13.
(β) Power to order payment of these is given by s. 102.
(γ) Comp. Act, 1867, s. 6, extends this to a director with unlimited liability.
(δ) s. 38 (7).

Set-off in winding-up.

After the decisions in *Black & Co.'s Case* (*g*) and *Whitehouse & Co.* (*h*) it is conceived that *Brighton Arcade Co.* v. *Dowling* (*i*) may be treated as overruled. And, premising this, the judgment in *Whitehouse & Co.* (*h*) renders the true construction of this section now a matter of much less difficulty. The bases of that judgment are, (1) that contributions under s. 38 of this Act are not debts to the company but contributions to the assets enforceable by the liquidator (*k*); (2) that such contributions include all that is unpaid on shares at the commencement of the winding-up, including, therefore, calls made before, as well as calls made in the winding-up; and (3) that this being so there is no set-off under the Statutes of Set-Off (*l*), because it is the liquidator who enforces the calls, while it is not the liquidator but the company that owes the debt, and that therefore to establish a set-off the person asserting it must find in the Companies Acts some provision giving a right of set-off.

Going, then, to s. 101, you find in it only two provisions for allowing set-off. The one is contained in the proviso, and is operative only as between contributories after all the debts are paid: this is applicable to both limited and unlimited companies. The other is confined to unlimited companies, and seemingly allows a set-off of debts due from the company to the contributory as distinguished from moneys due to him as a member against that which under s. 101 the Court can order him to pay (*k*), that is, debts due from the contributory and calls made *before* the winding-up.

Limited company.

Taking, therefore, first the case of a limited company, there is no provision at all for allowing set-off except as between contributories. No difficulty, therefore, arises from the first or any other words of the section. Whether the liquidation be voluntary, or under supervision, or compulsory, and whether the call be one made before or after the winding-up, there can be no set-off. This is consistent with all the cases except *Brighton Arcade Co.* v. *Dowling* (*m*).

The leading case on the subject is *Grissell's Case* (*n*), before the Full Court

(*g*) 8 Ch. 254.
(*h*) 9 Ch. D. 595.
(*i*) L. R. 3 C. P. 175; doubted also in *Gibbs and West's Case*, 10 Eq. 312, 330.
(*k*) *Cf. West of England Bank, E. p. Branwhite*, 27 W. R. 646; 48 L. J. (Ch.) 463; 40 L. T. 652.
(*l*) 2 Geo. II. c. 22, s. 13; 8 Geo. II. c. 24, ss. 4, 5.
(*m*) L. R. 3 C. P. 175.
(*n*) 1 Ch. 528; but see *Ex parte Clark*, 7 Eq. 550; where the company *in its winding-up* had become indebted to the contributory; as to which see further, *supra*, p. 243.

of Appeal, where it was held that in the winding-up of a limited company a contributory who is also a creditor of the company is not entitled to set-off against calls (the call in question in the case being a call made *in* the winding-up) either his debt or any dividend which may after the date of the call come to him on his debt; but that, on payment of all calls which have become due, he is entitled to receive a dividend *pari passu* with the other creditors; and in *Calisher's Case* (*o*) and *Barnett's Case* (*p*), in a limited company the contributory was held not entitled to set off money due to him from the company against a call made *before* the winding-up.

The doubt which was expressed in *Calisher's Case* (*o*), whether by special agreement such a right of set-off could be given, was settled by *Black & Co.'s Case* (*q*), where it was held that a company cannot contract with one of its shareholders so as to take him, in case of a winding-up, out of the law laid down in *Grissell's Case* (*r*), settled as it there was upon the interpretation of this Act, and give him, in substance, a right to be paid out of his own calls in preference to other creditors. Whether in the adjustment of the rights of the contributories among themselves the contract holds good is quite another matter.

In an action by a voluntary liquidator to enforce a call, the defendant cannot counter-claim for debt or damages. The case was one in which advertisements were inserted by the defendant upon terms of payment in paid-up shares, but no contract was registered: the action was for calls on the shares (*s*).

The rule which excludes set-off is equally applicable where the contributory is dead and his estate is insolvent. The estate must nevertheless pay in full before it can call for payment (*t*).

Unlimited company.

Then in the case of an unlimited company, the set-off which may be allowed by the Court is a set-off of debts due from the company to the contributory against debts due from the contributory to the company and calls made *before* the winding-up.

The decision of Fry, J., in *West of England Bank, E. p. Branwhite* (*u*), that there cannot be set-off of debt due to contributory at winding-up against call made in winding-up, is within this principle: but the decision of Malins, V.C., in *Gibbs and West's Case* (*x*) is certainly inconsistent with it. His Lordship there held that in an unlimited company set-off against calls in the winding-up might be allowed. Upon this decision it may be observed that the power to make and enforce calls in the winding-up might readily have been included in this section instead of being given independently in the 102nd, and that the fact that it is thus given independently is not insignificant in considering whether set-off against calls made in the winding-up was intended in any case to be allowed (*y*). The decision in *Gibbs and West's Case* cannot stand with the principles of *Whitehouse & Co.* (*z*), and in *West of England Bank, E. p. Branwhite*, Fry, J., refused to follow it.

Discretion.

The Court has a discretion in allowing set-off, and if the claim against the company requires investigation may allow payment of calls to be enforced without waiting until the cross claim has been investigated (a).

(*o*) 5 Eq. 214.
(*p*) 19 Eq. 449.
(*q*) 8 Ch. 254.
(*r*) 1 Ch. 528.
(*s*) *Government Security Co.* v. *Dempsey*, 50 L. J. (C. P.) 199.
(*t*) *West Hartlepool Co., Gunn's Case*, 38 L. T. 139.
(*u*) W. N. 1879, 86; 27 W. R. 646; 48 L. J. (Ch.) 463; 40 L. T. 652.
(*x*) 10 Eq. 312.
(*y*) See *West of England Bank, E. p. Branwhite, l.c.*
(*z*) See 9 Ch. D. 606.
(*a*) *Brasnett's Case*, W. N. 1884, 175; 1885, 156; 32 W. R. 1010; 34 W. R. 206; 51 L. T. 318; 53 L. T. 569.

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Judicature Act, 1875, s. 10.

The rule in *Grissell's Case* (*b*) has not been affected by s. 10 of the Judicature Act, 1875, in either part of that rule, *i.e.* in the decision, either that contributory who is also creditor cannot set off debt against call (*c*), or that contributory who is also creditor and who has paid all calls due from him is entitled to receive a dividend on his debt (*d*).

Set-off of debt against debt.

In an action brought against a member by the liquidator of a limited company which is in liquidation under a voluntary winding-up continued under supervision, a debt due from the company to the defendant previous to the resolution to wind up voluntarily cannot be set off against a debt incurred by the defendant to the company after the resolution (*e*).

Joint and separate demands.

Moreover, in any question of set-off in winding-up it is, of course, essential that, even if there is a right of set-off at all, the two demands should be of such a character as that the general principles of set-off apply.

Therefore, where two persons as trustees had deposited trust funds with a banking company, and one of those persons was both entitled to a life interest in a portion of the funds and was also a contributory of the company, the contention of the official liquidator that he was entitled to set off a dividend which had been declared on the debt against calls owing from the contributory was held untenable; for the one was a joint demand of the two persons as trustees, the other a separate demand against one of the persons in her personal character (*f*).

Proviso (iii.).

It has been said (*g*) that inasmuch as there is no distinction made in the Act between a creditor who is a member of the company, and one who is not, the proviso at the end of this section would appear to be inoperative—for when the creditors, including the contributories, have been paid, there is nothing left to set off. It is submitted, however, that the moneys here referred to are those due "in respect of any dividend or profit" which are excepted from the preceding clause, and which by sect. 38 (7) are not to be deemed a debt to the company payable to a member in a case of competition between himself and any other creditor not being a member of the company.

Bankrupt contributory.

See, as to set-off where a contributory becomes bankrupt, sect. 75, and as to set-off in the case of a person other than a contributory, sect. 158.

Contributory, petitioner for winding-up order.

A contributory, who was petitioner for the winding-up order, will receive the costs of the petition free from set-off of calls (*h*).

Jurisdiction.

The jurisdiction given by this section will not be confined to cases in which the debt is not disputed by the contributory, or in which the facts are very plain and straightforward, and there is no point of law to be determined. The object of this and like sections is to avoid a double process, and to do complete justice in the winding-up. And, therefore, it is only in rare instances (as where some of the parties concerned are not amenable to the jurisdiction in the winding-up) that an action should be brought.

Thus, an order might be made in the winding-up, under this section and the 165th section, to compel repayment by a director or a contributory of a dividend paid under a delusive and fraudulent balance-sheet (*i*).

(*b*) 1 Ch. 528.

(*c*) *General Works Co., Gill's Case*, 12 Ch. D. 755; the debt was a judgment debt.

(*d*) *West of England Bank, E. p. Brown*, 12 Ch. D. 823.

(*e*) *Sankey Brook Coal Co.* v. *Marsh*, L. R. 6 Ex. 185.

(*f*) *Imperial Mercantile Credit Association*, 16 L. T. 314; *cf. Middleton* v. *Pollock, E. p. Nugee*, 20 Eq. 29; *E. p. Morier*, 12 Ch. Div. 491.

(*g*) *Calisher's Case*, 5 Eq. 214, 216, 217.

(*h*) *v.* s. 86, *supra*, p. 251.

(*i*) *Mercantile Trading Co., Stringer's Case*, 4 Ch. 475; see s. 165.

And, under the Act of 1856, it was held that proceedings to recover from contributories shares in another company to which the liquidating company had sold its business, and which shares had been given as part of the consideration, ought to be taken, if at all, in the winding-up, and not by a suit (*k*).

If A., being the holder of shares not fully paid up, transfers to B., and the shares have been so dealt with that as between the company and B. the shares must be treated as paid up, *quære*, whether under this section A. could be compelled to pay the calls on the shares (*l*).

Holders of fully paid-up shares.

A holder of fully paid-up shares, who is indebted to the company, will not be put on the list of contributories in order to bring him within the summary jurisdiction of the section (*m*).

Power of Court to make calls.

102. The Court (*a*) may, at any time after making an order for winding up a company, and either before or after it has ascertained the sufficiency of the assets of the company, make calls (β) on and order payment thereof by all or any of the contributories, for the time being settled on the list of contributories to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and it may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same (γ).

(*a*) Comp. (W. Up) Act, 1890, s. 13. *supra*, p. 199.
(β) s. 120; Gen. Order, Nov. 1862, Rules 33–35. As to interest on calls, see
(γ) *Cf.* s. 133 (9).

Effect of section.

With respect to this section, see the notes to sect. 38, to which, in substance, this section is very similar.

"Debts and liabilities" means estimated debts and liabilities. The intention of the section is to provide a fund for payment of the debts when established: and it is not, therefore, the duty of the Court to wait until claims have been established against the company before making a call (*n*).

Appeal against *quantum* of call.

The Court of Appeal will not, without strong reason, interfere with the discretion of the judge to whose Court the winding-up is attached, as to the *quantum* of a call made in the winding-up (*n*).

Permanent building society.

As to a call for adjustment of the rights of the contributories among themselves in the case of a permanent building society, see *In re Doncaster Permanent Building Society* (*o*).

Winding-up order cannot be disputed in subsequent proceedings.

On a summons for a call (*p*) or other proceeding under the winding-up order (*q*) the propriety or validity of the winding-up order cannot be called in question (*r*).

For in any future proceedings in the winding-up the winding-up order

(*k*) *Cardiff Coal Co.* v. *Norton*, 2 Eq. 558; 2 Ch. 405.
(*l*) *Spargo's Case*, 8 Ch. 407, 410, 413.
(*m*) *Marlborough Club Co.*, 5 Eq. 365; *cf. Schroder's Case*, 11 Eq. 131, 134, 138.
(*n*) *Contract Corporation*, 2 Ch. 95; *Barned's Banking Co.*, 36 L. J. (Ch.) 215.
(*o*) 4 Eq. 579.
(*p*) *London Marine Insurance Association*, 8 Eq. 176; *Arthur Average Association*, 3 Ch. D. 522.
(*q*) *Arthur Average Association, E. p. Hargrove & Co.*, 10 Ch. 542; *cf. Re Haycock's Policy*, 1 Ch. D. 611, 616.
(*r*) And see *Padstow Association*, 20 Ch Div. 145; *Strick* v. *Swansea Tin Plate Co.*, 36 Ch. D. 558; *Sunderland Building Soc.*, Q. B. D. 349.

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must be taken to be valid until discharged. And therefore the Court refused to entertain an application to remove a name from the list of contributories where the motion was made on the ground that there was no duly registered company, and no valid winding-up order (*s*).

In *Re Plumstead, &c., Water Co.* (*t*) it was said that a winding-up order made in the supposed exercise of a jurisdiction which did not exist was null and void, and the decision of the Master of the Rolls (*u*) dismissing a bill filed by the official manager on the ground that, having been appointed under a void order he had no title to sue, was affirmed; but it is to be observed that, so far as the Court of Appeal is concerned, there was before the Court a motion to discharge the winding-up order, upon which an order was made.

Member resisting call.

Persons who are on the register of shareholders at the commencement of the winding-up, having thereby incurred a *primâ facie* legal liability, are not entitled to resist the making of a call on the ground that they assert a right to have their names removed from the list; but their remedy is to apply for the suspension of the operation of the call as against themselves (*x*).

Power of Court to order payment into Bank.

103. The Court may order any contributory, purchaser, or other person from whom money is due to the company to pay the same into the Bank of England or any branch thereof to the account of the official liquidator instead of to the official liquidator, and such order may be enforced (*a*) in the same manner as if it had directed payment to the official liquidator (*β*).

(*a*) Gen. Order, Nov. 1862, Rule 38.
(*β*) s. 100; Gen. Order, Nov. 1862, Rules 11, 32, 36–41.

When the official liquidator desires to issue a writ of *fi. fa.* against a contributory who has not paid a call, he must obtain an order for payment to himself under Gen. Order, Nov. 1862, Rule 38 (*y*).

Regulation of account with Court.

104. All moneys, bills, notes, and other securities paid and delivered into the Bank of England or any branch thereof in the event of a company being wound up by the Court shall be subject to such order and regulation for the keeping of the account of such moneys and other effects, and for the payment and delivery in, or investment and payment and delivery out of the same as the Court may direct (*a*).

(*a*) Gen. Order, Nov. 1862, Rules 36–44.

Provision in case of representative contributory not paying moneys ordered.

105. If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal and real estates of such deceased contributory,

(*s*) *Overend, Gurney, & Co., E. p. Oakes*, 16 L. T. 148; and see *infra*, s. 124, n.
(*t*) 2 D. F. & J. 20, 32, 37.
(*u*) *Plumstead Water Co.* v. *Davis*, 28 Beav. 545.
(*x*) *Barned's Banking Co.*, 36 L. J. (Ch.) 215.
(*y*) *Leeds Banking Co.*, 1 Ch. 150; and see the Gen. Order.

or either of such estates, and of compelling payment thereout of the moneys due (*a*).

(*a*) ss. 76, 95.

A balance order against the legal personal representatives is not a judgment so as to constitute the liquidator a judgment creditor, and to exclude the executor's right of retainer (*z*).

See further the notes to sect. 76.

Order conclusive evidence.

106. Any order made by the Court in pursuance of this Act upon any contributory shall, subject to the provisions herein contained for appealing against such order (*a*), be conclusive evidence that the moneys, if any, thereby appearing to be due or ordered to be paid are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons, and in all proceedings whatsoever, with the exception of proceedings taken against the real estate of any deceased contributory, in which case such order shall only be *primâ facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made (β).

(*a*) s. 124. (β) s. 99.

Court may exclude creditors not proving within certain time.

107. The Court (*a*) may fix a certain day or certain days on or within which creditors of the company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved (β).

(*a*) Comp. (W. Up) Act, 1890, s. 13.
(β) s. 158; Gen. Order, Nov. 1862, Rules 20–28; note to s. 94.

A creditor may come in and prove at any time before the company is dissolved; the penalty of not coming in before the day fixed by the Court is not exclusion altogether, but exclusion from the benefit of any distribution made before proof (a).

Proceedings in the Court of the Vice-Warden of the Stannaries on proof of debts.

108. If in the course of proving the debts and claims of creditors in the Court of the Vice-Warden of the Stannaries any debt or claim is disputed by the official liquidator or by any creditor or contributory, or appears to the Court to be open to question, the Court shall have power, subject to appeal as hereinafter provided(*a*), to adjudicate upon it, and for that purpose the said Court shall have and exercise all needful powers of inquiry touching the same by affidavit or by oral examination of witnesses or of parties, whether voluntarily offering themselves for examination or summoned to attend by compulsory process of the Court, or to produce

(*z*) *International Marine Co.* v. *Hawes*, 29 Ch. Div. 934.
(a) *Kit Hill Tunnel, E. p. Williams*, 16 Ch. D. 590; and see *Hicks* v. *May*, 13 Ch. Div. 236.

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documents before the Court, and the Court shall also have power, incidentally, to decide on the validity and extent of any lien or charge claimed by any creditor on any property of the company in respect of such debt, and to make declarations of right, binding on all persons interested; and for the more satisfactory determination of any question of fact, or mixed question of law and fact arising on such inquiry, the Vice-Warden shall have power, if he thinks fit, to direct and settle any action or issue to be tried either on the common law side of his Court, or by a common or special jury, before the justices of assize in and for the counties of Cornwall or Devon, or at any sitting of one of the superior Courts in London or Middlesex, which action or issue shall accordingly be tried in due course of law, and without other or further consent of parties; and the finding of the jury in such action or issue shall be conclusive of the facts found, unless the judge who tried it makes known to the Vice-Warden that he was not satisfied with the finding, or unless it appears to the Vice-Warden that in consequence of miscarriage, accident, or the subsequent discovery of fresh material evidence, such finding ought not to be conclusive.

(*a*) s. 124.

Court to adjust rights of contributories.

109. The Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto.

Collateral contract.

It is conceived that the only rights between the contributories which can be enforced and adjusted in the winding-up jurisdiction are the rights of the contributories as such. This will include of course the right to enforce payment to such amount as by the constitution of the company a member is liable under the memorandum of association, and it has been extended beyond this to allow of the enforcement in the winding-up of a contract contained in the articles to make payments for special purposes *ultra* the liability limited by the memorandum (*b*).

But the Court has refused to enforce in the winding-up jurisdiction a collateral contract of indemnity (*c*). In the case referred to the contract alleged was a contract by certain contributories to indemnify the rest. Application was made by the indemnified that the indemnifiers might be placed on a separate list of contributories, and be first called upon. The application was refused (*c*).

So where certain contributories had been ordered as tort feasors to pay moneys under sect. 165 and certain other persons, also contributories, would as creditors of the company share in these moneys, the Court refused to determine in the winding-up equities which were said to exclude those particular creditors from sharing in the moneys recovered (*d*).

Fully paid-up shareholders:

A holder of fully paid-up shares is a contributory within the meaning of the Act; and, therefore, when all debts have been paid, a call may be made

(*b*) *Maxwell's Case*, 20 Eq. 485; *McKewan's Case*, 6 Ch. Div. 447.

(*c*) *Addison's Case*, 20 Eq. 620.

(*d*) *Alexandra Palace Co.*, 23 Ch. D. 297.

upon the partly paid-up shareholders for the purpose of adjusting the rights between them and the fully paid-up shareholders (*e*).

equalization of shares.

And so clear is the right of shareholders who have paid more on their shares than their co-members, to be put on an equality with them, that even where resolutions for voluntary liquidation had been passed on the understanding that no call would be made except in the event of insufficiency of assets to discharge the debts, the Court, on the petition of a paid-up shareholder, compelled the liquidators to make a call on the partly paid-up shareholders to equalize the shares (*f*).

And where the articles provided that no calls should be made upon certain shares beyond a certain amount without the consent of a certain proportion of the shareholders, Jessel, M.R., held that the limitation affected the powers of the directors only while the company existed, and that in the winding-up, which was voluntary, the paid-up shareholders were entitled to have a call made for equalization (*g*).

But this right of equality holds good only as between shareholders who stand upon an equality in respect of the conditions under which their shares were created; and there can be no doubt that if, under the articles, the right of equality is excluded, a call to equalize the shares could not be made (*h*).

So, in a permanent building society, where the rules provided that the funds of the society should belong to the members in proportion to the time they had been subscribers, and the society was wound up before all the shares had matured, surplus assets were held to belong to the members *pro ratâ* according to their respective periods of subscription, and an order for a call to equalize the shares was discharged (*i*).

And no doubt it would be competent to a company to create new shares with deferred rights either in respect of capital or dividends, although it cannot without express power give rights of preference.

Surplus assets.

If, after payment of the debts, there are surplus assets, the fully paid-up shareholders are (in the absence of special circumstances, as where the articles of association provide otherwise (*k*)) entitled to receive the difference between the amount paid up on their shares and that paid up on the other shares of the company (*l*): and if the amount paid or credited in advance on their shares carries interest, to receive interest also to payment (and not merely to commencement of winding-up) (*m*) before the assets are divided.

A provision in the articles for payment of a preferential dividend to one class of shareholders (*n*) will not alter the rule of distribution of the assets in the absence of any provision for the distribution of capital.

Thus, where the articles authorized the directors to declare a dividend to be paid to the shareholders in proportion to the number of their respective shares, and the amount paid up thereon respectively, and there were issued both fully paid-up and partly paid-up shares, and dividends had been paid

(*e*) *Anglesea Colliery Co.*, 2 Eq. 379; 1 Ch. 555; and see *National Savings Bank Association*, 1 Ch. 547.

(*f*) *Provision Merchants' Co.*, 26 L. T. 862.

(*g*) *Coed Madog Slate Co.*, W. N. 1877, 190.

(*h*) See and consider *Eclipse Gold Mining Co.*, 17 Eq. 490; *Bangor Slate Co.*, 20 Eq. 59.

(*i*) *Doncaster Permanent Building Society*, 4 Eq. 579; see also the previous case in the same company, 3 Eq. 158; *cf. Norwich Building Society*, 45 L. J. (Ch.) 785.

(*k*) *Holyford Mining Co.*, I. R. 3 Eq. 208; *Doncaster Permanent Building Society*, 4 Eq. 579; *cf. Somes* v. *Currie*, 1 K. & J. 605.

(*l*) *Scinde, Punjaub, and Delhi Corporation*, 6 Ch. 53, n.; and see *Provision Merchants' Co.*, 26 L. T. 862, where an order directing payment in this manner is referred to.

(*m*) *Exchange Drapery Co.*, 38 Ch. D. 171.

(*n*) See Comp. Act, 1867, s. 24 (3).

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to the shareholders on the amounts so paid by them respectively, it was held that in the distribution of the surplus assets the fully paid-up shareholders were entitled to receive the difference between the amount paid on their shares and that paid on the other shares of the company, before the assets were divided (*o*).

In re London India Rubber Co. (*p*) is another case to shew that where there is a provision for preferential dividend, but no provision for preferential distribution of capital in breaking up, the distribution of assets will be made without reference to the rights in respect of dividend. But it is conceived, that that case, so far as it directs a distribution of the capital *pro ratâ* among the different classes of shareholders, without a previous equalization of payments as between fully paid-up and partly paid-up shareholders, is overruled by *Ex parte Maude* (*q*), cited *supra*.

Surplus assets are in fact capital in which *primâ facie* all the members are interested on principles of equality (*r*), and to alter this there must be found some contract respecting the distribution of the capital; a contract as to advantages in the matter of dividend is not enough (*s*).

And therefore, where a company whose capital was exhausted raised further capital under resolutions which provided that in case the company should be wound up before the new shares were fully paid, no call should be made on the new shares except for payment of debts, and in particular that no call should be made for the purpose of equalization with the old shareholders, it was held that surplus assets, although arising from payments by the new shareholders, were payable, not to the new shareholders exclusively—for they had not stipulated for this—but were divisible between both old and new shareholders (*t*).

But as to how they were divisible the usual rule, as found in *Ex parte Maude* (*u*), was held to be excluded, and the division was made according to the proportion of the amounts paid up (*t*).

If the surplus assets are sufficient to repay every member his capital in full and still to leave a surplus, such surplus forms part of the joint stock which at the winding-up represented the capital, and in the absence of provision to the contrary it is divisible amongst all the members in proportion to their interests in capital, that is, in proportion to the amount of their shares, not to the amounts paid on their shares (*x*).

If the company has power to create and does create shares with preference as to capital, of course in winding up effect will be given to it (*y*). Power to issue new capital with "special privileges or preferences" is sufficient to authorize the creation of a preference as to capital (*y*).

In *Re Doncaster Permanent Building Society* (*z*) the rules provided that the funds should belong to the members in proportion to the time they had been subscribers, and under this a *pro ratâ* distribution was directed. Of this case it is to be observed that the *pro ratâ* distribution not only followed the provision of the rules, but was also, in a society of this kind, a division of the assets on the footing of equality (a).

(*o*) *Hodges' Distillery Co., E. p. Maude*, 6 Ch. 51.
(*p*) 5 Eq. 519.
(*q*) 6 Ch. 51.
(*r*) See *Brown* v. *Dale*, 9 Ch. D. 78; *Strick* v. *Swansea Tin Plate Co.*, 36 Ch. D. 558; *Birch* v. *Cropper*, 14 App. Cas. 525, 546.
(*s*) See *Eclipse Gold Mining Co.*, 17 Eq. 490, 492; *Griffith* v. *Paget*, 5 Ch. D. 894; 6 Ch. D. 511.
(*t*) *Eclipse Gold Mining Co.*, 17 Eq. 490.
(*u*) 6 Ch. 51; *v. supra.*
(*x*) *Birch* v. *Cropper*, 14 App. Cas. 525.
(*y*) *Bangor Slate Co.*, 20 Eq. 59.
(*z*) 4 Eq. 579.
(a) See 4 Eq. at p. 586.

In a benefit building society the respective rights of repayment of "realised" and "withdrawal" members have been discussed under sect. 43.

Sheppard v. *Scinde Railway Co.* (*b*) was a very peculiar case arising not in winding up but upon a purchase by the Secretary of State for India of the whole undertaking of the company. The capital of the company consisted of £20 shares fully paid which had been converted into stock and £20 shares on which £5 had been paid. The purchase money considerably exceeded the total amount paid up. It was held that the money was to be divided in proportion to the amounts paid up. This decision neither equalized the capital by first repaying £15 in respect of each £20 to the stock-holder, nor divided the excess of the purchase money above all the capital paid up upon the footing of profit. It is difficult to say what principle can be extracted from the case. There is now the authority of the House of Lords which decided that case for saying that it was decided solely on the special circumstances, and is not to be relied upon as an authority except where the circumstances are precisely similar (*c*).

Rights to capital cannot be altered.

By the memorandum and original articles of association, the rights of the members *inter se* in respect of distribution of surplus assets in winding up, like their rights in respect of dividend, may be regulated in any such manner as may be agreed upon. The company may, for instance, take power by its original constitution to create shares with preference in repayment of capital (*d*), just as it may take power to create shares with preference in respect of dividend.

But if it have not taken such power originally, it is conceived that it cannot subsequently acquire it, any more than it can subsequently acquire power to issue with preference shares in respect of dividend (*e*). And the powers contained in sect. 161 do not extend to allow the company to determine in what manner the proceeds of sale shall be divided. For if they did, they would in fact allow a majority of the shareholders to alter a fundamental part of the constitution of the company, viz., the proportionate interest of the members in the capital of the concern, and to vote away for their own benefit the property of the minority (*f*).

Distribution of assets in specie.

It is useful to introduce into the memorandum and articles power to divide surplus assets in specie, for otherwise (*g*) it is conceived they must be sold and the proceeds divided. In the case of speculative or unsaleable assets this may involve great loss.

Court to order costs.

110. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding up any company in such order of priority as the Court thinks just (*a*).

(*a*) *Cf.* s. 144.

As to costs incurred in litigation by a company in liquidation, see *supra*, p. 243.

As to the costs of the winding-up petition, *supra*, p. 251.

As to the costs, charges, and expenses, incurred in the winding-up, it is not, it is conceived, from any difference of principle that the provision of

(*b*) 36 W. R. 1.
(*c*) See 14 App. Cas. 531, 542.
(*d*) *Bangor Slate Co.*, 20 Eq. 59.
(*e*) See *ante*, p. 182.
(*f*) *Griffith* v. *Paget*, 5 Ch. D. 894; 6 Ch. D. 511.
(*g*) Notwithstanding *March* v. *Martin*, W. N. 1880, 111.

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sect. 144 in the case of a voluntary winding-up that these costs shall be paid in priority to all other claims is not enacted here in the case of a winding up by the Court, but only because it is presumed that no direction is required to instruct the Court to do that which it would see that the justice of the case requires (*h*).

Change of solicitor.

Where in the course of the winding-up the liquidator changes his solicitor, and the assets are not sufficient to pay the whole of his costs, they will in general, as between the solicitors, be applied in payment of their costs *pro ratâ* (*i*). As between the liquidator and his solicitor the liquidator is not personally liable for the costs of the winding-up (*k*).

Remuneration of liquidator.

A liquidator is not entitled to receive anything out of the assets by way of remuneration until all the costs of the winding-up (including the bill of costs of the solicitor employed by him and the costs of any provisional liquidator properly appointed) have been paid in full. The rule of the

Order of priority.

Court is, that in the first place the costs of the petition for winding-up are to be paid out of the assets, next the costs of the winding-up, and then the remuneration of the liquidator (*l*).

As between costs of the liquidator incurred in litigation with third parties (*e.g.*, persons alleged to be contributories) and general costs of the liquidator on the one hand and costs ordered to be paid by the liquidator, or out of the assets to such third parties on the other, Chitty, J., held in *Dronfield Silkstone Co.* (*m*) that all these are payable rateably without regard to priority in the dates of the orders under which such costs have been directed to be paid, referring to *Cape Breton Co.* v. *Fenn* (*n*), and that all such costs are to be postponed to costs of realisation.

But this has been disapproved (*o*), and it has been held that under an order for payment of costs out of the assets, or by the liquidator with liberty to him to retain them out of the assets, the person to whom payment is to be made is entitled to immediate payment out of the assets, whatever they are, before costs of realisation or anything else (*o*), and if the liquidator pays them he is entitled to repay himself out of the assets in priority to all other creditors (*o*).

Solicitor's lien.

The solicitor to the liquidator is, *semble*, entitled to a lien for his costs on a fund recovered in the winding-up through his instrumentality (*p*).

The solicitor to the company is entitled to a lien on documents of the company in his possession before the commencement of the winding-up, and being documents upon which it is competent to the directors to give a lien (*q*) (*r*), but not for costs incurred before the incorporation of the company (*s*). The register of members is a book in which, under sect. 32, other persons than the company have rights, and the directors cannot so deal with it as to create a lien upon it (*q*). The minute book falls within the same principle (*q*); and, *semble*, this may extend to other books which, under the Companies Acts or the articles of association, are to be kept at the company's

(*h*) See *per* Lord Cairns, *Webb* v. *Whiffin*, L. R. 5 H. L. at p 735, cited *supra*, p. 151.

(*i*) *Audley Hall Cotton Spinning Co.*, 6 Eq. 245.

(*k*) *Anglo-Moravian Co.*, *E. p. Watkin*, 1 Ch. Div. 130, *ante*, p. 276.

(*l*) *In re Massey*, 9 Eq. 367; *Dronfield Silkstone Co.*, 23 Ch. D. 511; and see *In re Trueman's Estate*, 14 Eq. 278; *cf.* in bankruptcy, *E. p. Royle*, 20 Eq. 780.

(*m*) 23 Ch. D. 511.

(*n*) 17 Ch. D. 198, and *E. p. Percival*, 6 Eq. 519.

(*o*) *Dominion of Canada Plumbago Co.*, 27 Ch. Div. 33; *Home Investment Society*, 14 Ch. D. 167; *cf. Batten* v. *Wedgwood Coal Co.*, 28 Ch. D. 317.

(*p*) *Re Massey*, 9 Eq. 367.

(*q*) *Capital Fire Association*, 24 Ch. Div. 408.

(*r*) *Anglo-Maltese Dock Co.*, W. N. 1885, 84; 54 L. J. (Ch.) 730; 52 L. T. 841; 33 W. R. 652; see also note to s. 115.

(*s*) *Re Galland*, W. N. 1885, 224.

registered office (*t*). The solicitor to the company before winding-up cannot acquire a lien on documents which come into his possession after winding-up commenced (*u*).

Costs of realising assets.

Where there are incumbrancers, such as holders of debentures giving a charge upon the property of the company (*x*), or equitable mortgagees of property of the company (*y*), and the property is realised in the winding-up, the liquidator's costs, charges, and expenses of the realisation are first payable out of the fund, and then the principal and interest, and the costs of application, in the matter of the winding-up, of the incumbrancers. The foregoing have priority over the general costs of the liquidation. The liquidator's costs of preservation of the property are, as between the incumbrancers and the company, payable by the company, but the liquidator is entitled to be indemnified out of the fund against any costs of preservation which may not be paid out of the company's assets (*z*).

Where, however, in the winding-up part of the assets had been severed from the rest and paid into Court to answer the claim of a creditor, upon which claim there were many incumbrances, and then a petition for payment out of Court was presented and served on the liquidators, it was held that out of the fund must be paid the liquidators' costs of appearing on the petition, but not their costs, charges, and expenses of investigating the claims, or of an abortive attempt at arrangement (a).

In an unlimited insurance company whose policies provide that the assured shall have no claim against the shareholders beyond the amount unpaid on their shares, and that the funds, &c., of the company shall alone be liable, it is conceived that such costs of realisation as costs incurred in the sale of assets are to be deducted as against the policy-holders, and that the net sale moneys only will be assets applicable to the payment of their claims (*b*).

If, however, the costs of realisation cannot be readily distinguished from the general costs of winding up, it seems that the Court will not be diligent to distinguish them, so as to relieve the shareholders at the expense of the policy-holders (*c*). And as to the general costs of winding up (*b*), including the costs of calling up the unpaid capital (*d*), these are to be borne wholly by the shareholders to the relief of the funds applicable for payment of the policy-holders; although as between the assured and the general creditors the former are not entitled to any priority (*e*).

Limited and unlimited assets.

For the contract between the parties is that the policy-holder shall get the benefit of the £20, or whatever is the liability *quâ* the policies on the share. Where, therefore, the shares were £20 shares with £11 paid, and first a call was made of £9 and then another of £12, and the liquidator accepted from a contributory a lump sum of say £8 or £10 in compromise of both these calls and all future calls, the policy-holder was entitled to have as part of the limited assets the whole £8 in the former case and £9 out of the £10 in the

(*t*) *Anglo-Maltese Dock Co.*, W. N. 1885, 84; 54 L. J. (Ch.) 730; 52 L. T. 841; 33 W. R. 652; see also note to s. 115.

(*u*) *Capital Fire Association*, 24 Ch. Div. 408.

(*x*) *Marine Mansions Co.*, 4 Eq. 601; *Regent's Canal Ironworks Co., E. p. Grissell*, 3 Ch. Div. 411.

(*y*) *Oriental Hotels Co., Perry* v. *Oriental Hotels Co.*, 12 Eq. 126.

(*z*) See last two notes.

(a) *Bonelli's Telegraph Co., Cook's Claim*, 18 Eq. 656.

(*b*) *State Fire Insurance Co.*, 34 L. J. (Ch.) 436; *Agriculturist Cattle Insurance Co., E. p. Official Manager*, 10 Ch. 1.

(*c*) *Professional Life Ass. Soc.*, 3 Eq. 668; 3 Ch. 167.

(*d*) *Agriculturist Cattle Insurance Co., E. p. Official Manager*, 10 Ch. 1; and see *infra*, s. 200, n.

(*e*) *State Fire Insurance Co.*, 1 H. & M. 457; 1 D. J. & S. 634.

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latter, leaving for the unlimited assets only such sum (if any) as remained after crediting the limited assets with the £9 or so much of it as the contributory had paid (*f*).

And this decision seems borne out by a subsequent case (*g*) in which sums received under compromises were held not to be apportionable so as to appropriate some portion to payment of costs of winding up to the detriment of the policy-holders. Jessel, M.R., there said, "The shareholders have as between themselves and the policy-holders no equity under the Act to deprive the policy-holders of all the money the Court can get from them, the shareholders, until they have paid their calls."

But where a charge had been given upon calls, *i.e.*, upon the limited as distinguished from the unlimited or general assets, and had been paid out of the limited assets, it was held that the policy-holders had no equity to have the assets marshalled, so as to throw part of the debt on the unlimited assets (*h*).

Indemnity claim for costs.

Company A. having purchased the business of Company B., and covenanted to indemnify it against all claims, &c., and both companies being subsequently wound up, *semble* Company A. is either under no liability to indemnify Company B. against the costs of winding up the latter (*i*), or is liable to indemnify it only so far as those costs can be shewn to have been incurred by reason of the breach on the part of Company A. of their undertaking to indemnify (*k*).

Dissolution of company.

111. When the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of such order, and the company shall be dissolved accordingly (*a*).

(*a*) Gen. Order, Nov. 1862, Rules 65–67, Form 56 ; s. 143, as to voluntary winding-up.

Dissolution orders.

When the liquidation of a company is completed it is commonly the practice to take a dissolution order in order to bring the company to an end and allow of the books being destroyed. Cases of dissolution after voluntary winding-up are also by no means uncommon, and some questions which have arisen under them are noticed under sect. 143.

A comparison may be made between the provisions of this Act and those of the Industrial and Provident Societies Act, 1876 (*l*), as to dissolution. The 18th section of the repealed Act of 1862, which provided that, notwithstanding dissolution, a society should still be considered as subsisting so long as its affairs were unsettled, is not re-enacted.

Company incorporated by special Act.

Where a company, as a canal company, has been incorporated by a special Act of Parliament, whose provisions shew that the company was intended to be maintained in perpetuity, nevertheless, *semble*, if such a company becomes subject to the winding-up jurisdiction, the Court may make an order dissolving the company (*m*).

Contingent debt.

Whether the existence of a claim in respect of a debt payable on a con-

(*f*) *International Life Ass. Soc.*, 36 L. T. 914.

(*g*) *Accidental Death Insurance Co.*, 7 Ch. D. 568.

(*h*) *International Life Ass. Soc.*, 2 Ch. Div. 476.

(*i*) *Indemnity Case* (Alb. Arb.), Reil. 17 ; 16 Sol. J. 141.

(*k*) *Indemnity Case, Re British Nation Indemnity Claims* (Eur. Arb.), Reil. 3 ; L. T. 4 ; *Royal Naval Society's Indemnity Case* (Eur. Arb.), L. T. 165.

(*l*) 39 & 40 Vict. c. 45, s. 17.

(*m*) *Bradford Navigation Co.*, 10 Eq. 331, 341 ; S. C., 5 Ch. 600 ; and see s. 199.

tingency, which has been admitted to proof (*v.* sect. 158), ought to prevent the making an order for dissolving the company: *quære* (*n*).

Registrar to make minute of dissolution of company.

112. Any order so made shall be reported by the official liquidator to the registrar, who shall make a minute accordingly in his books of the dissolution of such company.

Penalty on not reporting dissolution of company.

113. If the official liquidator makes default in reporting to the registrar, in the case of a company being wound up by the Court, the order that the company be dissolved, he shall be liable to a penalty not exceeding five pounds for every day during which he is so in default.

Petition to be *lis pendens*.

114. *Any petition for winding up a company by the Court under this Act shall constitute a* lis pendens *within the terms of the Act passed in the session holden in the second and third years of the reign of her present Majesty, chapter eleven, and entitled "An Act for the better Protection of Purchasers against Judgments, Crown Debts,* Lis Pendens, *and Fiats in Bankruptcy," provided the same is duly registered in manner required by such Act concerning suits in equity.*

Section repealed.

This section is by 30 & 31 Vict. c. 47, s. 1, repealed from the passing of that Act.

Its effect as to company;

Sect. 153, which refers to all the property of the company, including, therefore, the real estate, seems to render this section superfluous, so far as registering the petition as a *lis pendens* against the company is concerned; although the object of the Legislature may have been to give protection to a purchaser of the real estate of the company, and to enable him to receive notice by the registration that a proceeding was pending, and not find without notice that the alienation to him was declared to be void and invalid.

as to contributories.

It was held in *In re Barned's Banking Co., Ex parte Thornton* (*o*), that the section did not extend to authorize the registration of the petition against individual contributories.

The section may therefore be said to have been superfluous as regards the property of the company, and inapplicable to restrain the alienation of his property by a contributory.

The improper removal or concealment of his goods by a contributory is dealt with by sect. 118; but with regard to the real property of a contributory any improper alienation is left to stand upon the general law of the kingdom.

Extraordinary Powers of Court.

Power of Court to summon persons before it suspected of having property of company.

115. The Court may, after it has made an order for winding up the company, summon (*α*) before it any officer (*β*) of the company or person known or suspected to have in his possession any of the estate or effects (*β*) of the company, or supposed to be indebted to the company or any person whom the Court may deem capable

(*n*) *Haytor Granite Co.*, 1 Ch. 77; and see and consider note to s. 143.

(*o*) 2 Ch. 171.

Sect. 115. of giving information concerning the trade, dealings, estate, or effects (γ) of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents (β) in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause such person to be apprehended, and brought before the Court for examination (γ); nevertheless, in cases where any person claims any lien on papers, deeds, or writings or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien.

(α) Gen. Order, Nov. 1862, Form 54. (β) *Cf.* ss. 100, 165. (γ) *Cf.* ss. 117, 127.

This section is now supplemented by sect. 8 of the Comp. (W. Up) Act, 1890.

By summons, not by subpœna.

Upon a special examiner being appointed for the purpose of any inquiries directed by the Court, any one in the position of an ordinary witness will, according to the ordinary practice, be summoned to attend before him by subpœna. But a witness summoned under this section is in a different position (*p*), and must be summoned by summons in the form given in Form 54 in the 3rd Schedule to the Rules of the 11th of November, 1862, and not by subpœna (*q*).

The reason for this is, that the Court is to be satisfied that the person summoned is capable of giving the information; and although the Court would probably be satisfied with even the suggestion of the official liquidator that he believes the person summoned to be within the section, yet the official liquidator does not so represent the Court that he can issue a subpœna, but a special action by the Court is required through the medium of a summons at chambers.

The summons may be issued by the Chief Clerk without a special authority from the judge (*r*).

Order on application of liquidator :—

Where the liquidator applies for the order the application will be made *ex parte*, and not upon affidavit (as the object is to keep the proceedings secret from the person to be affected), but upon written statement. And it is not necessary to make out even a *primâ facie* case, a case of suspicion may be enough, the object may be to ascertain whether a suspicion is well founded or not, with a view to determining whether or not to bring an action (*s*).

of contributory.

The application may equally be made by a contributory, but in such case he must give notice to the liquidator, for the liquidator is, so to speak, *dominus litis*, and in general if he is willing to take the proceedings the Court will let him have the conduct. But if he is not willing to proceed, the contributory may be allowed to do so (*s*). The contributory need not

(*p*) *Clement's Case*, 13 Eq. 179, n.
(*q*) *English Joint Stock Bank*, 3 Eq. 203; *Gold Co.*, 12 Ch. Div. 77, 82.
(*r*) *Nowgong Tea Co.*, 16 L. T. 47.
(*s*) *Gold Co.*, 12 Ch. Div. 77.

adduce evidence in support of his application (*t*); but will generally be required to do so (*u*), and *quære* he ought always to make out a *primâ facie* case (*x*).

In a voluntary winding-up, where the majority of the shares were said to be held by the late manager and his nominees, and some of the manager's shares were registered as fully paid up, contributories, applying under this and the 138th section, were held entitled to an order to examine the manager as to these shares, when he had refused to give any information, and the liquidator had paid no attention to a request made to him that he would take out a summons.

It was said in this case that a general order for examination should not be made, as the applicants, standing in no official position, were not under the control of the Court (*y*). But it is competent to the judge to commit the whole or some part of the examination to some creditor or contributory, and even where the liquidator takes the order to examine and does examine the witnesses, and there is no suggestion that he is not properly performing his duties, a contributory may be allowed to examine too (*z*).

In a contest between two persons as to which is contributory in respect of certain shares, an order may be obtained under this section to procure evidence (a).

Where the liquidator was one of the parties charged, a contributory, on making out a *primâ facie* case and before instituting any proceedings, was allowed to summon the liquidator, who was the late secretary (*b*).

Order is not matter of right.

The order is not a matter of right even on the liquidator's application (*c*). It is true that the application in this case was in a voluntary liquidation, and that it was said that the order must be shewn to be "just and beneficial" within sect. 138. But it is conceived that the case is of general application. The powers of the section are inquisitorial, and the Court will not allow them to be used for purposes of vexation and oppression. The section gives no right at all to liquidator, creditor, or contributory, but gives power to the Court if in its discretion it thinks right to exercise the power (*u*). Where, therefore, the party sought to be examined was defendant in an action brought by the company in liquidation, and he had already fully answered interrogatories in the action, and the liquidator made no special case for further examination, the order was refused (*c*). And where the applicant was plaintiff in an action against the company, and the Court was satisfied that his object was to gain information, not for the more beneficial winding up of the company, but to assist him in his action, the examination for which the applicant had obtained an order was postponed till after the trial of the action (*u*).

Discretion.

The matter is, however, essentially one for the discretion of the primary judge, and the Appeal Court (knowing, as it must, much less of the affairs of the company than the judge who has the control of the winding-up) will be very slow, except in an extreme case, to interfere with his order (*d*).

(*t*) *Silkstone and Dodworth Co., Whitworth's Case*, 19 Ch. Div. 118, 119.

(*u*) *Imp. Cont. Water Corp.*, 33 Ch. Div. 314.

(*x*) See in bankruptcy, *E. p. Nicholson*, 14 Ch. Div. 243.

(*y*) *Penysyflog Iron Mining Co.*, 30 L. T. 861; W. N. 1874, 166.

(*z*) *Silkstone and Dodworth Co., Whitworth's Case*, 19 Ch. Div. 118.

(a) *Qverend, Gurney, and Co., E. p. Musgrave*, 16 L. T. 378.

(*b*) *Sir John Moore Gold Mining Co.*, 37 L. T. 242; 25 W. R. 900.

(*c*) *Metropolitan Bank, Heiron's Case*, 15 Ch. Div. 139.

(*d*) *Gold Co.*, 12 Ch. Div. 77.

Sect. 115. But if the case be one of oppression, and particularly if the judge has decided on a wrong principle, as *e.g.* in holding that the order is matter of right, his decision may be reviewed (*e*); and so where the judge had refused the order, and the Appeal Court thought there was a case for investigation, they made an order (*f*).

Notice to witness.

The witness is entitled to reasonable notice, but not necessarily to the forty-eight hours required by the 22nd rule of the Order of the 5th of February, 1861 (*g*).

Appeal by person summoned.

Some observations of the Court of Appeal in the *Gold Co.* (*h*) go to shew that the person summoned to be examined has no *locus standi* to appeal against the order directing him to attend even where it has been obtained by a contributory, except in a case where the process of the Court has been abused (*h*); although against an order which allows the section to be used oppressively and vexatiously an appeal will be entertained (*i*). But *quære* whether the observations in the *Gold Co.* (*h*) do not go too far (*k*). The Court will at the instance of the person summoned control the examination (*l*).

Voluntary winding-up.

In a purely voluntary winding-up, motion having been made under sect. 138 for liberty to the liquidators to issue summonses, it was held to be the right course to give leave to take out a summons in chambers (*m*).

Who may be summoned to give information.

The liquidator is not bound to do more than shew the Court that there is a *primâ facie* probability that the person is capable of giving important information. He is not bound to shape his case, but may leave that to depend on the evidence (*n*).

A debt due to the company upon shares forms part of the effects of the company, and the circumstances under which shares have been entered on the register form part of the dealings of the company (*o*); and, therefore, any persons who possess any means of information on these subjects may be examined. And information which relates to the property of a contributory is information concerning the estate or effects of the company (*p*). The wording of the 127th section varies slightly from that of this section, and by the 127th power is expressly given to examine any person "in regard to the estate, dealings, or affairs of any person being a contributory of the company, so far as the company may be interested therein by reason of his being such contributory."

Orders have been made to compel information from:—the managing clerk of a bank with which a contributory had an account, and for the production of books and documents relating to the account (*q*); the broker, by whom a transfer was effected in a case in which the transferee was an infant, and a person of no substance (*r*); the sister and nephew of a contributory who

(*e*) *Metropolitan Bank, Heiron's Case*, 15 Ch. Div. 139.

(*f*) *Metropolitan Bank.* Appeal Court, 28 Feb. 1882.

(*g*) *North Wheal Exmouth Mining Co.*, 11 W. R. 58; 31 Beav. 628.

(*h*) *Gold Co.*, 12 Ch. Div. 77; *Silkstone and Dodworth Co., Whitworth's Case*, 19 Ch. Div. 118.

(*i*) *Heiron's Case*, 15 Ch. Div. 139; *Imp. Cont. Water Corp.*, 33 Ch. Div. 314.

(*k*) *North Australian Territory Co.*, W. N. 1890, 124.

(*l*) *London Paper Mills, E. p. Scott*, W. N. 1888, 63; *North Australian Territory Co.*, W. N. 1890, 124.

(*m*) *Mercantile Discount Co.*, W. N. 1866, 21.

(*n*) *Financial Insurance Co., Bloxam's Case*, 36 L. J. (Ch.) 687; *Mercantile Credit Association, Clement's Case*, 13 Eq. 179, n.; and see *supra*.

(*o*) *Mercantile Credit Association, Clement's Case*, 37 L. J. (Ch.) 295; 13 Eq. 179, n.; 18 L. T. 596; *Swan's Case*, 10 Eq. 675.

(*p*) *Bloxam's Case*, 36 L. J. (Ch.) 687; *Trower and Lawson's Case*, 14 Eq. 8.

(*q*) *Bloxam's Case*, 36 L. J. (Ch.) 687; *Druitt's Case*, 14 Eq. 6; S. C., *sub nom. Forbes' Case*, 26 L. T. 680.

(*r*) *Clement's Case*, 37 L. J. (Ch.) 295;

had been served with a balance order, but who could not be found, although there was no evidence beyond the relationship to shew that the persons summoned could give any information (*s*); the mother-in-law of a contributory, under circumstances similar to those in the last case (*t*); a creditor of the company who claimed for commission for service rendered and work done as agent for the company (*u*); brokers who entered into contracts for the company (*x*).

But a mere creditor cannot be examined (*y*).

A stockbroker, asserted to have acted improperly, will be examined as a matter of course as to the circumstances of a transfer (*z*).

Any person indebted to a contributory is liable to be summoned to give information respecting the means of such contributory.

Thus former partners of a contributory were compelled to attend to give evidence and to produce the ledger, cash-book, and cheque-book of the firm (a).

The section is as applicable to matters occurring in the winding-up, as to matters before the winding-up (*x*).

Witnesses summoned under this section, and refusing to attend, will be made to pay the costs of compelling their attendance (*b*).

In *In re Smith, Knight, & Co.* (*c*), G. took an active part in the transfer without consideration of shares from C. to N., and supplied moneys for subsequent calls. The liquidators considering it material to trace these moneys, a summons was allowed to issue for the examination of the secretary of the bank with which G. had an account, and for the production of the books; G. being absent from England, and not expected to return. But it was left open to the witness, on attending the summons, to take any objection he thought proper to the inspection of the books.

In *In re Contract Corporation* (*d*) the C. Company were judgment creditors of the T. Company, in which the G. and M. companies were large shareholders. The official liquidators of the C. Company, being unable to realise their judgment, were allowed to examine the shareholders in the T. Company with a view to shewing that the shareholders in the T. Company other than the G. and M. companies were mere nominees of the G. and M. companies, hoping, if they could establish this as the fact, to be able to carry a bill in Parliament to compel the G. and M. companies to take a transfer of the T. Company's line, and pay off its liabilities. The order in this case also was made without prejudice to any objection the witnesses might take on attending the summons.

Where leave is given to continue an action (sect. 87) the plaintiff in the action cannot therefore escape examination in the winding-up, or refuse to answer questions relating to the matters in dispute in the action (*e*).

A defendant (*f*) or a plaintiff (*g*) may be examined for the purpose of enabling the liquidator to form an opinion whether or not an action in which the company is plaintiff or defendant should be continued (*f*). But if the

13 Eq. 179, n.; *Baker's Case, E. p. Carter*, 19 W. R. 55; 40 L. J. (Ch.) 15; 23 L. T. 446.

(*s*) *Swan's Case*, 10 Eq. 675.

(*t*) *Fricker's Case*, 13 Eq. 178.

(*u*) *English Joint Stock Bank*, 3 Eq. 203.

(*x*) *E. p. Carver*, 47 L. J. (Ch.) 702, n.

(*y*) *Accidental and Marine Insurance Corporation, Mercati's Case*, 5 Eq. 22.

(*z*) *Baker's Case, E. p. Carter*, 19 W. R. 55; 40 L. J. (Ch.) 15; 23 L. T. 446.

(a) *Trower and Lawson's Case*, 14 Eq. 8.

(*b*) *Trower and Lawson's Case*, 14 Eq. 8; *Lisbon Steam Tramways Co.*, 2 Ch. D. 575.

(*c*) 4 Ch. 421.

(*d*) 6 Ch. 145.

(*e*) *E. p. Bateman*, 15 W. R. 118, 245; 15 L. T. 263, 495; W. N. 1866, 378, 406.

(*f*) *Massey* v. *Allen*, 9 Ch. D. 164.

(*g*) *E. p. Carver*, 47 L. J. (Ch.) 702, n.

Sect. 115. defendant has already been interrogated in the action the liquidator will not be allowed to harass him with a further examination unless he makes out a strong case for it (*h*).

A witness who attended several times under an order before a special examiner to whose appointment he had consented was not allowed to refuse to continue his evidence on the ground that his deposition might be used against him in a pending action commenced before the appointment of the special examiner (*i*).

Witness may be attended by counsel.

The witness is entitled to be attended at his examination by his counsel and solicitor (*k*). It is conceived that if he be a mere witness, and not a person between whom and the party summoning him any litigation is pending, he will not be entitled to the costs of employing a solicitor or counsel (*l*).

Where an alleged contributory, summoned before the Chief Clerk as a witness, refused to be sworn, on the ground that it was important that he should have the assistance of counsel, it was held that he ought to submit to be sworn, and might then apply for the examination to be taken before the judge or an examiner where counsel could attend (*m*).

Re-examination.

The witness is entitled to be re-examined for the purpose of explaining the evidence given on his examination, and for the purpose of such re-examination his counsel and solicitor are entitled to take and carry away notes of his examination (*n*).

Public and others excluded.

The office of the examiner is a private office and not a public court. If the presence of the public is objected to, the examiner has no discretion to admit them (*o*).

And the object of the section is to enable the liquidator, or examining party, to acquire information. The proceeding is of a private character, and neither admitted creditors (who under Order 60 of the Gen. Order of Nov. 1862 are entitled at their own expense to attend proceedings) (*p*) nor creditors who have obtained an order giving them liberty to attend proceedings at their own expense (*q*) are entitled to be present.

The Court may in its discretion no doubt allow persons to be present if it thinks proper (*p*). Thus, on the examination of the manager of the B. Company in liquidation, the official liquidator of the C. Company (with which the B. Company had before it went into liquidation become amalgamated), to whom leave had been given to attend all proceedings in the winding up of the B. Company, was, on an undertaking as to costs, allowed to attend and examine (*r*).

The witness is summoned by the Court (s. 115) and examined by the Court (s. 117), and it is for the Court to say what questions may be put. No right is given to any one, although in general the person conducting the examination is trusted to put only such questions as are proper (*s*).

What questions must be answered.

The witness must answer questions which refer to mere hearsay, for the

(*h*) *Metropolitan Bank, Heiron's Case*, 15 Ch. Div. 139.

(*i*) *Lisbon Steam Tramways Co.*, 2 Ch. D. 575.

(*k*) *In re Breech-loading Armoury Co., In re Merchants' Co.*, 4 Eq. 453; *E. p. Henry Calisher*, 17 L. T. 5; 15 W. R. 1007.

(*l*) See in bankruptcy, *E. p. Waddell, Re Lutscher*, 6 Ch. Div. 328.

(*m*) *Electric Telegraph Co. of Ireland, E. p. Bunn*, 3 Jur. (N.S.) 1013; and see *Nowgong Tea Co.*, 16 L. T. 47, noticed *supra*.

(*n*) *Cambrian Mining Co.*, 20 Ch. D. 376.

(*o*) *Western of Canada Oil Co.*, 6 Ch. D. 109.

(*p*) *Grey's Brewery Co.*, 25 Ch. D. 400.

(*q*) *Norwich Equitable Co.*, 27 Ch. Div. 515.

(*r*) *Empire Assurance Corporation*, 17 L. T. (N.S.) 488.

(*s*) *North Australian Territory Co.*, W. N. 1890, 124.

object of the section is to enable the liquidator to get at the facts, and hearsay evidence may be valuable as tending to put him on the right inquiries (*t*).

The only matters as to which the witness can refuse to answer are matters in which he may incriminate himself, and matters involving professional confidence. If the question involves disclosure of matters with which the litigant parties have nothing to do, he may appeal to the judge to release him from answering the question, but the decision of the judge ought to be final, and not subject to appeal (*u*).

On these principles, where a contributory, who had executed a composition deed, was asked whether he had not promised some of his creditors to pay them more than the composition as an inducement to them to execute the deed, an objection to the question on the ground that it was obviously put with a view to obtain grounds for setting aside the deed, and that this was a matter in which the Court of Bankruptcy had exclusive jurisdiction, was held untenable (*u*).

The depositions are evidence against deponent.

Depositions taken under this section may be read on a summons as evidence against the deponent; but, *semble*, notice should be given of the intention to read them (*x*). They are not evidence, and cannot be read against any one else (*y*).

The liquidator is not bound to file them (*z*).

Short-hand writer.

Quære: The examination may be taken by a short-hand writer, and the transcript read over to and signed by the witness (a).

Solicitors' lien—production.

Where the solicitors of the company have a lien for costs on documents relating to the company in their possession, the official liquidator may, nevertheless, by summons under this section, compel their production. For the official liquidator represents not only the company, but also the creditors of the company, and does not therefore stand simply in the position of a client asking production against his solicitor without having paid his solicitor's bill. The production will be without prejudice to the lien, but will practically, of course, in many instances, render the lien valueless (*b*).

Special examiner.

A special examiner is now so seldom appointed that the following cases are not of much importance.

The ordinary rule as to the appointment of a special examiner is that he is not appointed until all persons interested in the appointment have been heard thereon.

Accordingly it has been held that a person who had given evidence by affidavit in opposition to a summons to place him on the list of contributories, and who had not consented to the appointment of the special examiner who had been appointed to take the examination of witnesses in the winding-up, could not be required to attend and be cross-examined before him on his affidavit (*c*).

With respect to examination under this section, the two cases next cited leave the practice somewhat doubtful.

(*t*) *Ottoman Co.*, 15 W. R. 1069.

(*u*) *E. p. Webber*, 26 L. T. 227; 41 L. J. (Ch.) 145; 20 W. R. 195, 394; *Silkstone and Dodworth Co., Whitworth's Case*, 19 Ch. Div. 118, 121.

(*x*) *Pugh and Sharman's Case*, 13 Eq. 566; *E. p. Hall*, 19 Ch. D. 580.

(*y*) *Norwich Equitable Co.*, 27 Ch. Div. 515.

(*z*) *Grey's Brewery Co.*, 25 Ch. D. 400; *Great Western Coal Co.*, W. N. 1885, 37; 54 L. J. (Ch.) 506; 33 W. R. 444; *Re Brünner*, W. N. 1887, 144.

(a) *Sir John Moore Mining Co.*, W. N. 1878, 87.

(*b*) *South Essex Estuary Co., E. p. Paine and Layton*, 4 Ch. 215; see further note to s. 110 and Gen. Order, Nov. 1862, Rule 58; *cf. Cameron's Coalbrook Co.*, 25 Beav. 1.

(*c*) *In re Smith, Knight, & Co.*, 8 Eq. 23.

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An ex-director of a company, who had not consented to the appointment of the special examiner, was summoned to give evidence respecting the affairs of the company. He objected that he had had no voice in the appointment of the examiner. Romilly, M.R., there said that the statute does not say that persons who are deemed capable of giving information respecting the affairs of the company shall be examined before a special examiner to whose appointment they have not consented, and directed an application to be made in chambers respecting the appointment of a special examiner to take the examination (*d*).

But where H., on being summoned, while admitting that he had no objection to the examiner, refused to go before him on the ground that he was entitled to be heard with reference to his appointment, Romilly, M.R., said that he would not allow a mere captious objection to an examiner to prevail, that H. was merely a witness (and not a person between whom and the liquidator proceedings were pending in respect of which his examination might give information), and was not entitled to be heard upon the subject, and that he must therefore go before the examiner (*e*).

Interrogatories. Directors.

Directors do not cease to be officers of the company at the commencement of the winding-up (*f*), so as to be able to refuse to answer interrogatories administered by the defendant in an action brought by the official liquidator to recover arrears of calls (*g*). And for the purpose of appealing from the winding-up order, *semble*, they must from the necessity of the case be still able to act notwithstanding that a liquidator has been appointed (*h*).

Between petition presented and order made they can no doubt still receive and give a discharge for moneys payable to the company (*i*).

Special provisions as to Court of Vice-Warden of the Stannaries.

116. If, after an order for winding up in the Court of the Vice-Warden of the Stannaries, it appears that any person claims property in or any lien, legal or equitable, upon any of the machinery, materials, ores, or effects on the mine, or on premises occupied by the company in connection with the mine, or to which the company was at the time of the order *primâ facie* entitled, it shall be lawful for the Vice-Warden or the registrar to adjudicate upon such claim on interpleader in the manner provided by section eleven of the Act passed in the eighteenth year of the reign of Her present Majesty, chapter thirty-two; and any action or issue directed upon such interpleader may, if the Vice-Warden thinks fit, be tried in his court or at the assizes or the sittings in London or Middlesex, before a judge of one of the Superior Courts, in the manner and on the terms and conditions hereinbefore provided (*a*) in the case of disputed debts and claims of creditors.

18 Vict. c. 32, s. 11.

(*a*) s. 108.

This section is as follows:

18 Vict. c. 32, s. 11.

Interpleader in Equity.] "When any claim is made to or in respect of any goods and chattels, or the proceeds or value thereof, sold or intended to be

(*d*) *Bateman's Case*, 15 Sol. J. 491.
(*e*) *Contract Corporation*, 13 Eq. 27.
(*f*) See also *Landowners' Co.* v. *Ashford*, 16 Ch. D. 411, 426, 429–432.
(*g*) *Madrid Bank* v. *Bayley*, L. R. 2 Q. B. 37.
(*h*) *Diamond Fuel Co.*, 13 Ch. Div. 400.
(*i*) *Mersey Steel Co.* v. *Naylor, Benzon, & Co.*, 9 Q. B. Div. 648; 9 App. Cas. 434, 440.

sold, under a customary decree of sale in a mining creditor's suit, by any landlord for rent or other distrainable demand, or by any other person not being a party to the suit, it shall be lawful for the Vice-Warden to call upon the claimant by rule or order of the Court to appear in person or by his attorney or agent in support of the same, either before the Vice-Warden himself or before the registrar, and to state the nature and particulars of his claim, who shall thereupon hear the allegations and receive the proofs offered as well by the claimant as by the plaintiff in the suit, and if the claimant and plaintiff shall agree on the facts of the case, shall then adjudicate upon the claim; and if the said parties shall not so agree, then the disputed facts shall be ascertained by an action or issue to be tried in the Vice-Warden's Court, in such form as the Vice-Warden shall direct, and the Vice-Warden shall then adjudicate upon the claim: or the Vice-Warden or registrar shall have power, with the consent of the parties so before him, their counsel, attorneys, or agents, to adjudicate upon and dispose of the claim in a summary manner: Provided that in all cases, except in a case of summary adjudication by consent, it shall be competent for the registrar, at the request of the said parties, or either of them, to refer the decision of the case to the Vice-Warden; and the Vice-Warden shall in all cases of such interpleader make such other rules and orders in the matter of the said claim or adjudication as between the said parties in respect thereof, or of the costs of the proceedings, as to him shall seem fit and reasonable."

Examination of parties by Court.

117. The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid (*a*) concerning the affairs, dealings, estate, or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same.

(*a*) s. 115.

Power to arrest contributory about to abscond, or to remove or conceal any of his property.

118. The Court may, at any time before or after it has made an order for winding up a company, upon proof being given that there is probable cause for believing that any contributory (*a*) to such company is about to quit the United Kingdom, or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested, and his books, papers, moneys, securities for moneys, goods, and chattels to be seized, and him and them to be safely kept until such time as the Court may order.

(*a*) s. 74.

In *In re Imperial Mercantile Credit Co.* (*k*) the section was read in the alternative, and an order made for the seizure of goods, &c., while the Court declined to make an order for arrest on a mere hearsay statement of the intention of the contributory to leave the United Kingdom.

This section affects only the goods and chattels of the contributory.

(*k*) 5 Eq. 264; and see *Cotton Plantation Co. of Natal*, W. N. 1868, 79.

Sect. 119. There is no section by which his real estate is affected, but any claim upon it is left to be established according to the general law of the kingdom (*l*).

Powers of Court cumulative.

119. Any powers by this Act conferred on the Court shall be deemed to be in addition to and not in restriction of any other power subsisting, either at law or in equity, of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company, for the recovery of any call or other sums due from such contributory or debtor, or his estate, and such proceedings may be instituted accordingly.

Enforcement of and Appeal from Orders.

Power to enforce orders.

120. All orders made by the Court of Chancery in England or Ireland under this Act may be enforced in the same manner in which orders of such Court of Chancery made in any suit pending therein may be enforced, and for the purposes of this part of this Act the Court of the Vice-Warden of the Stannaries shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it as the Court of Chancery in England has in relation to matters within the jurisdiction of such Court, and for the last-mentioned purposes the jurisdiction of the Vice-Warden of the Stannaries shall be deemed to be co-extensive in local limits with the jurisdiction of the Court of Chancery in England.

Power to order contributories in Scotland to pay calls.

121. Where an order, interlocutor, or decree has been made in Scotland for winding up a company by the Court, it shall be competent to the Court in Scotland during session, and to the Lord Ordinary on the Bills during vacation, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due by each contributory respectively, and of the date when the same became due, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date till payment, at the rate of five pounds per centum per annum, in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest; and such decree may be extracted immediately, and no suspension thereof shall be competent, except on caution or consignation, unless with special leave of the Court or Lord Ordinary.

(*l*) See also s. 114.

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Order made in England to be enforced in Ireland and Scotland.

122. Any order made by the Court in England for or in the course of the winding up of a company under this Act shall be enforced in Scotland and Ireland in the Courts that would respectively have had jurisdiction in respect of such company, if the registered office of the company had been situate in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the Courts that are hereby required to enforce the same; and in like manner orders, interlocutors, and decrees made by the Court in Scotland for or in the course of the winding up of a company shall be enforced in England and Ireland, and orders made by the Court in Ireland for or in the course of winding up a company shall be enforced in England and Scotland by the Courts which would respectively have had jurisdiction in the matter of such company if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if such order had been made by the Court required to enforce the same in the case of a company within its own jurisdiction.

An order by the Court in Ireland, or in Scotland, when brought over here to be enforced, must be made an order of that Court which would have had jurisdiction to wind up the company if it had been registered here. And therefore, where winding-up proceedings in the Court of Chancery in Ireland had been remitted under sect. 81 to the Court of Bankruptcy in Ireland, the order of the last-mentioned Court when brought here to be enforced was made an order of the Court of Chancery, not of the Court of Bankruptcy (*m*).

So in the *Glasgow Bank* (*n*) an order for a call made by the Court of Session in Scotland was made an order of the Chancery Division in England in order to enforce it against contributories in England.

After a winding-up order has been made in England, an order to restrain actions in Ireland or Scotland may be granted in England. For the Act applies to the United Kingdom, and by virtue of this section the order may be enforced if made (*o*).

The Court has no jurisdiction to give leave to serve notices of orders and other proceedings in the winding-up on persons out of the jurisdiction (*p*). But this applies only to orders and proceedings which it is desired to enforce. Notice of an appointment to settle the list of contributories may be served out of the jurisdiction in manner provided by R. 30 of the Gen. Order of Nov. 1862 (*q*).

Parties out of the jurisdiction.

Leave was in an earlier case given to serve a summons in the winding-up on officials of the company resident in Scotland, the object of the summons apparently being to render the respondents liable under sects. 100, 165 (*r*).

(*m*) *Hollyford Copper Mining Co.*, 5 Ch. 93.

(*n*) 14 Ch. D. 628; *Scottish Pacific Co.*, W. N. 1886, 63.

(*o*) *International Pulp Co.*, 3 Ch. D. 594; *Middlesborough Firebrick Co.*, W. N. 1885, 7; 52 L. T. 98; *Hermann Loog & Co., Ramsay's Case*, 36 Ch. D. 502.

(*p*) *Anglo-African Steamship Co.*, 32 Ch. Div. 348.

(*q*) *Nathan Newman & Co.*, 35 Ch. Div. 1; *Liebig's Cocoa Works*, W. N. 1888, 120.

(*r*) *British Imperial Co.*, 5 Ch. D. 749; *Household Insurance Co.*, W. N. 1878, 26.

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A person resident out of the jurisdiction who comes in and proves under the winding-up is thereby probably brought within the authority of the Court (*s*), but of course if an order is made against him it may not be enforceable.

Security for costs.

Notwithstanding this section a claimant in a winding-up resident in Scotland may be called on to give security for costs (*t*).

Mode of dealing with orders to be enforced by other Courts.

123. Where any order, interlocutor, or decree made by one Court is required to be enforced by another Court, as hereinbefore provided (*a*) an office copy of the order, interlocutor, or decree so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such office copy shall be sufficient evidence of such order, interlocutor, or decree having been made, and thereupon such last-mentioned Court shall take such steps in the matter as may be requisite for enforcing such order, interlocutor, or decree in the same manner as if it were the order, interlocutor, or decree of the Court enforcing the same.

(*a*) s. 122.

Appeals from orders.

124. Rehearings of and appeals from any order or decision made or given in the matter of the winding up of a company by any Court having jurisdiction under this Act may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction; subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given, according to the practice of the Court appealed from, unless such time is extended by the Court of Appeal: Provided that it shall be lawful for the Lord Warden of the Stannaries, by a special or general order, to remit at once any appeal allowed and regularly lodged with him against any order or decision of the Vice-Warden made in the matter of a winding-up to the Court of Appeal in Chancery, which Court shall thereupon hear and determine such appeal, and have power to require all such certificates of the Vice-Warden, records of proceedings below, documents, and papers as the Lord Warden would or might have required upon the hearing of such appeal, and to exercise all other the jurisdiction and powers of the Lord Warden specified in the Act of Parliament passed in the eighteenth year of the reign of Her present Majesty, chapter thirty-two,

(*s*) *E. p. Robertson*, 20 Eq. 733, in bankruptcy.

(*t*) *Howe Machine Co., Fontaine's Case*, 41 Ch. D. 118.

and any order so made by the Court of Appeal in Chancery shall be final without any further appeal. Sect. 124.

This section refers to a re-hearing by way of appeal, and not to re-hearings by the Court of Appeal of orders made by itself. The limit of time therefore did not apply to a re-hearing of the latter kind (*u*). Re-hearing of appeal.

Where an order has been made in chambers and application is made in Court to discharge it, the analogy of this section will be followed, and as a general rule the application should be made within twenty-one days (*x*). In reckoning these twenty-one days in an action (and *quære* in a winding-up also, see *post*), the analogy of Order LVIII., R. 15, is to be applied, so that if the appeal be from a refusal, the time will run from the date of the refusal, while if it be from an order, the time will run from the date of the order being drawn up (*y*). Application to discharge chambers order.

Some indulgence in respect of re-hearing was allowed in winding-up proceedings, inasmuch as the issues are not so distinctly brought out in them as in cases brought before the Court by means of regular pleadings (*z*): and the time limited for appeal is short (a). Re-hearing when allowed;

Where important documents were discovered after the case had been argued, the Court granted a re-hearing upon terms as to costs (*z*).

In *Re Universal Bank* (*b*) Lord Cranworth, L.C., expressed an opinion that this section does not apply to any order made on the original petition for winding up, but only to orders made under an existing order to wind up. But in a subsequent case (*c*) the Court of Appeal refused to treat this as a binding authority, pointing out that the application was *ex parte*, and that nothing was done upon it beyond giving a direction to the secretary to receive the petition of appeal. of winding-up petition.

It is now settled that under this section and Order LVIII., Rules 9, 15, an appeal from an order made on a winding-up petition must be brought within twenty-one days (*c*).

Under the old practice the three weeks were to be computed from the date at which the order was pronounced, not from that at which it was drawn up; and an appeal was held to be too late when brought beyond three weeks from the former, though not from the latter period (*d*). The words of this section being "within three weeks after the order complained of *has been made*," *quære*, whether, having regard to Order LVIII., Rules 9, 15, the three weeks are now, in the case of an order, to be computed from the date at which the order is pronounced. It is submitted that as between this section and the rules referred to, the latter, which are latest in date, must prevail. Date of order.

An application for an extension of the time within which an appeal may be presented need not necessarily be made within the period of three weeks limited by this section for giving notice of appeal; but the Court of Appeal has power, notwithstanding the expiration of the three weeks, to extend the Extension of time.

(*u*) *Brett's Case*, 29 L. T. 255; S. C. 8 Ch. 800; *E. p. Besley*, 3 Mac. & G. 287.

(*x*) *Elham Valley Co., Dickson's Case*, 12 Ch. D. 298; and see *Dickson* v. *Harrison*, 9 Ch. Div. 243; *cf. E. p. Learoyd*, 10 Ch. Div. 3.

(*y*) *Heatley* v. *Newton*, 19 Ch. Div. 326.

(*z*) *Wiltshire Iron Co., E. p. Pearson*, 3 Ch. 443; see also *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004.

(a) *Craig* v. *Phillips*, 7 Ch. Div. 249.

(*b*) 1 Ch. 428, following *Anglo-Californian Gold Mining Co.*, 1 Dr. & Sm. 628; decided under s. 33 of the Winding-up Act, 1849 (12 & 13 Vict. c. 108).

(*c*) *National Funds Assurance Co.*, 4 Ch. Div. 305.

(*d*) *Risca Coal Co., E. p. Hookey*, 4 D. F. & J. 456; and see *E. p. Dudley Banking Co., Re Hopkins*, 3 D. J. & S. 456; 9 Jur. (N.S.) 702; *E. p. Hinton*, 19 Eq. 266, in bankruptcy.

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time and allow an appeal to be presented (*e*), and will exercise the power where necessary to secure justice, *e.g.*, where three out of six persons who were held jointly and severally liable (being the three who as between the six were *primâ facie* primarily liable) appealed on the last day without the knowledge of their fellows (*f*).

But the object of the Act is, that matters may be settled speedily, and, therefore, after the expiration of the time, leave to appeal will not be given except under special circumstances (*g*). So under the old practice with applications to inrol orders with a view to appeal to the House of Lords (*h*).

Where the intending appellants had from the first expressed their intention of appealing, but from a slip, and by reason of a *bonâ fide* mistake, had allowed the time to expire, the Court gave leave (*i*), and a notice, which was in form not a notice of appeal but a notice of intention to appeal, has been held sufficient though informal (*k*). And so where a notice of appeal was given wrong in point of form (*l*).

The person who applies for an extension of the time to appeal must show, not an equity properly so called, but something which entitles him to ask for the indulgence of the Court to relieve him from the legal bar that is imposed by the orders and Act of Parliament (*m*). It need not be an equity arising from the conduct of the respondent. Mistake by the appellant (*n*) or the necessity of the case in order to secure justice (*f*) may be a ground for extending the time without misconduct by the respondent.

Where an order is, by a subsequent decision of a Court of higher authority, shewn to be erroneous in point of law, but the error is not discovered till the time of appeal has elapsed, the Court may think it right to give an opportunity of appeal (*o*), but it is not a matter of course to do so: special circumstances must be shewn (*p*). In the absence of special circumstances a litigant who has obtained a judgment, which by expiration of the time limited for appeal has become absolute, ought not to be deprived of it (*p*). At any rate, it ought to be shewn that after the judgment from which it is desired to appeal there has been a decision of a Court of higher jurisdiction by which the law which has been previously unsettled, has been entirely settled. At the same time leave to appeal may be more readily given where, as in winding-up cases, the time limited for appeal is short, and also where there are accounts pending and assets undistributed (*q*).

A different decision arrived at by a Court of co-ordinate jurisdiction is not a sufficient ground for extending the time (*r*).

Where two persons were, upon similar facts, settled by the M.R. on the list of contributories, and one of them upon appeal obtained a reversal of the order, and then (the time having expired) the other applied to the M.R. for a re-hearing, the application was said to be unnecessary, for all orders similar to that reversed on the appeal would be reversed in chambers (*s*).

(*e*) *Banner* v. *Johnston*, L. R. 5 H. L. 157; *Manchester Economic Society*, 24 Ch. Div. 488.

(*f*) *Clayton Mills Co.*, 37 Ch. Div. 28.

(*g*) *In re Bastow*, 37 L. J. (Ch.) 51; *Madras Irrigation Co.*, 23 Ch. Div. 248; *Esdaile* v. *Payne*, 40 Ch. Div. 520, 533, 534.

(*h*) *Laffitte & Co.*, 10 Ch. 316; *Browne's Case*, 20 Eq. 639.

(*i*) *International Life Assurance Society*, L. C. and L. J. J. 17th Dec. 1874; *Taylor's Case*, 8 Ch. Div. 643.

(*k*) *Little's Case*, 8 Ch. Div. 806; but see *New Callao*, 22 Ch. Div. 484.

(*l*) *Munns* v. *Burn*, 34 Ch. Div. 664.

(*m*) 24 Ch. Div. 499.

(*n*) *New Callao*, 22 Ch. Div. 484; *Manchester Economic Society*, 24 Ch. Div. 488.

(*o*) *Ebbw Vale Co.'s Case*, 5 Ch. 112; and see *E. p. Holroyd*, 15 Jur. 696; *cf. Barned's Banking Co.*, *E. p. Bank of England*, 22 L. T. 895.

(*p*) *Esdaile* v. *Payne*, 40 Ch. Div. 520, 533, 534.

(*q*) *Craig* v. *Phillips*, 7 Ch. Div. 249.

(*r*) *Hull Forge Co.*, 15 W. R. 474; 36 L. J. (Ch.) 337.

(*s*) *E. p. Munday*, 31 Beav. 206.

On the 28th May, 1880, an order was made to wind up an unregistered mutual marine insurance society: the petition was served at the abandoned office of the company: no one appeared to oppose: the petition did not state, as the fact was, that the number of members exceeded twenty. In November, 1881, a member heard for the first time of the order, and within a week applied for leave to appeal against it. Leave was given (*t*).

Where an appellant in bankruptcy had not given notice of appeal until the last day allowed for the purpose, the Court gave the respondent leave to present a cross-appeal, although the time limited for appealing had expired (*u*).

Ex parte application.

The time will not be extended on an *ex parte* application (*x*): if exception is made in this respect the benefit of any objection will be reserved to the respondent at the hearing of the appeal (*y*).

Order which was a nullity.

This section does not, by reason of the three weeks having expired, interfere with the power of the Court to discharge an order which was in fact a nullity, by reason of its having been obtained at the instance of an alleged contributory whose name has since been removed from the register of shareholders (*z*).

And so, under the Act of 1848, it was held that the restriction as to the time of appealing did not apply to an appeal brought on the ground that there had been no jurisdiction to make the order appealed from (a). But it may be that the order of the Court below must be taken as determining that it had jurisdiction, and is therefore to be treated as an erroneous order open to appeal in the usual way (*t*).

Order binding unless appealed.

But, unless want of jurisdiction be shewn, it is conceived that an order, against which notice of appeal has not been given within the three weeks, must, unless the Court of Appeal grant an extension of time, be treated in all future proceedings as a valid order (*b*); and the intention of the Act being that all questions should be settled speedily, any proceedings whereby the limit of time might be evaded, as by a re-hearing in the Court of first instance (*c*), would not probably be favourably regarded.

Delay for three weeks. Analogy.

Where a person has been settled on the list of contributories in a winding-up under supervision, after disputing with the liquidators his liability to be put upon it, it has been said that he ought by analogy to this section to apply to the Court within three weeks to alter the decision of the liquidators (*d*).

Appeal by liquidator.

Semble, the liquidator ought not to appeal against an order made in the winding-up without first obtaining the leave of the judge to whose Court the winding-up is attached (*e*); if he wishes to be safe as to costs he will do well to apply for leave (*f*).

(*t*) *Padstow Association*, 20 Ch. Div. 137.

(*u*) *E. p. Kiveton Coal Co., In re Phillips*, 7 Ch. 730.

(*x*) *Lama Italian Coal Co.*, 16 L. T. 258; but see *E. p. Besley*, 3 Mac. & G. 287.

(*y*) *Hull Forge Co.*, 15 W. R. 388, 474; *National Funds Assurance Co.*, 4 Ch. Div. 305, in both of which cases the preliminary objection, that the time for appealing had expired, prevailed at the hearing.

(*z*) *Estates Investment Co., E. p. Turnley and Oliver*, 8 Eq. 227.

(a) *Plumstead Water Co.*, 2 D. F. & J. 20.

(*b*) See *Welsh Potosi Co., E. p. Clarke*, 2 De G. & J. 245; *E. p. Carter*, 1 D. M. & G. 212; *Carter* v. *Dimmock*, 4 H. L. C. 337; and see *supra*, p. 289.

(*c*) See *Plumstead Water Co.*, 2 D. F. & J. 20, in bankruptcy; and with *E. p. Brown, Re Jeavons*, 9 Ch. 304, contrast *E. p. Keighley*, 9 Ch. 667; *E. p. London and County Banking Co.*, 16 Eq. 391, under the Bankruptcy Act, 1869. See also *Sanderson's Case*, 1 Mac. & G. 306; 1 H. & Tw. 486; and 3 De G. & Sm. 66; and *E. p. Besley*, 3 Mac. & G. 287.

(*d*) *E. p. Trory's Executors*, 17 L. T. 198. But this was a mere dictum; there had been acquiescence for two years; *cf. Elham Valley Co., Dickson's Case*, 12 Ch. D. 298.

(*e*) *Trent and Humber Ship Building Co., E. p. Cambrian Steam Packet Co.*, 17 W. R. 181; reported also 4 Ch. 112.

(*f*) *City Investment Co.*, 13 Ch. Div. 475, 483.

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Where leave to appeal was supposed to be necessary (*g*)—as where creditors desired to appeal against the order made on a summons by alleged contributories whereby their names were struck out of the list—it was held that the leave to appeal must be obtained from the judge of first instance, and then an extension of time (if the time had expired) from the Court of Appeal (*h*).

Who may appeal.

It would seem that creditors or contributories who appeared below may appeal—as where contributories appealed from a winding-up order with which the petitioner was satisfied (*i*)—and that besides the official liquidator and the parties to the application in the Court below, any creditor or contributory of the company may appeal without leave obtained for the purpose (*k*). The company by its directors may appeal from a winding-up order notwithstanding that a liquidator has been appointed (*l*).

A contributory who has been settled on the list may make an original motion to settle other persons on the list as well (*m*), and a contributory may by leave appeal from an order excluding another contributory from the list (*n*). Under the former Winding-up Acts, motions by contributories have been entertained seeking to discharge orders of the Master, *e.g.*, an order allowing a claim against the company (*o*), and an order removing a name from the list of contributories (*p*); and in Ireland it has been said that a creditor can appeal without leave against an order excluding contributories from the list (*q*).

If the official liquidator appeals, it may perhaps be gathered from *Ship's Case* (*n*) that a contributory cannot appeal too without leave—for in general the Court will not in proceedings in the winding-up hear contributories as well as the official liquidator (*r*)—but otherwise it would seem from the Irish case referred to (*s*) that it is competent to any creditor or contributory to appeal.

Length of notice of appeal.

By Order LVIII. R. 4, as it stood in 1879, fourteen days' notice was to be given of appeal from a "judgment whether final or interlocutory," and four days' notice of appeal from any "interlocutory order." A decision upon summons in winding-up which finally determined the rights of the parties required a fourteen days' notice (*t*). *Quære*, it may be called an "interlocutory judgment." The language of the present rule (Order LVIII. R. 15) is different.

Appeal from County Court order made under 25 & 26 Vict. c. 87, s. 17.

The appeal from an order made by the County Court in the winding up of a company under the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), under sect. 17 of that Act, was to the Court of Chancery, not to a superior Court of common law (*u*).

(*g*) It was afterwards said it was not necessary: *Etna Insurance Co., E. p. National Provincial Bank of England*, I. R. 7 Eq. 362.

(*h*) *Etna Insurance Co., E. p. National Provincial Bank of England*, 21 W. R. 718.

(*i*) *Silkstone Fall Colliery Co.*, 1 Ch. Div. 38.

(*k*) See *e.g. Cape Breton Co.*, 19 Ch. Div. 77; *cf.* in bankruptcy, *E. p. Walter*, 2 Ch. Div. 326.

(*l*) *Diamond Fuel Co.*, 13 Ch. Div. 400.

(*m*) *Bush's Case*, 6 Ch. 246; *Murray* v. *Bush*, L. R. 6 H. L. 37.

(*n*) *Ship's Case*, 2 D. J. & S. 544; *Downes* v. *Ship*, L. R. 3 H. L. 343.

(*o*) *Sea Fire Assurance Co., E. p. Gwyn*, 1 Jur. (N.S.) 300.

(*p*) *Blackburn's Case*, 3 Drew. 409; 8 D. M. & G. 177.

(*q*) *Etna Insurance Co., E. p. National Provincial Bank of England*, I. R. 7 Eq. 362.

(*r*) *Norwich Yarn Co.*, 13 Beav. 426, 428 (a); *Bodmin United Mines Co.*, 23 Beav. 373, 385; *Continental Bank Corporation, E. p. London and County Bank*, W. N. 1867, 84; and see *supra*, p. 247.

(*s*) *Etna Insurance Co., E. p. National Provincial Bank of England*, I. R. 7 Eq. 362.

(*t*) *Stockton Iron Co.*, 10 Ch. Div. 335, 348.

(*u*) *Henderson* v. *Bamber*, 35 (L. J. (C.P.) 65.

125. In all proceedings under this part of this Act, all Courts, judges, and persons judicially acting, and all other officers, judicial or ministerial, of any Court, or employed in enforcing the process of any Court, shall take judicial notice of the signature of any officer of the Courts of Chancery or Bankruptcy in England or in Ireland, or of the Court of Session in Scotland, or of the registrar of the Court of the Vice-Warden of the Stannaries, and also of the official seal or stamp of the several offices of the Courts of Chancery or Bankruptcy in England or Ireland, or of the Court of Session in Scotland, or of the Court of the Vice-Warden of the Stannaries, when such seal or stamp is appended to or impressed on any document made, issued, or signed under the provisions of this part of the Act, or any official copy thereof.

Judicial notice to be taken of signature of officers.

126. *The Commissioners of the Court of Bankruptcy and* (a) the judges of the County Courts in England who sit at places more than twenty miles from the General Post Office, and the commissioners of bankrupt and the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, shall be commissioners for the purpose of taking evidence under this Act in cases where any company is wound up in any part of the United Kingdom, and it shall be lawful for the Court to refer the whole or any part of the examination of any witnesses under this Act to any person hereby appointed commissioner, although such commissioner is out of the jurisdiction of the Court that made the order or decree for winding up the company; and every such commissioner shall, in addition to any power of summoning and examining witnesses, and requiring the production or delivery of documents, and certifying or punishing defaults by witnesses, which he might lawfully exercise as a *commissioner of the Court of Bankruptcy* (a), judge of a County Court, commissioner of bankrupt, assistant barrister, or recorder, or as a sheriff of a county, have in the matter so referred to him all the same powers of summoning and examining witnesses, and requiring the production or delivery of documents, and punishing defaults by witnesses, and allowing costs and charges and expenses to witnesses, as the Court which made the order for winding up the company has; and the examination so taken shall be returned or reported to such last-mentioned Court in such manner as it directs.

Special commissioners for receiving evidence.

(a) Struck out by Statute Law Revision Act, 1875.

127. The Court may direct the examination in Scotland of any

Court may

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order the examination of persons in Scotland.

person for the time being in Scotland, whether a contributory of the company or not, in regard to the estate, dealings, or affairs of any company in the course of being wound up, or in regard to the estate, dealings, or affairs of any person being a contributory of the company, so far as the company may be interested therein by reason of his being such contributory (*a*), and the order or commission to take such examination shall be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time, and the sheriff shall summon such person to appear before him at a time and place to be specified in the summons for examination upon oath as a witness or as a haver, and to produce any books, papers, deeds, or documents called for which may be in his possession or power, and the sheriff may take such examination either orally or upon written interrogatories, and shall report the same in writing in the usual form to the Court, and shall transmit with such report the books, papers, deeds or documents produced, if the originals thereof are required and specified by the order, or otherwise such copies thereof or extracts therefrom, authenticated by the sheriff, as may be necessary; and in case any person so summoned fails to appear at the time and place specified, or appearing refuses to be examined or to make the production required, the sheriff shall proceed against such person as a witness or haver duly cited, and failing to appear or refusing to give evidence or make production may be proceeded against by the law of Scotland; and the sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such and the like allowances, as sheriffs when acting as commissioners under appointment from the Court of Session and as witnesses and havers are entitled to in the like cases according to the law and practice of Scotland: If any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required to be made, or on any other ground whatever, the sheriff may, if he thinks fit, report such objection to the Court, and suspend the examination of such witness until such objection has been disposed of by the Court.

(*a*) *Cf.* s. 115.

Affidavits, &c., may be sworn in Ireland, Scotland, or the colonies before any competent

128. Any affidavit, affirmation, or declaration required to be sworn or made under the provisions or for the purposes of this part of this Act may be lawfully sworn or made in Great Britain or Ireland, or in any colony, island, plantation, or place under the dominion of Her Majesty, in foreign parts, before any Court,

judge, or person lawfully authorized to take and receive affidavits, affirmations, or declarations, or before any of Her Majesty's consuls or vice-consuls, in any foreign parts out of Her Majesty's dominions, and all Courts, judges, justices, commissioners, and persons acting judicially, shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, judge, person, consul, or vice-consul attached, appended, or subscribed to any such affidavit, affirmation, or declaration, or to any other document to be used for the purposes of this part of this Act.

Sect. 129. Court or person.

Voluntary Winding-up of Company.

129. A company under this Act (*a*) may be wound up voluntarily,

Circumstances under which company may be wound up voluntarily.

(1.) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily:

(2.) Whenever the company has passed a special resolution (β) requiring the company to be wound up voluntarily:

(3.) Whenever the company has passed an extraordinary resolution (γ) to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same:

For the purposes of this Act any resolution shall be deemed to be extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution as hereinbefore defined (β).

(*a*) But not an "unregistered company," s. 119 (2); (and see note to s. 199); except it be a society registered under the Industrial and Prov. Soc. Act, 1876; see 39 & 40 Vict. c. 45, s. 17.

(β) s. 51; registration, s. 53; and advertisement, s. 132.

(γ) Registration, s. 53, note; advertisement, s. 132.

A special resolution (see sect. 51) is a resolution passed by the statutory majority at one meeting, and confirmed after a certain interval at a second. A company may, therefore, under clause (2), by a resolution so passed and confirmed, agree to wind up voluntarily.

Sub-sect. (2).

A voluntary winding-up may also be initiated, under clause (3), by a resolution passed at one meeting, and not requiring confirmation at a second; but if it is under this clause that it is intended to proceed, the notice (see sect. 51) of the meeting must specify the intention of proposing a resolution to the effect in this clause mentioned, viz., that it has been proved to the satisfaction of the company that it cannot, by reason of its

Sub-sect. (3).

Notice.

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A notice in the words of sub-section (3) is sufficient (*y*).

But a notice of a meeting "To take into consideration the present position of the company's affairs and the desirability of bringing its operations to a close, and to pass a resolution for the voluntary winding up of the company should it be determined to do so," and to appoint liquidators, is not sufficient for the purpose of an extraordinary resolution (*z*).

Winding-up resolution associated with resolutions *ultra vires*.

A winding-up resolution, which is in itself valid, is not invalidated by the fact of there being associated with it resolutions which have not been regularly passed; and *quære*, whether it would be invalidated if such resolutions were even *ultra vires* (a).

The *dictum* of Turner, L.J., in *In re Imperial Bank of China, &c.* (*b*), that if the winding-up was part of a scheme which was in itself *ultra vires*, then the winding-up resolution must fall with the scheme, is not borne out by the order in that case; for the order enabling a shareholder to file a bill in the name of the company was one which the Court had no jurisdiction to make except under sect. 138, upon the footing that there was a voluntary winding-up (*c*).

And where a resolution was passed and confirmed, "That for enabling the said agreement and the amalgamation thereby agreed on to be carried into effect, the said Financial Corporation, Limited, shall be wound up voluntarily," and the amalgamation was held invalid (*d*), the resolution for winding-up was nevertheless held to be valid (*e*).

So where five resolutions were passed the first of which was in the words of sub-section (3), the second was for voluntary liquidation, the third for the appointment of a liquidator, and the fourth and fifth adopted a certain agreement which was said to be *ultra vires* and directed the liquidator to carry it out, the first three resolutions were effective whether the fourth and fifth were binding or not (*f*).

The validity of a transfer or amalgamation cannot be decided under the winding-up jurisdiction, but must be ascertained in a suit properly instituted for the purpose (*g*).

Injunction to restrain voluntary winding-up.

An injunction to restrain the shareholders from exercising their statutory right of winding up the company is, it is submitted, except under very exceptional circumstances, out of the question. The case in which the question arose was one in which the plaintiffs claimed to be entitled to an allotment of certain shares, and asked an injunction to restrain a voluntary winding-up

(*x*) *Bridport Old Brewery Co.*, 2 Ch. 191; and see s. 51 as to "notice."

(*y*) *Stone* v. *City and County Bank*, 3 C. P. D. 282.

(*z*) *Silkstone Fall Colliery Co.*, 1 Ch. Div. 38.

(*a*) *Irrigation Co. of France, E. p. Fox*, 6 Ch. 176.

(*b*) 1 Ch. 339.

(*c*) See *E. p. Fox*, 6 Ch. 184, 190; *Cleve* v. *Financial Corporation*, 16 Eq. 363, 377.

(*d*) *Clinch* v. *Financial Corporation*, 5 Eq. 450; 4 Ch. 117.

(*e*) *Cleve* v. *Financial Corporation*, 16 Eq. 363.

(*f*) *Stone* v. *City and County Bank*, 3 C. P. Div. 282, 307, 313.

(*g*) *Imperial Bank of China, &c.*, 1 Ch. 339, 347; *Financial Corporation*, W. N. 1866, 162; *International Life Ass. Soc.*, 20 L. T. 433.

by the existing shareholders, alleging that if their shares were allotted their vote would defeat the resolutions (*h*).

Companies registered under the Joint Stock Companies Acts, as defined in s. 175.

To companies formed and registered under the Joint Stock Companies Acts, as defined in sect. 175, this Act is by sect. 176 (*i*) to apply as if they had been formed and registered under this Act. Such companies are, therefore, under no necessity of re-registering under the power given in the 180th section, and are not included under the designation of unregistered companies in sect. 199 (*i*). Such companies are, therefore, free from the prohibition contained in sect. 199 (2), and may be wound up voluntarily (*k*).

Thus, companies formed and registered under the Act of 1856, and not re-registered under this Act, have been wound up voluntarily (*l*), and the voluntary winding-up of such a company has been continued under supervision (*m*).

Commencement of voluntary winding-up.

130. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing such winding-up (*a*).

(*a*) s. 84, as to winding-up by the Court.

Commencement dates from confirmatory resolution.

When the voluntary winding-up takes place under sub-section (2) of sect. 129 by means of a preliminary, followed by a confirmatory resolution, the commencement of the winding-up dates from the passing of the confirmatory resolution (*n*). And *quære* a judgment creditor who levies execution between the preliminary and confirmatory resolution is entitled to hold the proceeds (*o*).

Commencement of winding-up under supervision.

Where a voluntary winding-up is continued under supervision, the winding-up is deemed to commence at the date of the resolution, and not at the date of the presentation of the petition (sect. 84), for the order is to continue the winding-up, and the commencement of such winding-up is defined by this section.

And it will make no difference if the order be made on a petition which was presented before the resolution was passed, where nothing more has been done until after the resolution was passed (*p*). But if in the interval a provisional liquidator has been appointed under the petition, the date of his appointment may, it has been said, for some purposes be the commencement (*q*). In this case the dates were Oct. 8, petition presented; Oct. 9, provisional liquidator appointed; Oct. 18, extraordinary voluntary resolution, followed by a supervision order (*q*). But the appointment of a provisional liquidator is only matter of machinery and does not affect the true date of commencement of the winding-up (*r*). It is, moreover, not only provisional but contingent also in this sense, that it operates to protect the property for an equal distribution only in the event of an order for com-

(*h*) *British Water Gas Syndicate* v. *Notts Water Gas Co.*, W. N. 1889, 204.

(*i*) And see note to that section.

(*k*) *London Indian Rubber Co.*, 1 Ch. 329.

(*l*) *Torquay Bath Co.*, 32 Beav. 581; *Beaujolais Wine Co.*, 3 Ch. 15.

(*m*) *London India Rubber Co.*, 1 Ch. 329; *Minima Organ Co.*, 11 W. R. 530, 8 L. T. 109, is an earlier case, in which doubt was expressed; see s. 146.

(*n*) *Dawes' Case*, 6 Eq. 232; *Weston's Case*, 4 Ch. 20; *Hornby's Case*, 16 W. R. 1164; 19 L. T. 237.

(*o*) See *E. p. Maclaren*, 16 Ch. Div. 534.

(*p*) *Hodgkinson* v. *Kelly*, 6 Eq. 496; *Weston's Case*, 4 Ch. 20; *contra*, *Re Hydraulic Tube Drawing Co.*, 16 W. R. 572; 18 L. T. 205, Malins, V.C., which must be considered as overruled; and see *E. p. Colborne and Strawbridge*, 11 Eq. 478, 499.

(*q*) *Colonial Trusts Corp.*, *E. p. Bradshaw*, 15 Ch. D. 465, 472; but see *Dry Docks Corporation*, 39 Ch. Div. 306; *West Cumberland Iron Co.*, 40 Ch. D. 361.

(*r*) *Emperor Life Society*, 31 Ch. D. 78; *West Cumberland Iron Co.*, 40 Ch. D. 361.

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pulsory winding-up being made. Where the dates were: March 6, petition presented; March 8, provisional liquidator; June 16, distress for rates; June 22, liquidation by extraordinary resolution, the overseers were entitled to the rates in full (*s*).

A supervision order relates back for all purposes, including the stopping of interest, to the date of the resolution, and this, though interest have been paid up to a later date in the voluntary winding-up (*t*).

Commencement where voluntary winding-up superseded by compulsory order:—

Where the dates were: 30th July, extraordinary resolution for voluntary winding-up; 5th August, distress for rent; 9th August, voluntary liquidators appointed; 18th August, winding-up petition; 8th September, winding-up order which did not mention the voluntary liquidation; 21st November, official liquidator appointed, the distress was not allowed to proceed; for in such case the compulsory winding-up supersedes (sect. 152) but does not invalidate what has been done under the voluntary winding-up (*u*). The case does not decide that the winding-up commenced on the 30th July (*x*).

where supervision order superseded by compulsory order.

As to the commencement of the winding-up where a winding-up under supervision is superseded by a compulsory order, see sect. 152.

Effect of voluntary winding-up on status of company.

131. Whenever a company is wound up voluntarily, the company shall, from the date of the commencement of such winding-up (*a*), cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof (*β*), and all transfers of shares, except transfers made to (*γ*) or with the sanction of the liquidators, or alteration in the status of the members of the company, taking place after the commencement of such winding-up, shall be void (*δ*), but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up (*ε*).

(*a*) s. 130.
(*β*) *Cf.* s. 95, and the note on it.
(*γ*) *Quære* intention of these words: *Vining's Case*, 6 Ch. 96.
(*δ*) *Cf.* s. 153.
(*ε*) *Cf.* s. 111.

Forfeiture of shares.

Where the directors have made a valid forfeiture of shares before the winding-up, the liquidators have no power to cancel such forfeiture; the only power given by the section is for the transfer of shares to the liquidators, or to another person by their sanction (*y*).

Infant.

If an infant transferee have not attained his majority at the commencement of the winding-up, his *status* as an infant at that date cannot afterwards be changed; but the liquidator may claim to place the name of the transferor on the list of contributories, although the infant have attained his majority before the application is made to the Court, and express a wish to retain the shares (*z*).

Transfer.

The commencement of the winding-up is the date of the passing of the second or confirmatory resolution (see sect. 130); and, therefore, a transfer

(*s*) *Dry Docks Corporation*, 39 Ch. Div. 306.
(*t*) *E. p. Colborne and Strawbridge*, 11 Eq. 478; and as to interest, *v.* s. 158.
(*u*) *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250.
(*x*) *Taurine Co.*, 25 Ch. Div. 118, 140.
(*y*) *Dawes' Case*, 6 Eq. 232.
(*z*) *Castello's Case*, 8 Eq. 504; *Symons' Case*, 5 Ch. 298; see also the cases collected under s. 22, "Infant Transferee," *supra*, p. 42.

made and registered *bonâ fide* in the interval between the preliminary and confirmatory resolutions is valid and effectual (a).

The execution of a transfer without the sanction of the liquidators is void, but not illegal; and, therefore, an action will lie against a person, who by employing a broker to sell shares has, by the rules of the Stock Exchange, become bound to execute a transfer, for refusing to execute such transfer, although the sanction of the liquidators has not been obtained; and that whether it was the duty of the seller or the purchaser to obtain such sanction (*b*).

The liquidators' power is not limited to allowing or refusing a transfer *simpliciter*, but they may give a conditional sanction. Thus, where liquidators refused to register a transfer, except on the terms that the transferor should execute a deed-poll whereby he should agree to guarantee to the liquidators payment of all calls by his transferee, this was held to be within their powers (*c*).

Repudiation or disclaimer.

Having regard to this section *quære* whether a shareholder can under any circumstances repudiate his shares after a resolution to wind up has been passed (*d*). It seems, however, that trustee in bankruptcy may disclaim (*e*).

Position of the company after the resolution.

After a company has passed a resolution to wind up voluntarily it is to exist as a company for the purpose of its being beneficially wound up, and for no other purpose. It cannot, then, have an existence after the resolution for the purpose of an amalgamation under its articles with another company (*f*).

Carrying on business.

As to the limits within which the business may be continued, see *ante*, p. 277. New contracts entered into by the liquidator of a character which fall within the ordinary business of the company must be taken to be for the beneficial winding up until the contrary is shown (*g*).

And further, Pollock, B., held in *Bateman* v. *Ball* (*h*), and the Court of Appeal in *Hire Purchase Co.* v. *Richens* (*g*) did not dissent from the view, that this section does not amount to a prohibition which makes a contract after winding up illegal as between the company and the person with whom it is made, but is confined to the relations between the shareholders in the company and its officers.

Notice of resolution to wind up voluntarily.

132. Notice of any special resolution or extraordinary resolution passed for winding up a company voluntarily shall be given by advertisement as respects companies registered in England in the *London Gazette*, as respects companies registered in Scotland in the *Edinburgh Gazette*, and as respects companies registered in Ireland in the *Dublin Gazette*.

See note to sect. 53.

Consequences of voluntarily winding up.

133. The following consequences shall ensue upon the voluntary winding up of a company:

(a) *Hornby's Case*, 16 W. R. 1164; 19 L. T. 237.

(*b*) *Biederman* v. *Stone*, L. R. 2 C. P. 504.

(*c*) *Cleve* v. *Financial Corporation*, 16 Eq. 363, 375, 381.

(*d*) *Stone* v. *City and County Bank*, 3 C. P. D. 282, 298.

(*e*) *West of England Bank, E. p. Budden*, 12 Ch. D. 288, but the point was not argued.

(*f*) *London, Bombay, and Mediterranean Bank, Drew's Case*, 36 L. J. (Ch.) 785; 16 L. T. 657.

(*g*) *Hire Purchase Co.* v. *Richens*, 20 Q. B. Div. 387.

(*h*) 56 L. J. (Q. B. D.) 291.

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(1.) The property of the company shall be applied in satisfaction of its liabilities *pari passu* (α), and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company (β).

(2.) Liquidators shall be appointed for the purpose of winding up the affairs of the company and distributing the property (γ):

(3.) The company in general meeting shall appoint such persons or person as it thinks fit to be liquidators or a liquidator, and may fix the remuneration to be paid to them or him (δ):

(4.) If one person only is appointed, all the provisions herein contained in reference to several liquidators shall apply to him:

(5.) Upon the appointment of liquidators all the power of the directors shall cease (ε) except in so far as the company in general meeting or the liquidators may sanction the continuance of such powers:

(6.) When several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or in default of such determination by any number not less than two:

(7.) The liquidators may, without the sanction of the Court, exercise all powers by this Act given to the official liquidator (ζ):

(8.) The liquidators may exercise the powers hereinbefore given (η) to the Court of settling the list of contributories of the company, and any list so settled shall be *primâ facie* evidence of the liability of the persons named therein to be contributories:

(9.) The liquidators may at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and the liquidators may in making a call take into consideration the probability

that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same (θ):

(10.) The liquidators shall pay the debts of the company and adjust the rights of the contributories amongst themselves (ι).

(α) *Cf.* s. 159, as to payment in full.
(β) *Cf.* ss. 38, 94, 98, 109; *Birch* v. *Cropper*, 14 App. Cas. 525.
(γ) *Cf.* s. 92.
(δ) *Cf.* ss. 92, 93; see ss. 135, 140, 141.
(ε) There is no provision corresponding to this in compulsory winding-up.
(ζ) ss. 95, 97; and see ss. 138, 139, 151, 159, 160, 161.
(η) s. 98.
(θ) *Cf.* s. 102.
(ι) As to debts, s. 158; set-off, s. 101; payments from contributories and their application, s. 38; distribution of surplus assets, s. 109.

The questions arising upon the various clauses of this section will be found in the main discussed under the corresponding sections with respect to winding up by the Court in the earlier part of the Act, and the references to those sections given above will render a recapitulation of the cases unnecessary.

(1) The word "property" in this section means the same thing as "assets" in sect. 38, and both alike mean and include not only the property in specie, but also the unpaid capital recoverable as well from the present as from the past members (*i*).

The distribution of the assets *pari passu* is a prominent feature in the scheme of the Act, and as regards those sections which deal with the details of the administration of the assets, no construction which would lead to a distribution other than *pari passu* has ever been entertained with any favour by the Court (*k*).

But the *pari passu* distribution is to be made in satisfaction of the liabilities as they exist at the commencement of the winding-up (*l*), and, therefore, where some creditors of the company had under an inspectorship deed, on which no question of fraudulent preference arose under sect. 164, received before the winding-up a dividend, and others not, the latter were not in the winding-up allowed to have any priority over the former (*m*).

Notwithstanding the words "*pari passu*," the Crown, not being expressly mentioned, is entitled to priority (*n*).

As between the members their rights in the capital in the concern cannot be altered by the vote of the majority to the prejudice of the minority (*o*).

(2.) *Semble*, the liquidators may be appointed at the meeting at which the resolution for voluntarily winding up is passed, although no special notice has been given of the resolution for their appointment (*p*). And it has been held that after voluntary resolutions passed, liquidators may be appointed at a subsequent meeting, although no notice has been given of the intention to propose their appointment (*q*).

Where the winding-up commences by a special resolution under sect. 129 (2)

(ι) *Morris' Case*, 7 Ch. 200, 204; S. C., 8 Ch. 800; *Webb* v. *Whiffin*, L. R. 5 H. L. 711, 724, 735; see note to s. 38.
(k) See *e.g.* note to s. 101, and *Black & Co.'s Case*, 8 Ch. 254, 263.
(l) See note to s. 94.
(m) *Smith, Knight, & Co., E. p. Ashbury*, 5 Eq. 223.
(n) *Henley & Co.*, 9 Ch. Div. 469; *Oriental Bank*, 28 Ch. D. 643, *ante*, p. 238.
(o) *Griffith* v. *Paget*, 5 Ch. D. 894; 6 Ch. D. 511, *ante*, p. 295.
(p) *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 355; *Indian Zoedone Co.*, 26 Ch. Div. 70; see, however, note to s. 51, as to notice.
(q) *Welsh Flannel Co.*, 20 Eq. 360.

Sect. 133. an appointment of liquidators made at the first meeting and confirmed at the second is good, and not open to objection on the ground of having been made before the commencement of the winding-up (*r*). But the appointment at the first meeting can of itself have no effect, and if at the second meeting the resolution for appointment of the liquidator is rejected, the appointment is not validated by the fact that the winding-up resolution has been confirmed (*s*).

(5.) It is conceived that, notwithstanding the 5th sub-section, the directors do not in a voluntary, any more than in a compulsory winding-up, cease to be officers of the company (*t*).

(6.) "As may be determined at the time of their appointment," *i.e.*, by the company. Two liquidators must, therefore, concur in the performance of any act unless they have authority *from the company* (or the creditors if the appointment is made under sect. 135) *at the time of their appointment* to perform it in some other manner, as *e.g.* by one liquidator only. The liquidators cannot themselves delegate their powers generally to one of their number (*u*). They can, perhaps, authorize one of their number to perform a purely ministerial act, on which they have previously exercised their discretion; but *quære*, whether, under any circumstances, they can delegate to one of their number the power of accepting bills (*x*).

And even in the case of a purely ministerial act, if one of two liquidators dies before it is done, the survivor alone cannot do it.

Thus where two liquidators entered into an agreement for sale, and a legal assignment was prepared, but before execution one of the liquidators died, the survivor could not affix the seal, and nothing could be done until a new liquidator was appointed (*y*).

In the case of an unincorporated company, where a vesting order had been obtained under sect. 203, vesting the property of the company in six liquidators, and an order made that acts might be done by any two of the liquidators, a conveyance executed by two of them operated nevertheless to pass only two-sixths of the legal estate (*z*).

As to appointment of liquidators by the creditors, see sect. 135.

(7.) Under this section and sect. 95 the liquidators no doubt have power to sell the property of the company (a), although for their protection they may, if they think fit, come to the Court under sect. 138 to approve the agreement for sale (*b*).

As to a sale in consideration of shares, &c., in another company, see *infra*, sect. 161.

(8.) Where the winding-up is by the Court notice is given to each contributory of the appointment to settle the list, and of the character in which he is included in it (*c*), and a voluntary liquidator ought no doubt in general to

(*r*) *London and Australian Agency Corporation*, 29 L. T. 417; 22 W. R. 45; W. N. 1873, 198; *Petersburg Gas Co.*, 33 L. T. 637.

(*s*) *Indian Zoedone Co.*, 26 Ch. Div. 70.

(*t*) See *Madrid Bank* v. *Bayley*, L. R. 2 Q. B. 37.

(*u*) *London and Mediterranean Bank, E. p. London and South Western Bank*, 36 L. J. (Ch.) 807; *London and Mediterranean Bank, E. p. Birmingham Banking Co.*, 3 Ch. 651; and see *Bolognesi's Case*, 5 Ch. 567.

(*x*) *E. p. Agra and Masterman's Bank*, 6 Ch. 206.

(*y*) *Re Metropolitan Bank and Jones*, 2 Ch. D. 366. Contrast in bankruptcy, *E. p. Waddell*, 34 L. T. 237.

(*z*) *Ebsworth and Tidy's Contract*, 42 Ch. Div. 23.

(*a*) See *Colonial Gas Co.*, W. N. 1867, 42; *Sankey Brook Coal Co., Re Radley & Bramall*, 12 Eq. 472, where the winding-up was under supervision, see s. 151.

(*b*) *Scinde, &c., Bank Corporation*, 15 L. T. 602; W. N. 1867, 41; *Alexandra Hall Co.*, 16 L. T. 7.

(*c*) Gen. Order, Nov. 1862, Rule 30 *infra*.

give a similar notice. But he is not bound to do so, and the fact that he has omitted to do so is no defence to an action for calls (*d*).

It is to be observed that under this section the list is only *primâ facie* evidence of liability, while under sects. 102, 106, in a winding-up by the Court an order for payment of a call is, subject to appeal, conclusive evidence that the money is due: and again, that while to a call in a winding-up by the Court sect. 120 applies, in a voluntary winding-up the call can only be enforced by action or under sect. 138, in which it would be open to the contributory to contest his liability. There is not, therefore, the same necessity for notice in a voluntary winding-up (*d*).

Quære, whether the liquidator in a winding-up under supervision has power to rectify the register without applying to the Court (*e*).

In a voluntary winding-up *semble* he has power under this clause to do so (*f*).

"Contributory" includes a holder of fully paid-up shares. And, therefore, when all debts have been provided for, a call, whose only object is to adjust the rights of the partly paid-up and fully paid-up shareholders, is valid (*g*). (9.)

The liquidators can enforce a call previously made by the directors (*h*).

Effect of winding-up on share capital of company limited by guarantee.

134. Where a company limited by guarantee, and having a capital divided into shares, is being wound up voluntarily, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a specialty debt (*a*) due from each member to the company to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the liquidators.

(*a*) ss. 75, 90.

Power of company to delegate authority to appoint liquidators.

135. A company about to be wound up voluntarily, or in the course of being wound up voluntarily, may, by an extraordinary resolution (*a*), delegate to its creditors, or to any committee of its creditors, the power of appointing liquidators or any of them, and supplying any vacancies in the appointment of liquidators, or may by a like resolution enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised; and any act done by the creditors in pursuance of such delegated power shall have the same effect as if it had been done by the company (β).

(*a*) s. 129. (β) s. 133 (3)—(6); ss. 140, 141.

Arrangement when binding on creditors.

136. Any arrangement (*a*) entered into between a company about to be wound up voluntarily, or in the course of being wound up voluntarily, and its creditors, shall be binding on the company if sanctioned by an extraordinary resolution (β), and on the

(*d*) *Brighton Arcade Co.* v. *Dowling*, L.R. 3 C. P. 175, 187; *London Bank of Scotland*, W. N. 1867, 114.

(*e*) *Gilbert's Case*, 5 Ch. 559.

(*f*) *Brighton Arcade Co.* v. *Dowling*, L. R. 3 C. P. 175, 187.

(*g*) *Anglesea Colliery Co.*, 2 Eq. 379; 1 Ch. 555; and see s. 109, and cases there cited.

(*h*) *Stone* v. *City and County Bank*, 3 C. P. Div. 282.

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creditors if acceded to by three-fourths in number and value of the creditors, subject to such right of appeal as is hereinafter mentioned (γ).

(α) *Cf.* s. 159. (β) s. 129. (γ) s. 137.

As to whether this section is applicable in a winding-up under supervision, and as to the joint effect of this section, sect. 159 of this Act, and sect. 2 of the Joint Stock Companies Arrangement Act, 1870, see note to sect. 160, *infra*, and note to sect. 2 of the Act of 1870.

It will be observed that:—

Under this section there is required the sanction of (i.) an extraordinary resolution; (ii.) three-fourths in number and value of the creditors; and (iii.) the approbation of the Court if applied to:

Under sect. 159 there is required (i.) in a compulsory winding-up the sanction of the Court; in a winding-up under supervision, the sanction of the Court, if the liquidator has been put under restrictions, but otherwise only that of an extraordinary resolution, as in a voluntary winding-up (*i*); in a voluntary winding-up the sanction of an extraordinary resolution; (ii.) no majority of creditors, because there is no power to bind any but assenting creditors; while as to (iii.) the intervention of the Court might, in any case where it is not required by the Act, be called in under sect. 138.

Under sect. 2 of the Act of 1870 there is required (i.) no sanction on the part of the contributories; (ii.) the sanction of three-fourths in value—not in number and value—of the creditors; (iii.) the sanction of the Court.

Power of creditor or contributory to appeal.

137. Any creditor or contributory of a company that has in manner aforesaid (α) entered into any arrangement with its creditors may, within three weeks from the date of the completion of such arrangement, appeal to the Court against such arrangement, and the Court may thereupon, as it thinks just, amend, vary, or confirm the same.

(α) s. 136.

The application will be made by petition or motion, or if the judge shall so direct by summons at chambers (*k*).

Power for liquidators or contributories in voluntary winding-up to apply to Court.

138. Where a company is being wound up voluntarily the liquidators or any contributory of the company may apply (α) to the Court in England, Ireland, or Scotland, or to the Lord Ordinary on the Bills in Scotland in time of vacation, to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court or Lord Ordinary, in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede, wholly or

(*i*) *Wright's Case*, 5 Ch. 437; see *infra*, s. 160, n.
(*k*) Gen. Order, Nov. 1862, Rule 51.

partially to such application, on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree on such application as the Court thinks just. Sect. 138.

(*a*) Gen. Order, Nov. 1862, Rule 51.

The object of the Act is that a company and its creditors shall be left if possible to settle their affairs without coming to the Court at all, either for a compulsory winding-up or for a winding-up under supervision, but to provide them [*quære*, as to the creditors] under this section with the means of access to the Court, whenever any question arises in the voluntary winding-up, just in the same way as when any question arises in the case of a compulsory winding-up or under supervision (*l*). Effect of section:—

And, therefore, in several cases the Court has discouraged any attempt to draw a distinction between the jurisdiction given to the Court in a voluntary winding-up, and in a winding-up under a compulsory order or under supervision (*m*).

Thus the Court has declined to make a supervision order on a contributory's petition expressly on the ground, that whatever is the jurisdiction of the Court under the supervision order would be its jurisdiction under a voluntary winding-up; that the contributories can have exactly the same protection in any particular instance by applying under this section as they would have under a supervision order (*n*). The Court will not readily cut down its power under this section (*o*). as to contributories

As regards creditors it is to be observed that the section does not specify creditors as being persons entitled to apply, and it is conceived that there is not jurisdiction to entertain a creditor's application (*p*). The Court would probably, however, find, if possible, a way out of the difficulty; and it has been said that if the liquidator do not do his duty, as, for example, by taking the opinion of the Court under this section in a proper case, it would be in the power of a creditor to apply for a proper order, which would give him some opportunity of obtaining the decision of the Court (*q*). But *quære*, this can only be by obtaining a compulsory order or a supervision order under sects. 145, 147 (*r*). as to creditors.

The order may be made whenever the Court is satisfied that it will be "just and beneficial." These words have been considered in *Gold Co.* (*s*), and *Metropolitan Bank, Heiron's Case* (*t*). "Just and beneficial."

Where the liquidator has allowed a claim against the company, and some of the shareholders dissent, it is not the liquidator's duty to bring the matter before the Court, he should leave the dissentient shareholders to do so (*u*). Who should apply.

But, in general, application should, it is conceived, be made by the liquidator, for contributories, not standing in an official position, and not under the control of the Court, may not be able to obtain an order so unfettered as would be given to the liquidator (*x*).

(*l*) See *Rance's Case*, 6 Ch. 104, 115.

(*m*) See *Black & Co.'s Case*, 8 Ch. 254, 263.

(*n*) *Bank of Gibraltar and Malta*, 1 Ch. 69; *Beaujolais Wine Co.*, 3 Ch. 15, 25; *Star and Garter Hotel Co.*, 28 L. T. 258; W. N. 1873, 74.

(*o*) *Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808.

(*p*) See *Poole Firebrick Co.*, 17 Eq. 268, 272; *Needham* v. *Rivers Protection Co.*, 1 Ch. D. 253, 254; *Stone* v. *City and County Bank*, 3 C. P. Div. 282, 314.

(*q*) *Rance's Case*, 6 Ch. 104, 115.

(*r*) See also *ante*, pp. 245, 246.

(*s*) 12 Ch. Div. 77.

(*t*) 15 Ch. Div. 139.

(*u*) *Licensed Victuallers, &c., Co.*, 15 W. R. 917; 17 L. T. 8.

(*x*) *Penysyflog Iron Co.*, 30 L. T. 861;

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The application may, it is conceived, in a proper case, be made in the first instance at chambers (*y*): although Gen. Order, Nov. 1862, Rule 51, directs that it be made by petition or motion. An application by motion is right (*z*).

In what branch of the Court application to be made.

Where one proceeding in respect of a company in voluntary winding-up, *e.g.*, an action, has been commenced in one branch of the Court, any other proceeding under the same winding-up ought to be instituted in the same branch (a).

There are many instances of petitions by liquidators presented under this section for the direction of the Court (*b*).

Power of liquidators to call general meeting.

139. Where a company is being wound up voluntarily the liquidators may, from time to time, during the continuance of such winding-up, summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution (α) or extraordinary resolution (β), or for any other purposes they think fit; and in the event of the winding-up continuing for more than one year, the liquidators shall summon a general meeting of the company at the end of the first year, and of each succeeding year from the commencement of the winding-up, or as soon thereafter as may be convenient, and shall lay before such meeting an account shewing their acts and dealings, and the manner in which the winding-up has been conducted during the preceding year (γ).

(α) s. 51. (β) s. 129.
(γ) See also Comp. (W. Up) Act, 1890, s. 23.

Power to fill up vacancy in liquidators.

140. If any vacancy occurs in the office of liquidators appointed by the company, by death, resignation, or otherwise, the company in general meeting may, subject to any arrangement they may have entered into with their creditors (α), fill up such vacancy, and a general meeting for the purpose of filling up such vacancy may be convened by the continuing liquidators, if any, or by any contributory of the company, and shall be deemed to have been duly held if held in manner prescribed by the regulations of the company, or in such other manner as may, on application by the continuing liquidator, if any, or by any contributory of the company, be determined by the Court.

(α) s. 135.

Power of Court to appoint liquidators.

141. If from any cause whatever there is no liquidator acting in the case of a voluntary winding-up, the Court may, on the

W. N. 1874, 166. But see *Silkstone and Dodworth Co., Whitworth's Case*, 19 Ch. Div. 118; and *ante*, p. 301.

(*y*) *Mercantile Discount Co.*, W. N. 1866, 21; *British Envelope Co.*, W. N. 1885, 84.

(*z*) *Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808.

(a) *Alexandra Printing Ink Co.*, 18 L. T. 18; 16 W. R. 456; and see Gen. Order, Nov. 1862, Rule 74.

(*b*) See *e.g. Alliance Society*, 28 Ch. Div. 539.

application (α) of a contributory, appoint a liquidator or liquidators; the Court may also, on due cause shewn (β), remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding-up (γ). Sect. 141.

(α) Gen. Order, Nov. 1862, Rule 51. (β) *Cf.* s. 93.
(γ) *Cf.* ss. 150, 152.

No liquidator. Where there was a question whether the sole voluntary liquidator had been properly appointed or not, the Court in order to quiet the question confirmed him in the office of liquidator (*c*).

Where the sole liquidator had become of unsound mind the Court made an order for his removal and appointed another liquidator (*d*).

Removal of liquidators; The Court has under this section power to remove any liquidator appointed by the company or the Court in a voluntary winding-up, and, under the 150th section, to remove any liquidator appointed by the Court in a voluntary winding-up continued under supervision.

Quære, whether in a voluntary winding-up an additional liquidator may be appointed for the protection of a petitioner without making a supervision order (*e*).

after supervision order made. The Court has also, after making an order to continue a voluntary winding-up under supervision, power under this section and sect. 150, or, at any rate, under sects. 151 and 93, to remove the liquidators appointed by the company before the order, and appoint others (*f*).

"Due cause." The words "on due cause shewn" have not the effect of "if the Court shall think fit." It was said by Jessel, M.R., that "they point to some unfitness of the person—it may be from personal character or from his connection with other parties or from circumstances in which he is mixed up—some unfitness in a wide sense of the term" (*g*). But these words are not to be understood as laying down any exhaustive rule. If the Court is satisfied on the evidence that it is desirable in the interests of all those interested in the assets that a particular person shall not manage the assets the Court has power to remove him, without there being shown any personal misconduct or unfitness (*h*).

Thus Malins, V.C., held, that to satisfy the words "due cause shewn" it was not necessary to prove against the liquidator anything amounting to misconduct or personal unfitness, that the Court might take all the circumstances into consideration, and if it found that it was, on the whole, desirable that a liquidator should be removed, it might remove him (*i*), but that in a voluntary winding-up the leaning of the Court was to leave the shareholders as far as possible to the exercise of their own discretion, and therefore it did not follow that, because the Court thought an appointment more for the benefit of the company might have been made, it would interfere and substitute other liquidators (*k*).

In the following instances orders have been made for removal:—the liqui-

(*c*) *Indian Zoedone Co.*, 26 Ch. Div. 70.
(*d*) *North Molton Mining Co.*, W. N. 1886, 78; 54 L. T. 602; 34 W. R. 527.
(*e*) *Llanfyrnach Silver Lead Mining Co., E. p. Turner*, 9 W. R. 500; 4 L. T. 154; see *infra*, s. 150.
(*f*) *E. p. Pulbrook, E. p. Rawlings*, 2 D. J. & S. 348; *United Merthyr Collieries Co.*, W. N. 1867, 99; 16 L. T. 170; and see s. 150; *Devonshire Silkstone Coal Co.*, W. N. 1878, 71, 173.
(*g*) *Sir John Moore Co.*, 12 Ch. Div. 325, 331.
(*h*) *Adam Eyton, Limited*, 36 Ch. Div. 299.
(*i*) *Marseilles Extension, &c., Co.*, 4 Eq. 692; *British Nation Assurance Society, E. p. Henderson*, 14 Eq. 492.
(*k*) *British Nation Society, E. p. Henderson*, 14 Eq. 492.

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dator was unwilling to take proceedings (which the Court thought ought to be taken) against directors with whom he was intimate (*l*); the trustee (in bankruptcy) was acting in fact, although not as the Court thought dishonestly, in the interest of the debtor rather than of the creditors (*m*); the debts more than absorbed all the assets, and the creditors desired the removal of the liquidator appointed by the shareholders (*n*); creditors to a very large amount offered to pay into Court enough to satisfy in full the claims of all other creditors and wished the assets to be administered by their nominee (*o*); the sole liquidator became of unsound mind (*p*); in a winding-up under supervision two liquidators were appointed, one of them went to Canada, giving a power of attorney to three persons to act for him in his absence (*q*).

The matter is one of judicial discretion, so that the Court of Appeal will not interfere with the decision of a judge if he has exercised his discretion according to law (*r*), for he has much better means of judging than the Court of Appeal (*m*), but inasmuch as due cause must be shewn for removal, the Court of Appeal must see whether cause is shewn or not (*s*) (*m*). A liquidator may appeal against the order removing him (*o*).

Liquidators on conclusion of winding-up to make up an account.

142. As soon as the affairs of the company are fully wound up, the liquidators shall make up an account shewing the manner in which such winding-up has been conducted, and the property of the company disposed of; and thereupon they shall call a general meeting of the company for the purpose of having the account laid before them, and hearing any explanation that may be given by the liquidators: the meeting shall be called by advertisement, specifying the time, place, and object of such meeting; and such advertisement shall be published one month at least previously to the meeting, as respects companies registered in England in the *London Gazette*, and as respects companies registered in Scotland in the *Edinburgh Gazette*, and as respects companies registered in Ireland in the *Dublin Gazette*.

Liquidators to report meeting to registrar.

143. The liquidators shall make a return to the registrar of such meeting having been held, and of the date at which the same was held, and on the expiration of three months from the date of the registration of such return the company shall be deemed to be dissolved (*a*): if the liquidators make default in making such return to the registrar they shall incur a penalty not exceeding five pounds for every day during which such default continues.

(*a*) s. 111, as to winding-up by the Court.

Effect of dissolution.

If an application be made to the Court after the registration of the return, but before the expiration of the three months limited by this section, the

(*l*) *Sir John Moore Co.*, 12 Ch. Div. 325.
(*m*) *E. p. Newitt*, 14 Q. B. Div. 177.
(*n*) *Oxford Building Soc.*, 49 L. T. 495.
(*o*) *Adam Eyton, Limited*, 36 Ch. Div. 299.
(*p*) *North Molton Mining Co.*, W. N. 1886, 78; 34 W. R. 527.
(*q*) *Scotch Granite Co.*, 17 L. T. 533.
(*r*) See *E. p. Sheard*, 16 Ch. Div. 107.
(*s*) *Sir John Moore Co.*, 12 Ch. Div. 325, 331.

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Court has jurisdiction to make an order in the matter of the winding-up notwithstanding that the three months have elapsed before the order is made (*t*).

But after the three months have expired there is no longer a company. It is an intelligible proposition that if the dissolution has been obtained by fraud, the Court may have power in a proceeding properly instituted for that purpose to declare the dissolution void, and in that case there will be an existing company which may be wound up compulsorily, or in whose voluntary liquidation an application may be entertained. But unless and until the dissolution is so set aside there is no corporate body in existence. And therefore petitions for a compulsory order presented by a debenture-holder (*u*) and by a creditor (*x*) after a dissolution under this section have been dismissed: and even an application by creditors, of whose claim the company had notice before the dissolution, was dismissed as not having been preferred before the company ceased to exist (*y*).

In these cases it was sought to be argued that the introductory words of sect. 142 form a condition precedent to the dissolution, and that if outstanding claims are shewn to remain, the affairs of the company have not been "fully wound up," and that therefore there has been no dissolution. This seems to be sufficiently answered by pointing to those provisions of the Act which give creditors ample opportunity of preferring their claims and stopping the dissolution from being brought about (*u*). "Fully wound up" means "as far as the liquidator can wind them up," that is when the liquidator has disposed of the assets as far as he can realise them, got in the calls as far as he can enforce them, paid the debts as far as he is aware of them, and done all that he can do in winding up the affairs (*x*).

After dissolution had it is possible that if the liquidator had wilfully left unpaid a debt of which he had notice he might be personally liable to the creditor (*x*), and *quære* whether in some cases it might not be possible, in a proper proceeding, to sue the individual corporators, notwithstanding the extinction of the corporate life.

Industrial societies.

The Industrial and Provident Societies Act, 1862, provided by sect. 18, that the dissolution of those societies should not prevent the winding up of their affairs, so far as they remain unsettled. By the Act of 1876, which repeals that of 1862, this is not re-enacted.

Powers of dissolution.

As to the effect, as regards the liabilities of a company, of a so-called dissolution under a power contained in its deed of settlement, the cases given in the note, which are not in all respects easy to reconcile, may be consulted (*z*).

Costs of voluntary liquidation.

144. All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims (*a*).

(*a*) *Cf.* s. 110.

(*t*) *Crookhaven Mining Co.*, 3 Eq. 69.

(*u*) *Pinto Silver Mining Co.*, 8 Ch. Div. 273.

(*x*) *London and Caledonian Insurance Co.*, 11 Ch. Div. 140; *Schooner Pond Coal Co.*, W. N. 1888. 70.

(*y*) *Westbourne Grove Drapery Co.*, W. N. 1878, 195.

(*z*) *Carr's Case*, 33 Beav. 542; *Times Life Assurance Co.*, 5 Ch. 381, 389, n.; *Mosley's Case* (Alb. Arb. Minutes, p. 953); *Wood's Case* (Alb. Arb.), Reil. 54; 15 Sol. J. 693; *Barnes's Case* (Enr. Arb.), L. T. 72; 17 Sol. J. 594; *Swift's Case, Kelly's Case* (Eur. Arb.), L. T. 89; and the cases cited *supra*, p. 40 (*s*).

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"All other claims" must mean all other claims at the date of the winding-up. If the liquidator, *i.e.* the estate in liquidation, incurs obligations, these must come first; and therefore costs which a liquidator had been ordered to pay out of the assets were entitled to priority over the costs of winding-up where there were not assetsenough for both (a).

Liquidators not responsible for costs.

Where the assets of the company are insufficient to pay the costs of the winding-up, the liquidators cannot be made personally responsible to the solicitors for the deficiency (*b*). So also in a compulsory winding-up (*c*).

Costs as between liquidator and mortgagees.

If the company's property is mortgaged, if, that is, the company is entitled only to an equity of redemption, it is the equity of redemption only that is assets for payment of costs. The liquidators' costs must therefore, of course, stand behind those of the mortgagees, save in so far as the liquidators' costs are costs of preservation, or realisation, of which the mortgagees have had the benefit (*d*).

See further, notes to sect. 110.

Saving of rights of creditors.

145. The voluntary winding up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the Court (*a*) if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up.

(*a*) *i.e.* before dissolution under s. 143, *Pinto Leite Co.*, 8 Ch. Div. 273.

This section is not confined to the case where the voluntary winding-up commenced before the petition was presented. If after petition presented the company goes into voluntary liquidation, the creditor may be called upon to shew that he will be prejudiced by the voluntary winding-up (*e*).

General principles.

As to the circumstances under which a company may be wound up by the Court, and the orders which will in different cases be made on a petition for having a company so wound up, see sects. 79, 80, and 91; and see also sects. 147, 149.

Upon the question of the general principles to which the Court will have regard in choosing between a voluntary and a compulsory winding-up, it is conceived that (due regard being had to those sections of this Act (*f*) which provide that the Court may have regard to the wishes of creditors and contributories) the observations of Turner, L.J., in *Re Northumberland and Durham District Banking Co.* (*g*) may be cited as equally applicable to cases arising under this Act. A compulsory order, his Lordship said, ought there to be made because "there have been preferences made by the directors, and there are transactions requiring investigation (*h*), and there are powers given in the case of a compulsory winding-up which are not given to liquidators under a voluntary winding-up. It appears, too, that there are very large calls which must necessarily be made, and I do not find any provisions in the Act by which the liquidators under a voluntary winding-up have any power to proceed for the recovery of those calls otherwise than

(*a*) *Home Investment Society*, 14 Ch. D. 167; *Dominion of Canada Plumbago Co.*, 27 Ch. Div. 33, not following *Dronfield Silkstone Co.*, 23 Ch. D. 511; and see *ante*, pp. 243, 297.

(*b*) *Trueman's Estate*, *Hooke* v. *Piper*, 14 Eq. 278; and see *In re Massey*, 9 Eq. 367.

(*c*) *Anglo-Moravian Co.*, *E. p. Watkin*, 1 Ch. Div. 130.

(*d*) *Regent's Canal Ironworks Co.*, *E. p. Grissell*, 3 Ch. Div. 411.

(*e*) *New York Exchange*, 39 Ch. Div. 415.

(*f*) ss. 91, 149.

(*g*) 2 De G. & J. 357, 378.

(*h*) *Cf. United Service Co.*, 7 Eq. 76.

by action (*i*), whereas better and more available powers exist for the purpose of enforcing those calls under a compulsory winding-up. . . . I think that in cases of this enormous magnitude, where such vast interests are at stake, where the most ample powers which the law has given must be required to be exercised; where there have been transactions justifying, if not requiring investigation; where it may be doubtful whether the property of the shareholders will answer the liabilities; where there is danger to the creditors of the shareholders escaping from their liabilities—in all such cases my very clear and decided opinion is that, having regard to the powers which may be put in force under a winding-up by the Court, and which cannot be exercised in the case of a voluntary winding-up, a winding-up by the Court ought to be preferred to a voluntary winding-up."

Contributory's petition.

From the provision that a voluntary winding-up shall not be a bar to the right of a creditor to have a compulsory order, arises the implication that it is a bar to any such right in a contributory. And in *Gold Co.* (*k*) James and Baggallay, L.JJ., intimated that had the matter been *res integra* they would have been disposed so to hold. The decision in that case has now laid down the rule in this way, that after voluntary winding-up commenced a compulsory order cannot be made upon a contributory's petition unless either (1) a case of fraud in passing the voluntary resolution is made out, *e.g.* that it was carried by the vote of a majority implicated in transactions to be investigated, or (2) the petition is supported by creditors (*l*). In the latter case the petition might possibly be amended or treated as amended (*l*).

As the decision in the *Gold Co.* (*k*) did not overrule any of the previous cases, but, on the contrary, proceeded upon the footing that a construction of the section had been established, it is still necessary to examine those cases in detail.

The corresponding section of the Act of 1856 (19 & 20 Vict. c. 47, s. 105) is, "The voluntary winding up of a company shall not prejudice the right of any creditor of such company to institute proceedings for the purpose of having the same wound up by the Court." Upon which section it was held in *Re Fire Annihilator Co.* (*m*) that a compulsory order could be so made upon a contributory's petition; and the proceedings in the voluntary winding-up having been dilatory and unsatisfactory, and not having come to a conclusion at the end of five years, a compulsory order was there made.

An opinion was expressed by Turner, L.J., in *In re Bank of Gibraltar and Malta* (*n*) that this section (the 145th) did, by specifying creditors, exclude contributories: but there are cases in which on a contributory's petition a compulsory order has been made, although it is not without very sufficient reason that such an order will be made.

Thus, in *Re London Flour Co.* (*o*) Stuart, V.C., held that the Court had jurisdiction to make such an order, and he there made a compulsory order; which was, however, in the absence of fraud, discharged on appeal, as a majority of the shareholders and creditors were in favour of a voluntary winding-up.

In *Re Lonsdale Vale Ironstone Co.* (*p*), the petition being supported by

(*i*) This is provided for by this Act by s. 138.

(*k*) 11 Ch. Div. 701.

(*l*) *Cf. Vron Colliery Co.*, 20 Ch. Div. 442, 447.

(*m*) 32 Beav. 561.

(*n*) 1 Ch. 69, 74; and see *Imperial Bank of China, India, and Japan*, 1 Ch. 339; *London and Mercantile Discount Co.*, 1 Eq. 277.

(*o*) 16 W. R. 474, 552; 17 L. T. 636; 19 L. T. 136.

(*p*) 16 W. R. 601.

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creditors, a compulsory order was made. The shares were in this case fully paid up, and the assets insufficient to pay the creditors in full, so that the contributories had really no interest in the estate.

In *Re Oriental Commercial Bank* (*q*) on a petition presented by the directors of the company, a compulsory order was made at the request of some of the creditors; which, on appeal, a majority of the creditors being in favour of a winding-up under supervision, was changed into a supervision order.

In *Re General International Agency Co.* (*r*) no question was made that a compulsory order could have been made on a shareholder's petition, and the Court gave reasons for taking the course of making a supervision order.

But the strongest case, perhaps, is *Re Littlehampton, Havre, &c., Steamship Co., Ex parte Ellis* (*s*) (although this point does not seem to have been discussed), where, notwithstanding that the company was in course of voluntary winding-up with the assent of a large majority of its creditors, an order for winding-up by the Court was made on the petition of a scripholder on his admitting himself to be a contributory, there being danger of want of efficient supervision under the voluntary winding-up. It appears, however (*t*), although it is not so stated in the report, that in this case the petition was presented before the voluntary resolutions were passed.

Where in the interval between the passing and the confirmation of a special resolution for voluntary winding-up a contributory's petition was presented, a compulsory order was made upon it (*u*).

A contributory may, after the commencement of a voluntary winding-up, obtain a supervision order under sect. 147: but special circumstances must be proved for that (*x*).

Creditor's petition.

As a general rule, the right of a creditor is absolute to have a compulsory order (*y*), if he brings his case within the section (*z*).

Thus, where the affairs of the company required a searching investigation, and the assets and interests concerned were very large, a compulsory order was made on a creditor's petition, without waiting for a petition by the company to continue the voluntary winding-up under supervision to be heard (a).

And, where a voluntary winding-up had been going on for more than a year, and no dividend had been paid, and the only excuse was, that the liquidator was prosecuting a claim against the late manager of the company, a compulsory order was made on the petition of a single creditor whose debt amounted to three-fourths of the whole debts of the company (*b*).

So where the voluntary liquidator was proceeding at his own leisure to realise the property, and selling it piecemeal at a loss, and it was alleged that he was the nominee of, and acting in the interest of the shareholders, a compulsory order on a creditor's petition which was supported by the majority of the creditors was held to be *ex debito justitiæ* (*c*).

But the creditor must shew the Court that his rights will be prejudiced by

(*q*) 15 W. R. 7; 14 L. T. 755; 15 L. T. 8.
(*r*) 36 Beav. 1; 13 W. R. 363; 34 L. J. (Ch.) 337.
(*s*) 34 L. J. (Ch.) 237; 34 Beav. 256; 2 D. J. & S. 521.
(*t*) See 11 Ch. Div. 717.
(*u*) *West Surrey Tanning Co.*, 2 Eq. 737.
(*x*) See *Gold Co.*, 11 Ch. Div. 701, 718.
(*y*) *Manchester Queensland Cotton Co.*, 15 W. R. 1070; 16 L. T. 583; *General Rolling Stock Co.*, 34 Beav. 314; 13 W. R. 423; but see ss. 79, 91, 149.
(*z*) See *Universal Drug Supply Association*, 22 W. R. 675; W. N. 1874, 125.
(a) *Barned's Banking Co.*, 14 W. R. 722; 14 L. T. 451.
(*b*) *Manchester Queensland Cotton Co.*, 15 W. R. 1070; 16 L. T. 583.
(*c*) *Tramway Wheel Co.*, W. N. 1873, 60.

a voluntary winding-up; and if he do not, he cannot claim his order *ex debito justitiæ* (*d*).

Thus where the petitioner claimed to be a creditor for about £50, and having been formerly the manager of the company, had acted for some time under the voluntary liquidators, and then quarrelling with them, presented the petition; and upon the facts it appeared that the debts were about £200, the assets already got in £350, and the principal creditors were opposed to an order being made, the order was refused (*d*).

But where the liquidator paid some debts in full, and offered the petitioner a composition, he was entitled to an order (*e*).

The Court will favour a voluntary winding-up where the creditors are willing to support it (*f*); and will lean rather to a winding-up under supervision than to a winding-up by the Court, except in case of fraud or undue influence (*g*).

Where, however, there had been considerable delay, and the contributories had, nevertheless, not taken steps to express their wishes, a compulsory order was made, on a petition by the directors of the company, at the request of some of the creditors, so as to protect their interests, although the contributories had at the last moment passed a resolution in favour of winding-up under supervision, and other creditors did not oppose it. On appeal, however, a supervision order was made, a majority of the creditors having expressed themselves in favour of it (*h*).

Result of order.

The result of a compulsory order superseding a voluntary resolution is not to invalidate what has been done under the voluntary winding-up even when no order adopting the proceedings has been made under sect. 146. Where in the interval between voluntary resolutions and subsequent presentation of a petition on which a compulsory order was afterwards made a landlord distrained for rent, his distress was not allowed to proceed (*i*).

Power of Court to adopt proceedings of voluntary winding-up.

146. Where a company is in course of being wound up voluntarily, and proceedings are taken for the purpose of having the same wound up by the Court (*a*), the Court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound up by the Court, provide in such order or in any other order for the adoption of all or any of the proceedings taken in the course of the voluntary winding-up (β).

(*a*) ss. 145, 79.

(β) *E.g.* the Court might adopt the list of contributories, and thus might preserve the liability of B. contributories who might otherwise escape: *Taurine Co.*, 25 Ch. Div. 118, 129, 135, 139.

As to the commencement of the winding-up in such a case, see sect. 152.

In *Re Hertfordshire Brewery Co.* (*k*) liberty was given to adopt any of the proceedings under a previous order to wind up under supervision.

It does not follow, because the Court does not under this section adopt

(*d*) *Universal Drug Supply Association*, 22 W. R. 675; W. N. 1874, 125.

(*e*) *Caerphilly Colliery Co.*, 32 L. T. 15.

(*f*) *Lonsdale Vale Ironstone Co.*, 16 W. R. 601.

(*g*) *Inns of Court Hotel Co.*, W. N. 1866, 348; *United Merthyr Collieries Co.*, 16 L. T. 170; and see s. 147; *Owen's Patent Wheel Co.*, 29 L. T. 672; 22 W. R. 151; W. N. 1873, 226.

(*h*) *Oriental Commercial Bank*, 15 W. R. 7; 14 L. T. 755; 15 L. T. 8.

(*i*) *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250. But see this case discussed in *Taurine Co.*, 25 Ch. Div. 118.

(*k*) 22 W. R. 359; 43 L. J. (Ch.) 358; W. N. 1874, 38.

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the proceedings, that therefore everything done under the voluntary winding-up is nullified and abrogated (*l*).

Where a company, formed and registered under the Act of 1856, but not registered under that of 1862, passed resolutions to wind up voluntarily after the latter Act came into operation, *quære*, whether there was jurisdiction, on applying to the Court for an order, to adopt the proceedings in the voluntary winding-up (*m*).

Winding-up subject to the Supervision of the Court.

Power of Court, on application, to direct winding-up subject to supervision.

147. When a resolution has been passed by a company to wind up voluntarily (*a*), the Court may make an order (*β*), directing that the voluntary winding-up should continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others, to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just.

(*a*) s. 129. (*β*) Gen. Order, Nov. 1862, Rules 6, 7, and Form 4.

Order is in discretion of Court.

This section leaves it absolutely in the discretion of the Court whether an order shall be made or not, and the only clue which is given by the Act as to the manner in which such discretion is to be exercised is given by the 149th section, from which it appears that the wishes of the creditors and contributories are to be regarded (*n*).

Contributory's petition.

The policy of the Act is primarily to let the shareholders meet and regulate the winding up of the company as they would regulate any other part of their business (*o*); and, therefore, unless it appears that in passing the resolution for a voluntary winding-up the minority have been overborne by fraud or by improper or corrupt influence, the Court will not in general on the petition of a *contributory* make an order to continue the voluntary winding-up under supervision (*p*); and this is no hardship on the contributories, for should any wrongful doing on the part of the liquidators arise, it is open to the contributories to come to the Court upon an originating summons under sect. 138 (*q.v.*).

The Act by s. 129 creates as between the contributories a domestic tribunal with whose decision the Court will not lightly interfere (*q*).

If there have been informality in the resolutions for voluntary winding-up, the contributories should procure another meeting to be called, and not at once present a petition (*r*).

Miscouduct of liquidators.

It was held in *In re Imperial Bank of China* (*s*) that, in the absence of

(*l*) *Cleve* v. *Financial Corporation*, 16 Eq. 363, 372, 380; *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250.

(*m*) *Minima Organ Co.*, 11 W. R. 530; 8 L. T. 109; and see s. 199. It is presumed that this is now decided in the affirmative by the cases cited under s. 129.

(*n*) *Bank of Gibraltar and Malta*, 1 Ch. 69; *Beaujolais Wine Co.*, 3 Ch. 15; *Owen's Patent Wheel Co.*, 29 L. T. 672; 22 W. R. 151; W. N. 1873, 226.

(*o*) *Cf. British Nation Association*, 14 Eq. 492.

(*p*) *London and Mercantile Discount Co.*, 1 Eq. 277; *Imperial Mercantile Credit Association*, W. N. 1866, 257; *St. David's Gold Mining Co.*, 14 W. R. 755; 14 L. T. 539; *Beaujolais Wine Co.*, 3 Ch. 15; *Irrigation Co. of France*, 6 Ch. 176; *Madras Coffee Co.*, 17 W. R. 643; *Gold Co.*, 11 Ch. Div. 701, 718; and see s. 145.

(*q*) *Langham Skating Rink Co.*, 5 Ch. Div. 669; *Gold Co.*, 11 Ch. Div. 701, 710; *Middlesborough Assembly Rooms*, 14 Ch. Div. 104.

(*r*) *London Flour Co.*, 17 L. T. 636; 19 L. T. 136; 16 W. R. 474, 552.

(*s*) 1 Ch. 339.

any distinct allegation in a shareholder's petition of misconduct on the part of voluntary liquidators, the Court would make no order for continuing the voluntary winding-up under the supervision of the Court.

But the personal misconduct of voluntary liquidators is not in itself a ground for making a supervision order on a shareholder's petition (*t*). The proper course in such a case is to bring an action against the liquidators (*u*).

And a creditor's petition to supersede a winding-up under supervision by a compulsory order on account of the misconduct of the liquidators has been refused, as the right course was to apply in chambers to change the liquidators (*x*).

Where, however, the person complaining of the misconduct is not a contributory but a creditor, and his complaint is that the assets are being misapplied, he is entitled to an order under sect. 145, as he is being prejudiced by the voluntary winding-up (*y*).

Company insolvent.

If the Court finds that the company is hopelessly insolvent, it will, although a section of the shareholders oppose the petition and wish to put an end to the voluntary winding-up and continue the business, refuse to direct a meeting to be held, and will make a supervision order (*z*).

Creditor.

A creditor with an unliquidated claim for damages cannot petition for a supervision order. The only persons who can petition are the company, a creditor, or a contributory. A claimant for unliquidated damages must make himself a creditor by obtaining a judgment before he can petition (a).

There is a case before Romilly, M.R. (*b*), in which the company's lessor, who claimed in respect of past and future rent and for damages, and who had offered to refer his claim to arbitration, presented a petition for a supervision order for the purpose of having his claim settled in chambers, the company having refused to arbitrate. His Lordship there inclined towards making a supervision order, on the ground that the proceeding in chambers was cheaper than either action or arbitration.

A supervision order may in the discretion of the Court be made, and a compulsory order refused, notwithstanding that unpaid creditors ask for a compulsory order (*c*).

See further, sect. 145.

Supervision order on petition praying compulsory order.

Upon a petition for a compulsory order an order to continue a voluntary winding-up under supervision may be and commonly is made without amending the petition. The petition may, no doubt, be treated as amended by stating the voluntary resolution and asking for a supervision order (*d*). But it appears that on a petition for a supervision order the Court will not make a compulsory order if the petitioners do not consent, but may direct the petition to stand over to allow of some one else presenting a petition for a compulsory order (*e*). *Quære* whether the Court can compel a petitioner

(*t*) *Star and Garter Hotel Co.*, W. N. 1873, 74; 28 L. T. 258; *Yorkshire Fibre Co.*, 9 Eq. 650.

(*u*) *London Bank of Scotland*, 15 W. R. 1103; 16 L. T. 783.

(*x*) *London and Mediterranean Banking Co.*, 15 W. R. 33; 15 L. T. 153; W. N. 1866, 317.

(*y*) *Caerphilly Colliery Co.*, 32 L. T. 15.

(*z*) *Prince of Wales Slate Quarry Co.*, 18 L. T. 77.

(a) *Pen-y-Van Colliery Co.*, 6 Ch. D. 477; *cf. Milford Docks Co., Lister's Case*, 23 Ch. D. 292.

(*b*) *Fniscedwyn Iron Co.*, 19 W. R. 194.

(*c*) *Owen's Patent Wheel Co.*, 29 L. T. 672; 22 W. R. 151; W. N. 1873, 226; *Simon's Reef Co.*, W. N. 1882, 173; 31 W. R. 238.

(*d*) *Hodgkinson* v. *Kelly*, 6 Eq. 496, 499; *United Bacon Curing Co.*, W. N. 1890, 74.

(*e*) *Electric Co.*, W. N. 1881, 98; 29 W. R. 714; 50 L. J. (Ch.) 491; 44 L. T. 604.

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Voluntary winding-up irregular.

If by reason of informality, irregularity, or otherwise, the resolutions for voluntary winding-up were not properly passed, the Court of course cannot make a valid supervision order, for it would be an order to continue that which was in its inception invalid (*g*).

Commencement.

A supervision order is an order to continue the voluntary winding-up. The winding-up under supervision is, therefore, deemed to commence at the commencement of the voluntary winding-up (*h*).

Petition for winding-up subject to supervision.

148. A petition, praying wholly or in part that a voluntary winding-up should continue, but subject to the supervision of the Court, and which winding-up is hereinafter referred to as a winding-up subject to the supervision of the Court, shall, for the purpose of giving jurisdiction to the Court over suits and actions, be deemed to be a petition for winding up the company by the Court (*a*).

(*a*) ss. 85, 87.

A petition for a supervision order must be served, not upon the liquidator only (*i*), but upon the company also (*k*). But if the liquidator is appointed before the petition is presented only one set of costs will be allowed (*l*).

And if the liquidator joins in the petition, the company must be served (*m*).

Court may have regard to wishes of creditors.

149. The Court may, in determining whether a company is to be wound up altogether by the Court or subject to the supervision of the Court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may direct meetings (*a*) of the creditors or contributories to be summoned, held, and regulated in such a manner as the Court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court: in the case of creditors, regard shall be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company (β).

(*a*) Gen. Order, Nov. 1862, Rules 45–47; Comp. (W. Up) Act, 1890, ss. 6, 23.

(β) *Cf.* s. 91; and see s. 147.

The following is a collection of cases, falling under this section, with

(*f*) *Chepstow Bobbin Co.*, 36 Ch. D. 563.

(*g*) See *Bridport Old Brewery Co.*, 2 Ch. 191; *Patent Floorcloth Co.*, 8 Eq. 664; *Sheffield Mortgage Co.*, W. N. 1887, 218.

(*h*) See s. 130.

(*i*) Gen. Order, Nov. 1862, R. 3.

(*k*) *Inventors' Association*, 13 W. R. 1015; 12 L. T. 840; 6 N. R. 349; *Petroleum Co.*, 15 L. T. 169; 15 W. R. 29; and see Gen. Order, Nov. 1862, Rule 3.

(*l*) *Hall and Co.*, W. N. 1885, 190; 53 L. T. 633; 34 W. R. 56.

(*m*) *Panonia Leather Cloth Co.*, 13 W. R. 1015.

respect to supervision orders, similar to that under sect. 91 with respect to compulsory orders :—

SHAREHOLDERS' PETITIONS.

SUPERVISION ORDER MADE,

at wish of majority of creditors, and compulsory order discharged on appeal (*n*).

at wish of majority of creditors and shareholders, and compulsory order refused (*o*).

although a section of the shareholders wished to continue the business, company insolvent (*p*).

although it was not clear that a majority were not in favour of a compulsory order (*q*).

COMPULSORY ORDER MADE,

the petition being supported by creditors (*r*).

although voluntary winding-up in progress with assent of large majority of creditors, there being danger of want of efficient supervision (*s*).

ORDER REFUSED,

because no allegation of fraud in obtaining the voluntary resolution (*t*): and no creditors supported (*u*).

CREDITORS' PETITIONS.

SUPERVISION ORDER MADE,

and compulsory order refused, *at wish of majority of creditors* (*x*): by the Court applying sect. 145, although petition preceded voluntary winding-up (*y*).

COMPULSORY ORDER MADE,

without waiting for the company's petition for a supervision order to be heard—affairs required investigation—assets and interests involved very large (*z*).

and supervision order refused, where company had not dealt *bonâ fide* with the petitioner, and the transaction demanded investigation (a).

on petition of single creditor, but for an amount which was three-fourths of the debt—voluntary winding-up had been going on for more than a year, but no dividend paid—company opposed the order (*b*).

at wish of majority of creditors, order made *ex debito justitiæ*: voluntary liquidator not proceeding actively and *bonâ fide* to realise the assets (*c*).

and see further, sect. 91.

(*n*) *Oriental Commercial Bank*, 15 W. R. 7; 14 L. T. 755; 15 L. T. 8; *London Flour Co.*, 16 W. R. 474, 552; 17 L. T. 636; 19 L. T. 136.

(*o*) *Trowbridge Water Supply Co.*, 18 L. T. 115; *Imperial Mercantile Credit Association*, W. N. 1866, 257.

(*p*) *Prince of Wales Slate Quarry Co.*, 18 L. T. 77.

(*q*) *General International Agency Co.*, 36 Beav. 1; 13 W. R. 363; 34 L. J. (Ch.) 337.

(*r*) *Lonsdale Vale Ironstone Co.*, 16 W. R. 601.

(*s*) *Re Littlehampton, Havre, &c., Steamship Co.*, 34 Beav. 256; 34 L. J. (Ch.) 237; 2 D. J. & S. 521.

(*t*) *Sir John Moore Mining Co.*, W. N. 1877, 183; and see *ante*, p. 262.

(*u*) *Gold Co.*, 11 Ch. Div. 701.

(*x*) *Owen's Patent Wheel Co.*, 29 L. T. 672; 22 W. R. 151; W. N. 1873, 226; *West Hartlepool Ironworks Co.*, 10 Ch. 618.

(*y*) *New York Exchange*, 39 Ch. Div. 415.

(*z*) *Re Barned's Banking Co.*, 14 W. R. 722; 14 L. T. 451.

(a) *London and Provincial Starch Co., E. p. Adams*, 16 L. T. 474.

(*b*) *Manchester Queensland Cotton Co.*, 15 W. R. 1070; 16 L. T. 583.

(*c*) *Tramway Wheel Co.*, W. N. 1873, 160.

Sect. 150. Sect. 149 is especially applicable where application for a winding-up order is made, not by creditors, but by shareholders, under the circumstances mentioned in the first four clauses of sect. 79 (*d*).

Power to Court to appoint additional liquidators in winding-up subject to supervision.

150. Where any order is made by the Court for a winding-up subject to the supervision of the Court (*a*), the Court may, in such order or any subsequent order, appoint any additional liquidator or liquidators; and any liquidators so appointed by the Court shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if they had been appointed by the company (β): the Court may from time to time remove any liquidators so appointed by the Court, and fill up any vacancy occasioned by such removal, or by death or resignation (γ).

(*a*) s. 147.
(β) s. 133.
(γ) *Conf.* ss. 141, 152; Gen. Order, Nov. 1862, Rule 16.

Removal of liquidators.

This section empowers the Court to remove liquidators appointed by the Court in a winding-up subject to supervision; and sect. 141 (*q.v.*) to remove the liquidators appointed by the company or the Court in a voluntary winding-up.

As to the removal in a winding-up under supervision of the liquidators appointed by the company before the supervision order, *v. supra*, sect. 141.

The Court has under sect. 141 power to remove and appoint liquidators in a voluntary winding-up, and *quære* in *Llanfyrnach Silver Lead Mining Co.* (*e*) an additional liquidator was appointed for the protection of the petitioner without making a supervision order.

Security.

Where in a voluntary winding-up the shareholders have not required security from a liquidator appointed by them, the Court will not require security from a substituted liquidator appointed by the Court after a supervision order has been made (*f*).

Appointment by the Court.

Where the contributories, on passing a resolution for winding up voluntarily, did not, at the proper time, exercise their right of appointing a liquidator, the Court, on making a supervision order, appointed one, and the Court of Appeal refused to interfere with the discretion of the primary judge (*g*).

But it is competent for the shareholders, after a supervision order has been made, to meet and resolve on the appointment of a new liquidator in order to inform the Court of their wishes. Thus, where, there being disputes between the two liquidators, one of whom had been appointed by the shareholders before, and the other by the Court after supervision order made, the shareholders met and resolved on the appointment of an additional liquidator, the Court confirmed their appointment, and removed the liquidator previously appointed by the Court (*h*).

Effect of order

151. Where an order is made for a winding-up subject to the

(*d*) *Per* Selwyn, L.J., *London Flour Co.*, 16 W. R. 552; 19 L. T. 136.
(*e*) *E. p. Turner*, 9 W. R. 500; 4 L. T. 154.
(*f*) *European Bank, E. p. Paul*, 19 W. R. 268.
(*g*) *London Quays and Warehouses Co.*, 3 Ch. 394.
(*h*) *Montrotier Asphalte Co.*, W. N. 1874, 172.

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of Court for winding-up subject to supervision.

supervision of the Court (*a*), the liquidators appointed to conduct such winding-up may, subject to any restrictions (β) imposed by the Court, exercise all their powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily (γ); but, save as aforesaid, any order made by the Court for a winding-up subject to the supervision of the Court shall for all purposes, including the staying of actions, suits, and other proceedings (δ), be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls (ε), or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court; and in the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression official liquidators shall be deemed to mean the liquidators conducting the winding-up subject to the supervision of the Court.

(*a*) s. 147.
(β) *Cf.* s. 96.
(γ) s. 133.
(δ) ss. 87, 163.
(ε) s. 102.

Restrictions.

"Subject to any restrictions imposed by the Court." In *Re London Quays and Warehouses Co.* (*i*) the liquidator was appointed "to conduct the winding-up of the company, subject to such restrictions as an official liquidator would in a compulsory winding-up be subject to, except so far as the Court may, upon an application for that purpose, modify or dispense with such restrictions in any case or class of cases." The converse case is to be found in *Rochdale Property Co.* (*k*).

Semble, restrictions will not be imposed unless there be a necessity for doing so (*l*).

Powers of liquidators.

This section preserves to the liquidator, when a supervision order is made, the same powers as he had in the voluntary winding-up, but enables the Court to restrict them if it thinks fit. Unless, therefore, the Court have given any directions restricting the exercise of his powers, the sanction of the Court will not be necessary to render valid any arrangement which, in a purely voluntary winding-up, might have been entered into with the sanction of a general meeting (sect. 139); and to this extent sect. 160 must be looked upon as cumulative upon, not as restrictive of, sect. 139 (*m*).

Appointment in certain cases of voluntary liquidators to office of official liquidator.

152. Where an order has been made for the winding up of a company subject to the supervision of the Court (*a*), and such order is afterwards superseded by an order directing the company to be wound up compulsorily (β), the Court may in such last-mentioned order, or in any subsequent order, appoint the voluntary

(*i*) 3 Ch. 394.
(*k*) 12 Ch. D. 775, *ante*, s. 96, note.
(*l*) *Owen's Patent Wheel Co.*, 22 W. R. 151; 29 L. T. 672; W. N. 1873, 226.
(*m*) *Anglo Romano Water Co., Wright's Case*, 5 Ch. 437.

Sect. 152. liquidators or any of them, either provisionally (γ) or permanently, and either with or without the addition of any other persons, to be official liquidators.

(α) s. 147. (β) s. 79. (γ) ss. 85, 92.

A compulsory order will, in general, continue the voluntary liquidators as official liquidators (n).

It is not necessary for the purpose of superseding a supervision order by a compulsory order, to proceed by way of re-hearing or appeal from that order. The Court can under the Act supersede, discharge, or modify its orders from time to time, as circumstances may require, and can, therefore, supersede a supervision by a compulsory order on an original petition for a compulsory order presented subsequent to the supervision order having been made (o).

The cases are few in which the Court would make a compulsory order where there is already a supervision order. In the case of a petition of two small creditors the order was refused (p).

Commencement where compulsory order made after supervision order :— Where a supervision order is superseded by a compulsory order, it has been said that the winding-up will date from the commencement of the winding-up under supervision, *i.e.*, from the resolution to wind up voluntarily, not from the presentation of the petition.

Thus where five months after the commencement of a voluntary winding-up two petitions were presented, the one asking for a supervision order, and the other for a compulsory order, the Court, being of opinion that the winding-up ought to be compulsory, but not wishing to alter the date of its commencement, made a supervision order on the first petition, and an order dated the following day on the second petition for a compulsory winding-up (q). But this case is very difficult to understand and has been said to be hardly an authority for anything (r).

after voluntary winding-up. Where a purely voluntary winding-up is superseded by a compulsory order made upon a petition presented after the commencement of the voluntary winding-up, the commencement is the date of the presentation of the petition (s). The contrary is not decided by *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250 (s).

Supplemental Provisions.

Dispositions after the commencement of the winding-up avoided. 153. Where any company is being wound up by the Court or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company, made between the commencement of the winding-up (α) and the order for winding-up, shall, unless the Court otherwise orders, be void (β).

(α) ss. 84, 130. (β) *Cf.* ss. 114, 131, 163, 164.

Effect of section. In the case of a voluntary winding-up sect. 131 avoids all transfers, except

(n) *London and Mediterranean Banking Co*, 15 W. R. 33; 15 L. T. 153; W. N. 1866, 317.

(o) *London and Mediterranean Bank*, W. N. 1866, 317; 15 L. T. 153; 15 W. R. 33; see, however, *supra*, p. 252.

(p) *Orrell Colliery Co.*, W. N. 1879, 106.

(q) *United Service Co.*, 7 Eq. 76; and see s. 146.

(r) *Taurine Co.*, 25 Ch. Div. 118, 140.

(s) *Taurine Co.*, 25 Ch. Div. 118; diss. Cotton, L.J.

as therein mentioned, or alteration in the *status* of the members of the company after the commencement of the winding-up. In the case of a company wound up by or under the supervision of the Court, a discretion is, by this section, reserved to the Court in setting aside the avoidance in the cases here mentioned. Sect. 153.

In both cases the business of the company is to come to an end, except so far as may be necessary for the beneficial winding up of the same (*t*).

Sect. 114 (now repealed by 30 & 31 Vict. c. 47, s. 1) by constituting a winding-up petition when registered a *lis pendens*, affected the real estate of the company, while this section affects all alienations both of its real and personal estate (*u*).

The words of this section are very wide, and properly so, to prevent, in the interval which must necessarily elapse between the presentation and the hearing of a petition, the improper alienation and dissipation of the property of the company. But the words at the end of the section are necessarily introduced in order to give the Court a discretion to say that a transaction which is, in its opinion, perfectly fair and *bonâ fide* shall stand. Without such a discretion given to the Court it would be open to any one by the mere presentation of a petition, whether well-founded or merely groundless and malignant, to paralyse *ipso facto* the trade of the company, and effectually work its ruin.

In the case of a voluntary winding-up no such considerations arise, as the winding-up takes its origin from the voluntary action of the shareholders.

It is not necessary that the sanction of the Court should be obtained at the time of the transaction which it is sought to establish (*x*).

Thus the Court may establish *bonâ fide* transfers of shares made and completed, in ignorance of the presentation of a petition, between the commencement of the winding-up and the order for winding-up, although it will not enforce specific performance of an agreement for purchase of shares if it have not been completed (*y*). Transfers of shares.

(Under the Act of 1848, the holder of the shares at the time the petition was presented was, upon the construction of the statute, necessarily the contributory (*z*); and execution, previous to the presentation of the petition, of a transfer which was not registered till after the presentation, did not relieve the transferor (a).

And this, as has been seen (*b*), is the case under this Act, and for the purpose of determining the period of time at which shareholders will be debarred from transferring their shares and escaping liability a date earlier than that of the commencement of the winding-up, namely, the date of the stoppage of the company and the issue of a notice of a meeting to pass voluntary resolutions, was adopted in the Glasgow Bank cases (*c*).)

Where persons who had become shareholders by transfer, after the presen-

(*t*) ss. 131, 95.

(*u*) *Barned's Banking Co., E. p. Thornton*, 2 Ch. 171, 179.

(*x*) *Gibbs and West's Case*, 10 Eq. 312, 324.

(*y*) *Emmerson's Case*, 2 Eq. 231; 1 Ch. 433; and see *Walker's Case*, 2 Eq. 554; *Paine* v. *Hutchinson*, 3 Ch. 388, 391. To *Ward and Garfit's Case*, 4 Eq. 189, this section did not apply, for there the transfer was, so far as the transferor and transferee were concerned, completed before the commencement of the winding-up, and the question was only one of registration by the company, as to which see further, s. 35.

(*z*) *Glanville's Case*, 10 Eq. 479.

(a) *Feigan's Case*, W. N. 1873, 16.

(*b*) *Supra*, s. 35, note.

(*c*) See *Mitchell's Case, Rutherfurd's Case*, 4 App. Cas. 548. *Cf. Tennent* v. *Glasgow Bank*, 4 App. Cas. 615; *Mitchell* v. *Glasgow Bank*, 4 App. Cas. 625; and see *Sunderland Building Soc.*, 24 Q. B. D. 394; *North British Building Soc., Carrick's Case*, 22 Sc., L. R. 833; and see *ante*, s. 35, note. Contrast *Taurine Co.*, 25 Ch. Div. 118.

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tation of the petition, appeared on the hearing of the petition, an objection to their being heard, taken on the ground that the transfers were void, was overruled because the company was not then at the hearing being wound up (*d*).

Notice of petition.

A vender of shares cannot profess ignorance of the petition after it has been advertised, the advertisement is notice to all the world (*e*): that is to say, *semble*, if the parties have had such a reasonable time as that knowledge of the advertisement may be imputed to them (*f*). Lord Westbury in the European Arbitration refused to impute notice on the morning of the day following the publication of the *Gazette* (*f*).

A contract for the purchase of shares entered into before the presentation of the petition is not rendered void by its presentation (*g*); neither is such a contract void if entered into in the interval between the presentation of and the order on the petition (*h*); and in the case last referred to it was held that a transfer could be made after the winding-up order.

Disposition of property.

In *Gibbs and West's Case* (*i*) a charge upon certain calls was given by the directors of a company between the commencement of the winding-up and the order, and was confirmed by the Court under this section, the Court being of opinion that it was *bona fide* given to prevent the ruin of the company.

Transactions in the ordinary course of the trade of a company, *bonâ fide* entered into *and completed* before the winding-up order, will always, in the discretion given to the Court, be maintained; but to transactions which at the date of the winding-up order rest only in contract, this section has no application (*k*); in such a case the person with whom the contract is entered into can claim only *pari passu* with the rest of the creditors of the company.

Thus, where after the presentation of a petition, of which the company were aware, but P. was ignorant, P. contracted with an iron company to supply him with, and paid for, iron, he would, if the iron had not been delivered to him, have been entitled only to prove and not to have delivery of the iron (*k*), but it appearing that the iron had been delivered so that the disposition of the property was complete before the winding-up order, P. was allowed to retain the iron (*k*).

In the *Oriental Bank* (*l*) intelligence of the fact that a winding-up petition had been presented and a provisional liquidator appointed could not and did not reach the Mauritius for ten days. In the interval persons in the Mauritius paid money to the officers of the company's branch there for drafts of the company drawn by the Mauritius branch upon the head office in London. Chitty, J., held that the contract was not invalid, as having been entered into by agents whose authority had in fact, though they did not know it, come to an end, and that the creditors were not entitled to have their money refunded, but must prove and take a dividend.

Payment of debt to the company:—

This section has nothing to do with payment to the company of money due

(*d*) *Tumacacori Mining Co.*, 17 Eq. 534, 537.

(*e*) *Emmerson's Case*, 2 Eq. 231; *E. p. Watkins*, 14 L. T. 696; 14 W. R. 817; but see *United Service Co.*, 7 Eq. 76. Where, however, the petition was allowed to stand over for six months, a creditor who presented a second petition was allowed his costs: *Marron Bank Paper Co.*, 38 L. T. 140.

(*f*) *Oriental Bank, E. p. Guillemin*, 28 Ch. D. 634, 640; *National Bank's Case* (Eur. Arb.), L. T. 92; *Empire Assurance Corporation*, 16 L. T. 341; *Owen's Patent Wheel Co.*, 22 W. R. 151; 29 L. T. 672; W. N. 1873, 226.

(*g*) *Chapman* v. *Shepherd*, *Whitehead* v. *Izod*, L. R. 2 C. P. 228; and see s. 131 as to a voluntary winding-up.

(*h*) *Rudge* v. *Bowman*, L. R. 3 Q. B. 689.

(*i*) 10 Eq. 312.

(*k*) *Wiltshire Iron Co., E. p. Pearson*, 3 Ch. 443.

(*l*) *E. p. Guillemin*, 28 Ch. D. 634.

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to the company. After petition presented, and before order made, a debtor may safely pay and take a receipt from the company as before (*m*). The Act contains no provision as to compulsory winding-up corresponding to sect. 133 (5).

by the company.

But payment by the company after the commencement, and after the creditor must be taken to have notice of the commencement of the winding-up, of even a perfectly *bonâ fide* debt of the company, is not a transaction to which the Court will, in the exercise of its discretion, give validity. For to do so would be to sin against the cardinal principle of the Act, viz., *pari passu* distribution amongst creditors.

And therefore, although a creditor who, in ignorance of a petition having been presented, and no later than the morning after its advertisement in the *Gazette*, received payment, was allowed to retain the money, this was only expressly on the ruling that notice of the petition could not be imputed to him (*n*); and where payment of a policy-holder's claim, allowed in April, and due on the 16th of June, was made on the 8th of July, and the petition, on which an order was made on the 12th of January following, was presented on the 10th of June, the policy-holder was made to refund (*o*).

And it can scarcely be doubted that the principle of these cases would be followed in Chancery, for the following proceeds on a similar footing.

A creditor having presented a winding-up petition, the company paid him a part of the debt, and promised to pay the remainder on a certain day. This was not done, and the creditor proceeded with his petition, and an order was made on that and another petition presented by the company. It was held that the creditor must refund what had been paid him (*p*).

If the creditor had received payment and dismissed his petition, this would have been a very different matter, for then the date of commencement of the winding-up would have been altered (*q*).

Liability of directors.

If directors after the presentation of the petition make payments they make them at their peril, and if the payments are improper they are personally liable for the amounts paid (*r*).

Registration of transfer to liquidating company.

The C. Company took a transfer of shares in the B. Company and sent in the transfer for registration. In the interval between sending in the transfer and the actual registration a petition was presented to wind up the C. Company, upon which an order was afterwards made. The registration was held not to be affected by this section, as not being a disposition of the property of the C. Company within its meaning (*s*).

Acceptance of bill.

The acceptance of a bill of exchange is not a disposition of the property of the company within this section, so as to give the Court power to support under this section an acceptance by a director, which was not valid as made by him in the character of liquidator (*t*).

Alteration of status.

After a petition had been presented for winding up a company, a shareholder with knowledge of the petition, on the proposal of the directors, advanced a sum of money on the arrangement that if the company should be able to go on, such sum should be treated as a loan; but if it were wound up, should be taken as paid on account of capital unpaid on his shares. An

(*m*) *Mersey Steel Co.* v. *Naylor, Benzon, & Co.*, 9 Q. B. Div. 648; 9 App. Cas. 434, 440.

(*n*) *National Bank's Case* (Eur. Arb.), L. T. 92.

(*o*) *Brown & Tylden's Case* (Eur. Arb.), L. T. 163; 18 Sol. J. 781.

(*p*) *Liverpool Civil Service Association, E. p. Greenwood*, 9 Ch. 511; *cf. E. p. Boss, Re Whalley*, 18 Eq. 375.

(*q*) See note (*p*); and see *E. p. Bouchard*, 12 Ch. Div. 26.

(*r*) *Neath Harbour Co.*, W.N.1887, 87, 121.

(*s*) *Barned's Banking Co., E. p. Contract Corporation*, 3 Ch. 105.

(*t*) *Bolognesi's Case*, 5 Ch. 567.

Sect. 154. order was afterwards made on the petition; and it was held that such an arrangement was invalid as an alteration in the status of the member, and that he was not entitled to treat the amount as paid upon his shares (*u*).

As to a shareholder who, being an infant at the commencement of the winding-up, subsequently attains his majority, see sects. 22, 131.

As to questions of fraudulent preference, see *infra*, sect. 164.

It seems that notwithstanding this section trustee in bankruptcy may disclaim after winding-up (*x*).

Registration of an unregistered company.

A petition was presented to wind up an unregistered company. The company was then registered, the registrar not being informed of the pendency of the petition; subsequently an order was made on the petition. It was held that the registration was a nullity, and that the company was being wound up as an unregistered company (*y*).

The books of the company to be evidence.

154. Where any company is being wound up, all books, accounts, and documents of the company and of the liquidators shall, as between the contributories of the company, be *primâ facie* evidence of the truth of all matters purporting to be therein recorded.

The books are *primâ facie* evidence (*z*), but no more than *primâ facie* evidence (a). If the name of a director, an alleged contributory, be found upon the register, then even where registration or non-registration is the cardinal point, he may shew that his name was not there with his assent and knowledge (a).

As to disposal of books, accounts, and documents of the company.

155. Where any company has been wound up under this Act and is about to be dissolved (*α*), the books, accounts, and documents of the company and of the liquidators may be disposed of in the following way: that is to say, where the company has been wound up by or subject to the supervision of the Court, in such way as the Court directs, and where the company has been wound up voluntarily, in such way as the company by an extraordinary resolution (*β*) directs; but after the lapse of five years from the date of such dissolution, no responsibility shall rest on the company or the liquidators, or any one to whom the custody of such books, accounts, and documents has been committed, by reason that the same or any of them cannot be made forthcoming, to any party or parties claiming to be interested therein.

(*α*) ss. 111, 143. (*β*) s. 129.

Where the company had been dissolved after voluntary winding-up the liquidator was ordered to produce documents upon the footing that they were under his absolute control (*b*).

(*u*) *Oriental Commercial Bank, Barge's Case*, 5 Eq. 420; and see note to s. 25; see also *London Suburban Bank, Walmesley's Case*, 15 Eq. 274.

(*x*) *West of England Bank, Ex p. Budden*, 12 Ch. D. 288; but the point was not argued: and see *Michael Brown's Case* (Eur. Arb.), Reil. 32; L. T. 21; 17 Sol. J. 310.

(*y*) *Hercules Insurance Co.*, 11 Eq. 321.

(*z*) *Great Northern Salt Co.*, 44 Ch. D. 472.

(a) *Barangah Oil Co., Arnot's Case*, 36 Ch. Div. 702, 712.

(*b*) *London and Yorkshire Bank* v. *Cooper*, 15 Q. B. Div. 473.

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Inspection of books.

156. Where an order has been made for winding up a company by the Court or subject to the supervision of the Court, the Court may make such order for the inspection by the creditors and contributories of the company of its books and papers as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories in conformity with the order of the Court, but not further or otherwise (*a*).

(*a*) Sch. 1, Table A., Art. (78). As to the documents relating to the winding-up, see Gen. Order, Nov. 1862, Rule 58.

The N. Company transferred its business to the O. Company, and all the books of the former company were handed over to the latter, but no provision was made for the liquidation of the debts of the N. Company. Both companies being subsequently wound up by orders made in different branches of the Court, upon motion by the official liquidator of the N. Company, that the books of that company should be delivered up to him by the official liquidator of the O. Company, it was ordered that these books should be produced to him at all reasonable times at the chambers of the judge by whom the order for winding-up the O. Company was made (*c*).

Order, when made.

Special circumstances must generally be shewn in order to obtain an order for inspection of the books; but where the debts are large, and the transactions of the company have been complicated, the Court will make an order for inspection without any special reason being given for it (*d*).

An order for inspection will be made, notwithstanding a secrecy clause in the articles of association (*e*). But if the winding-up is for purposes of reconstruction the existence of a secrecy clause will be regarded (*f*).

The order is to be made *primâ facie* only for the purposes of the winding-up and for the benefit of those interested in the winding-up. Where all the assets had been sold to a new company and the books handed over to the new company, and inspection was sought by members of the old company who had taken shares in the new company, the object being to establish claims against the directors or promoters of the old company, an order was refused both on the ground that the order was not asked for the purposes of the winding-up and that the books were not in the possession of the company (*g*).

Independently of this section, *semble*, a creditor's right to inspection rests upon principles similar to those which would be applicable if he had brought an action to establish his claim (*h*).

Where in an action for calls against a contributory the judge at chambers had given liberty to the defendant after plea to inspect the books, the Court refused to review the exercise of his discretion (*i*).

Pending petition.

An order for production before an examiner of the company's books and documents, for the purpose of testing in cross-examination the evidence of an officer who has made an affidavit for the company, in opposition to a winding-up petition, may be made pending the petition; but of course the

(*c*) *National Financial Co.*, 15 W. R. 499.

(*d*) *E. p. Buchanan*, 15 W. R. 99; 15 L. T. 261; *Imp. Land Co. of Marseilles*, W. N. 1882, 173.

(*e*) *Birmingham Banking Co.*, 36 L. J. (Ch.) 150.

(*f*) *Glamorganshire Banking Co., Morgan's Case*, 28 Ch. D. 620.

(*g*) *North Brazilian Sugar Factories*, 37 Ch. Div. 83.

(*h*) *E. p. Walker*, 15 Jur. 853.

(*i*) *Lancashire Cotton Spinning Co. v. Greatorex*, 14 L. T. 290.

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Court will in such a case take care not to lend its aid to the assistance of a person who files a mere fishing petition, and then applies for inspection to see what case he can make. The power of inspection will be limited, and the papers allowed to be dealt with as at a trial at *nisi prius* (*k*).

Thus where the company opposed the petition of a shareholder, and filed an affidavit by their secretary, upon which he was cross-examined before a special examiner, the Court ordered that the books be produced before the examiner upon the cross-examination (*k*).

In cases in the Stannaries Court the right of inspection given by s. 22 of the Stannaries Act, 1855, is not taken away by the pendency of a winding-up petition. The same practice applies as in the High Court, and if a proper case is shown an order for inspection may be made (*l*).

As to discovery from the official liquidator, *v.* sect. 94.

Voluntary winding-up.

Where a company, in whose articles of association was contained a clause providing that the books should, subject to reasonable restrictions, be open to the inspection of the shareholders during the hours of business, went into voluntary liquidation, it was held that the clause ceased then to be applicable (*m*).

Where the articles of association provided that no shareholder should be at liberty to inspect the books, except such as should be produced at a general meeting, and the company went into voluntary liquidation with a view to reconstruction with reduced capital, a shareholder who had accepted shares in the new company was held bound by the original contract, and not entitled to inspect the books of the winding-up company (*n*).

Power of assignee to sue.

157. Any person to whom anything in action belonging to the company is assigned in pursuance of this Act may bring or defend any action or suit relating to such thing in action in his own name.

See now Judicature Act, 1873, s. 25 (6).

Debts of all descriptions to be proved.

158. In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof (*α*) against the company, a just estimate being made, so far as is possible, of the value (*β*) of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value.

(*α*) Gen. Order, Nov. 1862, Rules 20–28.

(*β*) As at the date of the winding-up order, Gen. Order, Nov. 1862, Rule 25; and see *infra*, p. 356.

What is admissible to Proof. Trustee for the company.

A trustee for a company in liquidation of shares in another company is entitled to prove for the amount of calls which have been made on him, and interest thereon, and also for any future calls and interest, he under-

(*k*) *Emma Silver Mining Co.*, 10 Ch. 194; *Lisbon Steam Tramways Co.*, W. N. 1875, 54.

(*l*) *West Devon Consols*, 27 Ch. Div. 106.

(*m*) *Yorkshire Fibre Co.*, 9 Eq. 650; see Table A. Art. (78), n.

(*n*) *Metropolitan and Provincial Bank, E. p. Davis*, 16 W. R. 668; and see *Glamorganshire Banking Co., Morgan's Case*, 28 Ch. D. 620.

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taking to pay over the dividends, when received, in discharge of the liability against which he is entitled to be indemnified (*o*).

A trustee for a company of a lease is entitled to prove for the amount of rent actually paid by him since the commencement of the winding-up, and for the consideration, being a fit and proper sum, which he may have to pay for the purpose of assigning the lease and putting an end to his liability (*p*).

Indemnity.

By deed of amalgamation of the A. and B. Companies, the B. Company covenanted to indemnify the A. Company against its liabilities: held, that the A. Company was entitled to prove in the winding-up of the B. Company as creditor for the amount of judgments recovered against the A. Company by its creditors, and costs; but that a simple contract creditor of the A. Company was not entitled to prove for his debt (*q*).

Mutual insurance society—Unstamped policy.

Where a ship, insured in a mutual insurance society upon an unstamped policy, was lost, and it appeared from entries in the company's books that the money due upon the policy had been raised by order of the committee, but a winding-up order was made before the money was paid, proof was allowed in respect of the amount secured by the policy; for, although the policy, being unstamped, was, under 35 Geo. 3, c. 63, inadmissible in evidence, there was a sufficient admission of liability in the books of the company (*r*).

Invalid acceptance.

Where in the course of liquidation bills were accepted by one liquidator in such manner as not to be valid against the company, proof in respect of the bills was disallowed, but without prejudice to a claim as for money advanced (*s*).

Fraudulent trust.

Money placed with the company for a fraudulent purpose (*e.g.* to give fictitious credit in case of inquiries at their bankers) cannot be recovered (*t*).

Damages.

A company having power to enter into a contract for the purchase of goods is bound by such contract, although the goods may not be intended to be used for the purposes of the company, and although that fact may be known to the person with whom the contract is entered into; and if, through the winding-up of the company, the contract becomes incapable of being performed, the person with whom the contract was entered into may prove for damages for its non-performance (*u*).

Claim stayed till costs paid.

Where a claim was brought which included matters which the claimant had already previously litigated in unsuccessful proceedings in which he had been ordered to pay costs, all further proceedings on the claim were stayed until the costs were paid (*x*).

Servants and officers of the company;

Under the Companies Act, 1883 (repealed by the Act of 1888), certain wages and salaries were and, under the preferential payments in Bankruptcy Act, 1888, the same are payable in full in priority to all other debts.

But except in cases falling under that Act, or under the Stannaries Act, servants of the company are not entitled to payment in full of any part of the wages or salary due to them at the date of winding-up in priority to other creditors (*y*).

(*o*) *National Financial Co., E. p. Oriental Commercial Bank*, 3 Ch. 791; see also note to s. 30; but as to interest, see cases cited *infra*, p. 368, and in particular *Hughes's Claim*, 13 Eq. 623.

(*p*) *Southampton Imperial Hotel Co., Hunt's Claim*, W. N. 1872, 53.

(*q*) *British Provident Life, &c., Co., Anglo-Australian Co.'s Case*, 4 N. R. 48.

(*r*) *Martin's Claim*, 14 Eq. 148; and see s. 200.

(*s*) *London and Mediterranean Bank, E. p. Birmingham Banking Co.*, 3 Ch. 651.

(*t*) *Great Berlin Steamboat Co.*, 26 Ch. Div. 616.

(*u*) *Contract Corporation, Ebbw Vale Co.'s Claim*, 8 Eq. 14.

(*x*) *United Kingdom Co., E. p. Croll*, 34 L. T. 238; 24 W. R. 546, 593.

(*y*) *General Rolling Stock Co., Chapman's Case*, 1 Eq. 346.

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Mining companies in the Stannaries.

By the Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 26: "On a company formed for, or engaged in, working a mine (including a company registered under any of the Joint Stock Companies Acts), being wound up in the Court of the Vice-Warden, or any other Court, or otherwise, the date of the winding-up order having been not earlier than two months after the passing of this Act (*z*); then and in every such case the amount (if any) due at the date of the winding-up order to miners, artisans, and labourers employed, wholly or in part, in or about the mine, in respect of their wages or other earnings in relation to the mine, not exceeding three months' wages or earnings to each such person, shall be paid in priority to all other debts of the company."

The Stannaries Act, 1887, contains (sect. 4) provisions that miners shall have a first charge for three months' wages in priority to all claims for rents, royalties, dues, or otherwise by lessors, mortgagees, or judgment execution or other creditors, or any other persons whatever, and (sect. 9) that wages which under sect. 4 would be a first charge are to be paid by an official liquidator or liquidator in priority to all other costs except certain costs of the winding-up order, and subject to the 10th sect. to all claims and (sect. 10) provisions as to wages or salary of clerks and servants referring to the Companies Act, 1883, now repealed and replaced by the preferential payments in Bankruptcy Act, 1888.

It is conceived that the Judicature Act gave no preference to wages, and that notwithstanding *Norton Iron Co.* (a) and *Association of Land Financiers* (*b*), sect. 32 of the Bankruptcy Act, 1869, did not apply, and wages were not entitled to priority of payment. These two cases, if taken to be decisions on the construction of sect. 10 of the Judicature Act, 1875, are in fact opposed to the principle of all the other cases on the section, and will be found commented upon later under the present section. The point has now become of no importance, for the whole matter is now covered by the preferential payments in Bankruptcy Act, 1888.

The winding-up order is notice of discharge to the servants (*c*), or at any rate the appointment of a receiver and manager in a debenture-holder's action is such notice (*d*). If the business is continued after the winding-up, and the former servants are actually employed, the circumstances may be such that the notice of discharge has been waived or a new contract entered into on the same terms, and in such case notice of discharge must be given pursuant thereto (*e*).

Company wound up compulsorily;

T. was, under articles of agreement, engaged as manager of a branch bank for a term of five years, at a stipend of not less than £500 a year; and it was provided that he should have the right of occupying the bank premises as a dwelling-house free of rent and taxes. The company having been compulsorily wound up during the term, it was held that T. was entitled to claim for the present value of an annuity of £500 for the remainder of the term, and a proper rent for the bank premises for the same time, a deduction to be made (*f*) in consideration of his being at liberty to obtain a fresh appointment (*g*).

(*z*) 24th of June, 1869.

(a) 26 W. R. 53.

(*b*) 16 Ch. D. 373.

(*c*) *Chapman's Case*, 1 Eq. 346; *Shirreff's Case*, 14 Eq. 417; *Oriental Bank, MacDowall's Case*, 32 Ch. D. 366.

(*d*) *Reid* v. *Explosives Co.*, 19 Q. B. Div. 264.

(*e*) *English Joint Stock Bank, E. p. Harding*, 3 Eq. 341; *cf. Northfield Iron Co.*, 14 L. T. 695; W. N. 1866, 253; *Reid* v. *Explosives Co.*, 19 Q. B. Div. 264; and, *quære*, *Wiltshire Iron Co.* v. *Great Western Railway Co.*, L. R. 6 Q. B. 101, 776, as to contracts continuing after winding-up.

(*f*) *Cf. Hartland* v. *General Exchange Bank*, 14 L. T. 863.

(*g*) *Yelland's Case*, 4 Eq. 350.

The case last mentioned was followed in *E. p. Clark* (*h*).

By the articles of association of a company, L. was appointed manager, and it was provided that if he should at any time be deprived of or removed from his office for any other cause than gross misconduct, the directors should pay to him as compensation for loss of office a sum equal to three years' salary within one month from the time of his removal. He was held entitled to prove in the compulsory winding-up for the sum specified in the articles, without any such deduction as was made in *Yelland's Case* (*v. supra*), in consideration of his being at liberty to obtain a fresh appointment (*i*).

But where one of the terms of the engagement of an officer of the company was, that "£5000 be paid him if the company discontinue to employ him," it was held that this must be a discontinuance when it was optional with the company either to continue or discontinue the employment; and that, therefore, his employment having been terminated by the compulsory winding-up of the company his claim against the company could not be sustained (*k*).

Company wound up voluntarily.

A company covenanted that in case they should at any time thereafter displace an agent of the company from his appointment they would do certain acts. The voluntary dissolution of the company and transfer of its business to another company, and the consequent determination of the agent's employment, was a displacement of him within the meaning of the covenant (*l*).

Where the directors of a company in course of formation appointed a broker on the terms that he should have £100 down and £400 more on the allotment of all the shares, and subsequently they, by their own act, abandoning the company and winding it up, made it impossible that the rest of the shares should be allotted, it was held that the broker was entitled to recover either as damages or for work done, and that the sum to which he was entitled was the £400, less an allowance for the chance of his not having been able to dispose of all the shares if the company had gone on (*m*).

Where a person entered into an agreement to act as agent for an insurance company for five years, and to transact no business except for the company, in consideration of a fixed salary and a commission of 10 per cent. on all business transacted (*n*), and the company during the term passed into voluntary liquidation, afterwards continued under supervision, he was held not entitled to prove for the prospective value of the commission during the remainder of the term (*o*).

So where L. agreed with an insurance company to act as their agent, for a fixed salary and a commission of 10 per cent. on the renewal premiums of all policies effected through him, and he was further, in case of his retirement from the agency, to receive a commission of 5 per cent. during his life on the renewal premiums of all policies effected through him and existing at the time of his retirement, it was held in the compulsory winding-up that the commission was dependent on the existence of premiums, and his claim against the company was therefore disallowed (*p*).

The principle of the two last-mentioned cases is, it is conceived, the same as that of *Rhodes* v. *Forwood* (*q*), namely, that where two parties mutually

(*h*) 7 Eq. 550.

(*i*) *E. p. Logan*, 9 Eq. 149.

(*k*) *Tait's Case* (Alb. Arb.), 16 Sol. J. 46.

(*l*) *Stirling* v. *Maitland*, 5 B. & S. 840; 5 N. R. 46.

(*m*) *Inchbald* v. *Neilgherry Coffee Co.*, 5 N. R. 52.

(*n*) As to the meaning of "net profits" where the agreement is for a proportion of net profits, see *Stamp's Claim*, 25 L. T. 653.

(*o*) *E. p. Maclure*, 5 Ch. 737; and see *Hartland* v. *General Exchange Bank*, 14 L. T. 863.

(*p*) *Lewine's Case* (Alb. Arb.), 15 Sol. J. 828.

(*q*) 1 App. Cas. 256.

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agree for a fixed period the one to employ the other as his sole agent in a certain business at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named.

Where, however, the agreement was to act as commercial traveller and agent for three years at a commission on orders obtained (without any fixed salary), and the company passed into voluntary liquidation, afterwards continued under supervision, compensation was allowed in respect of the amount which might have been earned during the unexpired portion of the term (*r*).

Of this case it is submitted that the distinction drawn by Bacon, V.C., between it and *E. p. Maclure* (*s*) is very thin. In both cases the liquidation was voluntary. There is, however, no doubt a difference between an agent of an insurance and of a floor-cloth company in respect of some matters to which James, L.J., in *E. p. Maclure* (*t*) called attention, for in the case of the latter company the extent of the business might be said to be in the discretion of the agent, for it was his duty in fact to get all the business he could.

By the articles of association of a company S. was appointed general manager, and it was therein stated that he had agreed to take a large number of shares in the company, and it was stipulated that in the event of his being dismissed from the service of the company he should be repaid any sum he might have paid on the shares. He paid £2000 in respect of the shares, and, a resolution to wind up having been passed, he was appointed liquidator and received £400 as remuneration. It was held that the resolution to wind up was tantamount to a notice of dismissal, and that he was entitled to prove for £2000, with a set-off of the £400 paid to him as liquidator (*u*).

In an unlimited company the articles of association provided that all contracts and obligations of the company should contain a limitation of the liability of the shareholders to the amount of their shares. B. acted as underwriter to a limited company, which became amalgamated with the unlimited company, and at an interview with the directors of the unlimited company he was told that he was to go on for them as he had been doing for the limited company. It was held that this agreement was not a contract or obligation within the articles, and that B.'s claim must be admitted against the general assets of the company (*x*).

Share of plant in cost-book company.

According to the custom of Devon and Cornwall, an adventurer in a cost-book mine, upon relinquishing his shares and discharging his proportion of the liabilities of the company at that date, is entitled to be paid his share of the then value of the stock and plant—such share is due to him immediately and payable within two years, and if the company be wound up before payment is made, he may prove for the amount (*y*).

If the mine is solvent he receives his proportion of the assets on the above footing, if it is insolvent then he pays his share of the deficiency. But in either case he is entitled to have the concern valued as a going concern (*z*).

There is no custom that for the purpose of ascertaining his share of assets or deficiency all arrears owing by other members are to be treated as good

(*r*) *Patent Floor Cloth Co., Dean and Gilbert's Claim*, 26 L. T. 467.

(*s*) *E. p. Maclure*, 5 Ch. 737; and see *Hartland* v. *General Exchange Bank*, 14 L. T. 863.

(*t*) 5 Ch. at p. 740.

(*u*) *Shirreff's Case*, 14 Eq. 417.

(*x*) *Bache's Case*, W. N. 1872, 187.

(*y*) *Prosper United Mining Co., E. p. Palmer*, 7 Ch. 286.

(*z*) *Frank Mills Mining Co.*, 23 Ch. Div. 52.

debts, and all the members treated as solvent (a), and the fact that the accounts of retiring members have always been made out on that footing does not establish such a custom (a). A custom may be proved to relinquish without discharging arrears (*b*).

The Stannaries Act, 1887, s. 21, now provides that the valuation as between the relinquishing and continuing shareholders is to be made upon the basis that all the continuing shareholders have also at the same time relinquished their shares.

Contributory buying up debt of company.

A contributory of the company, having bought up a debt of the company for a less sum than is actually due thereon, may prove for the full amount of the debt, and not merely for what he has paid for it (*c*).

But this is not so in the case of a person standing in a fiduciary relation towards the company, for to such an one the rule will apply which forbids a trustee to make a profit by buying up an incumbrance on the trust estate. Upon these principles, and also upon the ground that the debentures in question had been improperly issued to promoters, and that knowledge of that fact must be attributed to the director, Malins, V.C., held that a director who, after the commencement of the liquidation, bought up debentures at 25 per cent., could not prove for 100 per cent. On appeal James, L.J., and Amphlett, J.A., approved the principle upon which the V.C. had proceeded, implying, it is conceived, that that principle was applicable to a director; but the case was compromised upon the terms of the director being paid in full the amount he had paid with interest at 5 per cent (*d*).

The distinction between this case and that of a director taking an allotment of debentures at a discount upon the same terms as the public (*e*) is obvious.

Policy-holder.

A claim under a winding-up in respect of a policy of life insurance is not affected by non-payment of the premiums after the commencement of the winding-up, *i.e.*, after the presentation of the petition on which an order is afterwards made. The condition of the policy is that the holder shall pay the premium to the directors of the company within a limited time, and if, before the time for payment has arrived, or the days of grace have expired, the winding-up has destroyed the functions of the directors, the policy-holder cannot be affected by the non-payment (*f*).

The date, however, at which the policy is to be estimated is, not the date of presentation of the winding-up petition, but the date of the winding-up order (*g*). Premiums, therefore, which fall due in the interval between the presentation of the petition and the order must be paid before the policy is presented for valuation—for the policy must be valued as a current valid engagement. And the policy-holder will not be allowed to set off the amount of the valuation against the premiums (*h*).

The result, therefore, is this, that non-payment of a premium, whose days of grace expired before the presentation of the petition, avoids the policy (*i*), but non-payment of a premium which fell due after the presentation, or whose days of grace expired after the presentation, does not do so. But if

(a) *Frank Mills Mining Co.*, 23 Ch. Div. 52.

(*b*) *Bodmin United Mines*, 23 Beav. 370.

(*c*) *Humber Ironworks Co.*, 8 Eq. 122. Of course fraud may exclude the right: *Jones* v. *Gordon*, 2 App. Cas. 616.

(*d*) *Imperial Land Co. of Marseilles, E. p. Larking*, 4 Ch. Div. 566.

(*e*) *Compagnie Générale, Campbell's Case*, 4 Ch. D. 470.

(*f*) *Cook's Policy*, 9 Eq. 703.

(*g*) *Lancaster's Case* (Alb. Arb.), Reil. 76; 16 Sol. J. 103; 14 Eq. 72, n.; *Wallberg's Case* (Eur. Arb.), Reil. 65; L. T. 50; 17 Sol. J. 69; *Holdich's Case*, 14 Eq. 72, 80; but see *Bell's Case*, 9 Eq. 706, 720, and *infra*, p. 356.

(*h*) *Wallberg's Case*, *ubi supra*.

(*i*) Subject to note (*m*), *infra*.

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a policy-holder in the latter case wishes to prove on his policy he must first make payment of all premiums which fell due before the winding-up order, whether the days of grace expired after the order or not (*k*).

If the premium be an annual premium payable by quarterly instalments, payment may have to be made of the premiums for the current year (*l*).

If there was no hand competent to receive a premium whose days of grace expired before the presentation of the petition, as where the assuring company had transferred its business to another company, and the latter, being in liquidation, could not receive the premium, and the former had no office or agent, the non-payment by a policy-holder who has not novated (*m*) will not avoid the policy (*n*).

Valuation of policy;

In estimating the amount for which the holders of current life policies are entitled to prove in the liquidation of a life assurance office, it was held by James, V.C., in *Bell's Case* (*o*), that the amount is the sum which would be required by a solvent assurance office, having the same rate of premiums and the same amount of proprietary capital as the company in liquidation, in order to grant to the policy-holder a policy of the same amount, under the same conditions, whether ordinary or special, at the same premium; or, in other words, the proof will be for the capitalized difference between the increased premium required by such a company, having regard to the state of health of the life insured, and the premium formerly paid to the company in liquidation.

The case was, however, disapproved by Lord Cairns in *Lancaster's Case* (*p*); and his Lordship there held that the amount for which the policy-holder is to be admitted to prove is the difference between the present value of the reversion in the sum assured at the decease of the life and the present value of a life annuity of an amount equal to the pure premium without the loading. The time as from which the valuation is to be made is the date of the order to wind up—the tables to be employed, the Seventeen Offices' Experience Tables—and the rate of interest 4 per cent.

And this rule was followed where the life insured was in India, and not under the control of the policy-holder (*q*).

Subsequently Romilly, M.R., held that in these cases the rule in *Bell's Case*, and not that in *Lancaster's Case*, is to be followed (*r*).

of annuity.

An annuitant is entitled to prove for the estimated value of the annuity (*s*), but his claim is not an "immediate claim" for the purpose of immediate payment out of a fund set apart upon amalgamation for payment of immediate claims (*t*).

The claim on an annuity contract will be for the present value of the annuity calculated according to the tables, where they can be ascertained, of the company originally granting the annuity, and where those tables cannot be ascertained, then the Government Annuitants' Experience Tables; and the time as from which the valuation will be made is the date of the order to wind up (*u*).

Life Assurance Companies Act, 1872.

In the conflict of opinion which has thus arisen with respect to the

(*k*) *Wallberg's Case, ubi supra.*

(*l*) *Hort's Case* (Eur. Arb.), L. T. 112, 114; 17 Sol. J. 765; S. C., 1 Ch. Div. 307.

(*m*) *Conquest's Case* (Eur. Arb.), L. T. 67; 17 Sol. J. 328; S. C., 1 Ch. Div. 334.

(*n*) *Conquest's Case* (Eur. Arb.), L. T. 121.

(*o*) 9 Eq. 706; and in *Warner's Claim*, 18 W. R. 1097.

(*p*) (Alb. Arb.), Reil. 76; 16 Sol. J. 103; 14 Eq. 72, n.

(*q*) *Slator's Case* (Alb. Arb.), Reil. 71.

(*r*) *English Assurance Co., Holdich's Case*, 14 Eq. 72.

(*s*) *Hunt's Annuity Case*, 1 H. & M. 79.

(*t*) *Wyatt's Case* (Alb. Arb.), Reil. 42.

(*u*) *Lancaster's Case, ubi supra.* See further as to the tables on which the calculation is to be taken, *Watt's Case* (Alb. Arb.), 16 Sol. J. 517.

valuation of current life policies, the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), provides with respect to companies the commencement of whose winding-up is subsequent to the 6th of August, 1872, that the value of annuities and policies shall be estimated in manner provided by the first schedule to that Act (*x*), being the method adopted in *Lancaster's Case* (*v. supra*). The section does not apply to any winding-up commenced before the date above given unless the Court having cognizance of the winding-up so order, which order that Court is empowered to make, if it think it expedient so to do, on the application of any person interested in the winding-up.

European Arbitration.

Lord Westbury, in the *European Life Assurance Society Arbitration* (*y*), adopted the method of valuation provided by this Act.

Contingent Claims.

"Where a creditor has a claim which is admissible as a contingent claim, that ought to be admitted to the catalogue of claims admissible to proof in the winding-up. Such a proof is not a proof for anything payable *in præsenti*, but it is admissible as a proof for something which may ripen into a right for present payment" (*z*).

Lessor to company.

Thus, where a company are lessees, the lessor is entitled to enter a claim (a) for future rent, whether the lease have been assigned by the company to a purchaser (*b*) or not (*c*); and where, in Scotland, a company are feuars or assignees of the original feuars, the superior is entitled to enter a claim in respect of the capitalized value of future feu duties (*d*). But where a claim is made for payments accruing due after winding-up there must be shown a liability or obligation existing at the commencement of the winding-up (*e*). The fact that the company were then legal owners of a property subject to a rent-charge does not of itself establish that subsequent instalments of the rent-charge are provable (*e*).

And though such claim may be entered for the whole estimated value of the future rent, yet the lessor, having been paid all rent accrued due, is entitled to no present right at all as between himself and creditors who have a present claim—and on the payment of a dividend it has been held that he is not entitled to have a dividend on the estimated amount set apart to secure the future rent (*c*).

In the same view the Court has refused, in a winding-up under supervision, to impound out of the assets a sum equal to the aggregate future rent, or any other sum, or if such sum could not be raised, to admit the creditor to prove. It is true that the applicant was a second mortgagee of the company's lessor, and that the judgment proceeds on there being no privity between him and the company, but it rests also upon the ground that there was no present breach and no constat there ever would be one (*f*).

But where the question is not between the lessor, to whom no rent is presently due, and the creditors, but between such a lessor and the shareholders, who after payment of all debts are about to divide the remaining assets among them, other considerations arise. In such a case an injunction has been granted to restrain the company (which was in voluntary liquida-

(*x*) See the Act, *infra*.

(*y*) *Wallberg's Case* (Eur. Arb.), Reil. 65; L. T. 50; 17 Sol. J. 69.

(*z*) *Per* James, V.C., *Telegraph Construction Co.*, 10 Eq. 384, 388.

(*a*) *Cf. E. p. Good*, 14 Ch. Div. 82, 96.

(*b*) *Haytor Granite Co.*, 1 Eq. 11; 1 Ch. 77.

(*c*) *Horsey's Claim*, 5 Eq. 561.

(*d*) *Gartness Iron Co., E. p. Lord Elphinstone*, 10 Eq. 412; but see *Blackburn Building Soc., E. p. Graham*, 42 Ch. Div. 343.

(*e*) See *Blackburn Building Soc., E. p. Graham*, 42 Ch. Div. 343, stated more fully *infra*, p. 357.

(*f*) *Westbourne Grove Drapery Co.*, 5 Ch. D. 248.

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tion) from distributing the assets without providing for the claim of the lessor in respect of the rent which might accrue due (*g*); and in another case, in which the amount to be set apart was the question, it was held that there ought to be set apart such a sum as, when invested in Consols, would with half-yearly rests produce the aggregate amount of all the future rent (*h*).

The case may be said to be analogous to that of a proceeding for the distribution of assets, not to creditors, but to shareholders in a proposed reduction of capital under sect. 9 of the Companies Act, 1867 (*v. infra*); in such a case the Court will see that the contingent claim is secured before the assets are distributed (*i*).

Whether the existence of a contingent claim ought ultimately to prevent making the order (sect. 111) for the dissolution of the company, *quære* (*k*).

Continuing damage.

Where a company has entered into a contract, in respect of which some damage has been sustained by the party contracting with the company at the date of the winding-up, and after the date of the winding-up there is a continuing breach of the contract going on, the damages will continue to run after the winding-up, and the claim in respect of such damages will fall within this section, notwithstanding the 25th rule of the Gen. Order of the 11th Nov. 1862 (*v. infra*), which provides that such claims "shall, so far as is possible, be estimated according to the value thereof at the date of the order to wind up the company" (*l*).

In the case last mentioned, Wood, V.C., said (*m*): "I am rather inclined to the view that all creditors having claims which they cannot at the time establish as debts certain, but which still remain uncertain, have the power of making claims and proving the debts, irrespective of the circumstance of the debts being contingent, and there being no means at present of ascertaining them. The 25th rule only follows that, and says that the value of the debt must be estimated, so far as is possible, according to the value at the date of the order to wind up the company. It would not prevent any creditor who prefers to wait and see if the event takes place upon which the contingency is determined, from doing so, unless the time for bringing in claims has expired."

Claims contingent at winding-up which mature during winding-up.

By Bankruptcy Act, 1869, s. 31 (and Bankruptcy Act, 1883, s. 37 (3)), contingent debts and liabilities to which the bankrupt may become subject during the continuance of the bankruptcy are provable. And by Judicature Act, 1875, s. 10, the rules in bankruptcy as to debts and liabilities provable are to be applied. A claim, therefore, contingent at the commencement of the winding-up, which during the winding-up becomes ascertained, is provable at the ascertained amount, but not disturbing of course any dividend previously paid (*n*).

Thus where at the winding-up A. held a fire policy of the company, and after winding-up petition presented and order made, a fire occurred, he was entitled to prove for the full amount insured (*n*). And where a testator, who died

(*g*) *Gooch* v. *London Banking Association*, 32 Ch. D. 41; *Elphinstone* v. *Monkland Iron Co.*, 11 App. Cas. 332.

(*h*) *Oppenheimer* v. *British and Foreign Bank*, 6 Ch. D. 744.

(*i*) *Telegraph Construction Co.*, 10 Eq. 384.

(*k*) *Haytor Granite Co.*, 1 Ch. 77.

(*l*) *Trent and Humber Co.*, *E. p. Cambrian Steam Packet Co.*, 6 Eq. 396; 4 Ch. 112.

(*m*) 6 Eq. 400; and see *Holdich's Case*, 14 Eq. 72, 80, where Romilly, M.R., said with respect to proof on a policy or annuity: "No doubt the day of the winding-up order is the time at which the value of the policy or annuity is to be calculated; but subsequent facts may be given in evideuce for the purpose of shewing what the real value was at that time;" and see *Bell's Case*, 9 Eq. 706, 721.

(*n*) *Macfarlane's Claim*, 17 Ch. D. 337; and see *Great Britain Mutual Society*, 19 Ch. D. 39; 20 Ch. Div. 351.

insolvent, had covenanted for payment of £5000 within a month after the death of his wife, and after his death and after judgment in an action for administration of his estate, but before certificate, his widow died, proof was admitted for £5000 less a rebate at 4 per cent. for the period between the judgment and the widow's death (*o*).

But no claim can be admitted except in respect of a liability or obligation which existed at the commencement of the winding-up. Thus where the company were legal mortgagees in possession of property which was subject to a rent-charge created by deed, it was held that although an action of debt may be brought against the terre tenant for a rent-charge (*p*), yet the rent-charge is not a debt—that the claim to recover it arises not out of contract but out of privity of estate, and that the liability is for breach of duty in not paying while in possession. And seeing that in the case before the Court the liquidators had given up possession or done their best to do so before the commencement of the period over which the arrears were claimed, no proof was admissible in the winding-up, although the liquidators did not convey the property to a grantee until two years later (*q*).

SET-OFF;

When a company is being wound up, whether an action is brought by the company or a proof is carried in by a creditor of the company in the winding-up, a set-off of a liquidated sum was always admissible (*r*).

Thus where A., being under liability upon his acceptance to a limited banking company, took an acceptance of the bank, which fell due and was dishonoured; and subsequently an order was made for winding up the bank, and A.'s acceptance matured in the hands of the official liquidator, it was held that A.'s right of set-off was not interfered with by the winding-up order (*s*).

And so where ascertained sums were due to and from A. and the company, there was a right of set-off, although the sum due to A. was not ascertained until after the winding-up commenced (*t*).

Again, there may be a right of set-off against a debt due to the company of a debt due from the company, which the person desiring to make the set-off has acquired by assignment after the winding-up, if the assignment have been made in consequence of an arrangement made, or by reason of an equity arising, before the winding-up.

Thus, where one, who was surety for a debt of the company before the winding-up, paid off the debt after the winding-up, and took an assignment of securities, among which was a promissory note of the company, set-off was allowed (*u*).

But where, after a winding-up order, a company was under present liability in respect of dishonoured bills, and S. & Co. were under future liability in respect of bills not yet due, of which the company were holders, it was held that S. & Co. had no present right to set these off one against the other, and were not entitled to have their bills retained by the official liquidator until a right of set-off arose, but the official liquidator was under sect. 95 (*q.v.*) allowed to negotiate the bills accepted by S. & Co. (*x*).

(*o*) *Hill* v. *Bridges*, 17 Ch. D. 342.

(*p*) *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368.

(*q*) *Blackburn Building Soc.*, *E. p. Graham*, 42 Ch. Div. 343.

(*r*) See 9 Q. B. Div. 667; *E. p. James*, 8 Eq. 225.

(*s*) *Anderson's Case*, 3 Eq. 337; but upon the point raised that a debtor to the company may thus, by buying up the acceptances of the company, set off his debt to the prejudice of the other creditors, see the remarks in *Smith, Fleming, & Co.'s Case*, 1 Ch. 538, next cited; and see *Grissell's Case*, 1 Ch. 528, with respect to contributories.

(*t*) *Progress Assurance Co.*, *E. p. Bates*, 22 L. T. 430.

(*u*) *Mosely Green Coal Co.*, *Barrett's Case*, (No. 2), 4 D. J. & S. 756. The set-off was against calls, so that except on the principle stated in the text the case is no doubt, under this Act, overruled by *Grissell's Case*, 1 Ch. 528, *ante*, sect. 101.

(*x*) *Smith, Fleming, & Co.'s Case*, 1 Ch. 538.

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And where the liquidator after winding-up, in further performance of a current contract of the company, supplied goods to one who was a creditor of the company in respect of a debt incurred before winding-up, the latter could not set off (*y*).

since Judicature Act;

And sect. 10 of the Judicature Act, 1875, has imported into winding-up the rules as to mutual credits and set-off in bankruptcy (*z*). So that where the liquidator brought an action for a money demand, the defendant was entitled to set off unliquidated damages for breach of contract by the company (*z*).

But where the liquidator's claim was in detinue the defendant could not set off, for the mutual credits clause (Bankruptcy Act, 1883, s. 38) is only applicable where the claims on each side are such as result in pecuniary liability (a).

Moreover, even where the mutual credits clause is applicable, it applies only to the state of things at the date of the winding-up; the rights of the parties are not to be altered by subsequent transactions. Thus A. proved a debt against the company. So far as this proof was concerned it could be diminished by set-off only of amount due by A. to the company at the date of the winding-up, and established either at the time of proof or subsequently. After proof admitted A. assigned the debt to B. *bonâ fide* for value. B. subsequently assigned it to C. *bonâ fide* for value. Before the assignment to C. the official liquidator took out a summons for misfeasance against B. After the assignment to C. an order was made against B. on the summons for payment of £2000. After this order had been made the official liquidator declared a dividend on the debt. Held:—

(1.) If the debt had remained in B. he could not have set off the debt against the £2000, for at the winding-up he had no set-off, and he could not acquire a set-off by taking the assignment. Thus the company could have made B. pay the £2000, and have left him to take a dividend on the debt, or possibly might as against him have said, You shall not take a dividend on the debt until you have paid the £2000.

(2.) C. was enforcing the right of A., not that of B., and the fact that the debt had passed through B. to C. did not carry to C. equities that might have attached against B. The equities, if one may say so, do not run with the debt. If C. had been suing he would have sued in the name of A.

(3.) There was probably no debt until the order for payment of the £2000 was made. The company had a right either to the property (which was shares) or to a money compensation. Before the order C. had become entitled to the debt.

(4.) The dividend not being declared until after C. had become entitled to the debt there could be no set-off against the dividend.

So that as against C. there was no right to set off the £2000 either against the debt or the dividend on the debt (*b*).

by policy-holder.

Where a policy-holder in the M. Company assigned his policy to the trustees of the M. Company to secure a loan, and the M. Company, on an amalgamation with the A. Company, assigned the mortgage debt and security to trustees upon trust to satisfy all claims then due from the M. Company, and subject thereto for the A. Company, the policy-holder (there being no novation) could not on being required to pay the mortgage debt claim in the winding-up of the M. Company to set off the estimated value of the policy—

(*y*) *Ince Hall Co.* v. *Douglas Forge Co.*, 8 Q. B. D. 179.

(*z*) *Mersey Steel Co.* v. *Naylor, Benzon, & Co.*, 9 Q. B. Div. 648; 9 App. Cas. 434; *Lee and Chapman's Case*, 26 Ch. D. 624; 30 Ch. Div. 216.

(a) *Eberle's Hotel Co.* v. *Jonas*, 18 Q. B. Div. 459.

(*b*) *Milan Tramways Co., E. p. Theys*, 22 Ch. D 122; 25 Ch. Div. 587.

for his only right was, on payment of the debt, to have from the trustees a re-assignment of the mortgaged property, including the policy, on which the M. Company, and not the A. Company, were liable (*c*).

There being no question of novation, the general question of set-off by a policy-holder did not arise in the case last cited. It will be seen, however, by the following cases that the claim of the holder of a current policy in a life assurance company in liquidation not being an ascertained and liquidated claim, could not be set off against a debt due from the policy-holder to the company.

Thus, where a policy-holder has borrowed money from the company in which his life is insured, and has deposited his policy with the company as security for the loan, the liquidator in the winding-up is entitled to sue at once for the sum advanced, and a claim to set off against that sum the amount recoverable from the company in respect of the policy will not be allowed (*d*).

The sum at which the current policy is estimated in the winding-up is not a sum due at all, but merely a sum arrived at in the winding-up for the purpose of regulating the proof of debts. If the company were still a going company, there could, of course, be no set-off between a sum due from policy-holder to company and a current policy. It made no difference that the company was wound up (*e*).

Therefore, where the policy-holder was liquidating by arrangement, the trustee could not set off against the liquidators. Each party would have to prove, and there would no doubt be a set-off of dividends (*e*).

Where it was a condition of the policy that the sum assured should not be payable until three months after the dropping of the life, and a winding-up order was made after the death of the person assured, but before the expiration of three months therefrom, no set-off was allowed, for the position of affairs must be determined at the date of the winding-up order (*f*).

But if each of two life insurance companies hold a policy granted by the other, and both the lives fall in before the winding-up of one of the companies, but the sums assured are not payable till after the winding-up, then, both sums becoming payable after the winding-up, there is a right to set off the sums assured against each other (*g*).

See further as to set-off, sects. 75, 101.

DEBENTURES. Proof by *bonâ fide* holder for value.

The debentures of a company being choses in action not assignable at law are *primâ facie*, according to the ordinary rule, subject, in the hands of the assignee, to all the equities to which they were liable in the hands of the assignor (*h*).

Where, therefore, debentures, issued in the first instance in fraud of the company, found their way in the ordinary course of business into the hands of a *bonâ fide* purchaser for value without notice of the fraud, it was held that he must nevertheless hold them, subject to the equities attaching to them, and he was restrained from suing upon them at law (*h*).

But the rule that a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the

(*c*) *Bourne's Case* (Alb. Arb.), Reil. 44; 15 Sol. J. 653.

(*d*) *Price* v. *Parlby* (Alb. Arb.), Reil. 48; 15 Sol. J. 654; *Parlby's Case*, 19 W. R. 382; *Gloag's Case* (Eur. Arb.), L. T. 32; 17 Sol. J. 534; *Stevens' Case, Nuttall's Case* (Eur. Arb.), L. T. 155; 18 Sol. J. 399.

(*e*). *E. p. Price, Re Lankester*, 10 Ch. 648.

(*f*) *Delhi Bank Case* (Alb. Arb.), 15 Sol. J. 923.

(*g*) *Eagle Insurance Co.'s Case* (Alb. Arb.), 16 Sol. J. 483.

(*h*) *Athenæum Life Assurance Society* v. *Pooley*, 1 Giff. 102; 3 De G. & J. 294; and see as to set-off, *South Blackpool Hotel Co., E. p. James*, 8 Eq. 225.

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contract, is a rule which must yield, when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities (*i*); or where the debtor has precluded himself from setting up such equities against the assignees (*k*).

Thus, where a banking company gave a letter of credit, containing a promise to accept bills to a certain amount drawn upon them, the particulars of which were to be indorsed, by persons negotiating bills under it, on the back of the letter of credit, it was held that, whatever might be the effect of the letter of credit at law, it constituted a contract to the benefit of which all parties taking and paying for bills on the faith of it, were entitled in equity, without regard to equities between the bank and the parties to whom the letter of credit was given (*i*).

So, where an antecedent contract had been entered into between the promoter of a company and certain persons, whereby the latter agreed to sell their business to the company when formed, part of the purchase-money to be paid in debentures of the company payable to bearer, and the agreement was carried into effect, and debentures given under the seal of the company covenanting for payment to "A., his executors, administrators, or assigns, or to the bearer hereof," it was held that although a bond or debenture could not covenant for payment to bearer so as to enable the bearer to sue upon it in his own name (*l*), yet that, the bonds having been issued upon a bargain which contemplated that the company should give debentures, which, so far as it was competent to them, should be payable to bearer, and which were therefore to be treated as money, the company had estopped themselves from setting up against the bearer equities to the benefit of which they would, under other circumstances, have been entitled (*m*).

So, where the directors gave for value an instrument under the seal of the company, as to which there was some question whether it was not in fact a promissory note (*n*), although called on its face a "debenture," and which was in form an undertaking "to pay to the order of A. B.," it was held that the indorsee or transferee for value could prove free from equities (*o*). Lord Justice Wood there said (*p*): "The authorities go to this, that where there is a distinct promise held out by a company, informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own, and say that because the person who makes the order is indebted to them they will not pay."

Higgs v. *Northern Assam Tea Co.* (*q*) is a similar case, in which the debentures were expressed to be payable "to A. B., his executors, administrators, or assigns"; and where the assignees, having been treated by the company as proprietors, and certificates issued to them describing them as "registered proprietors," were held entitled, in actions brought against the

(*i*) *Agra and Masterman's Bank, E. p. Asiatic Banking Corporation*, 2 Ch. 391, 397; and see *Dickson* v. *Swansea Vale, &c., Railway Co.*, L. R. 4 Q. B. 44; and, as to a deposit note, *Albion Bank* v. *Cooper*, W. N. 1874, 110.

(*k*) *E. p. Universal Life Assurance Co.*, 10 Eq. 458; *Romford Canal Co.*, 24 Ch. D. 85.

(*l*) See also *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374.

(*m*) *Blakely Ordnance Co., E. p. New Zealand Banking Corporation*, 3 Ch. 154; and see *Aslatt* v. *Farquharson*, 10 W. R. 458, commented on by Malins, V.C., in *E. p. Colborne and Strawbridge*, 11 Eq. 478, 494.

(*n*) Whether an instrument under the seal of a corporation can be a promissory note, *quære*, see *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374.

(*o*) *General Estates Co., E. p. City Bank*, 3 Ch. 758.

(*p*) See 3 Ch. 762, and *per* Malins, V.C., *E. p. Colborne and Strawbridge*, 11 Eq. 478, 495.

(*q*) L. R. 4 Ex. 387; and see *E. p. Universal Life Assurance Co.*, 10 Eq. 458.

company in the name of the assignor, to recover free from a right to set off a debt which could have been set off as against the assignor.

There appears to be a difficulty—not upon principle, but upon the construction of the wording of the instrument—in reconciling with some of these cases the decision of Lord Cairns in *Re Natal Investment Co.* (*r*). There the debentures were in the form of undertakings "to pay to C., or to his executors, administrators, or transferees, or to the holder for the time being." His Lordship held that the word "transferees" was equivalent to "assigns," and that the further words, "to the holder for the time being," added nothing to the legal effect of the bond beyond this, that, to save the trouble and expense of assignment by deed, the company would recognise the holder as being in as good a position as if he had become assign by deed. The debentures were given in pursuance of an agreement for sale of land by C. to the company, which provided that part of the purchase-money should be paid in debentures, but did not specify any particular form. The holders of the debentures were held entitled to prove only subject to all equities between the company and C.; his Lordship distinguishing *Re Blakely Ordnance Co.* (*s*) on the ground that there was not here an agreement for debentures in the particular form of being payable to bearer. Of this case it may be well to notice that it was not a case of set-off, but a case of failure of consideration for the debenture assigned, C. having wholly failed to make any title to the land he professed to sell. At any rate, the decision did not overrule the other cases (*t*), and must probably be taken to have been decided on its own particular facts (*u*).

The foregoing cases establish this, that if the contractors, with a view to induce people to become assignees of instruments of this kind, represent that there are no equities, or that they will not take advantage of any equities which there are, between them and the original contractees, this affords a good defence to any subsequent attempt on their part to set up these equities.

And as to *Re National Investment Co.* (*x*), Lord Cairns did not there dispute that such a representation, if made out, would produce this effect, or say that such a provision was beyond the competency of the parties, but only thought that the mere fact of making an instrument payable to the holder did not amount to such a representation (*y*).

But it is quite another thing to say that the contractor has any power to alter the rights of the original contractee, so as to make the instrument negotiable in such a way as that the holder may sue upon it in his own name, and that a *bonâ fide* purchaser may acquire a good title, although claiming under a person taking by fraud upon the original contractee.

Thus where the debenture was in form a promise to pay to bearer, and was held not to be a promissory note, it was held that a *bonâ fide* holder for value deriving title from a person who had stolen the debenture could not recover upon it (*z*).

If bonds or debentures, invalid in the first instance, have been transferred,

(*r*) 3 Ch. 355. See *E. p. Colborne and Strawbridge*, 11 Eq. 478, 493, where Malins, V.C., professed himself unable to reconcile it with *E. p. City Bank* and *E. p. New Zealand Banking Corporation*, *ubi supra*.

(*s*) 3 Ch. 154, *v. supra*.

(*t*) See *per* Wood, L.J., *General Estates Co.*, 3 Ch. 758, 762; *per* Bramwell, B., *Higgs* v. *Northern Assam Tea Co.*, L. R. 4 Ex. 387, 395; *per cur. Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374, 385.

(*u*) See as to this case some observations of Kay, J., in *Romford Canal Co.*, 24 Ch. D. 85, 91.

(*x*) 3 Ch. 355.

(*y*) See *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. at p. 385; *Romford Canal Co.*, 24 Ch. D. p. 91.

(*z*) *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374.

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and there be circumstances sufficient to affect the company with notice of the transfer, and with that knowledge judgment has been allowed to pass in an action brought by the assignee in the name of the original holder for interest due or to recover the principal, the company cannot subsequently dispute their validity.

Thus the assignee of debentures issued in payment for work done by a person who was styled an honorary director, but whose name was not inserted in the list of directors, was, under such circumstances, held entitled to prove on the debentures, he having no notice that the assignor had acted as a director (a).

So where the transferee of Lloyd's bonds had been registered by the company, and had recovered from the company in an action an amount of interest due, it was held that, whether the bonds were valid or invalid in the hands of the original holder, the official liquidator was precluded from questioning their validity in the hands of the *bonâ fide* purchaser for value without notice (*b*).

Carey's Claim (*c*), in the same company as the case last referred to, is a much stronger decision. There two of the bonds had been transferred; the transfer of one was registered, but of the other was not. No action had been brought. But it was held that, one transfer having been registered, the other would have been registered if required, and the holder, who was the *bonâ fide* purchaser for value without notice, was allowed to prove in respect of both bonds.

It is conceived that this decision and *Athenæum Life Assurance* v. *Pooley* (*d*), in which there was both registration and payment of interest (*e*), cannot possibly stand together. Although that case has never been overruled, Malins, V.C., more than once expressed himself as of opinion that it could no longer be considered as good law (*f*).

In another case (*g*) before the same learned judge, where assignment had been made of a debenture which was in form a bond, conditioned to be void on payment to A. B., "his executors, administrators, and assigns," it was held that, by accepting notice of the assignment, the company had—although the assignment was not registered—precluded themselves from setting up as against the assignee the equities which they might have set up against the original holder.

So in an earlier case, where debentures payable to K., his executors, administrators, or "registered assigns," were transferred, and, no books being kept for registration of debentures, the secretary told K. and his transferee, on their applying for registration, that it was unnecessary, and made no mention of a claim by the company against K., the transferee was held entitled to prove free from equities (*h*).

In *E. p. Colborne and Strawbridge* (*i*), instruments issued in payment to vendors of land, described on their face as "debenture bonds," and stamped as bonds, but expressing that the company "bind themselves and their successors to pay to the bearer," were held to be promissory notes, or if

(*a*) *Hulett's Case*, 2 J. & H. 306; as to the original invalidity of the debentures in such a case under the 7 & 8 Vict. c. 110, s. 29, see *Stears' Case*, John. 480.

(*b*) *Re South Essex Estuary Co., E. p. Chorley*, 11 Eq. 157.

(*c*) W. N. 1873, 17.

(*d*) 1 Giff. 102; 3 De G. & J. 294, *v. supra*.

(*e*) As to payment of interest, see also *Exmouth Docks Co.*, 17 Eq. 181.

(*f*) See *E. p. Chorley*, 11 Eq. 157; *Carey's Claim*, W. N. 1873, 17; *Brunton's Claim*, 19 Eq. 302.

(*g*) *Hercules Insurance Co., Brunton's Case*, 19 Eq. 302.

(*h*) *Lishman's Claim*, 23 L. T. 40.

(*i*) 11 Eq. 478.

not promissory notes, negotiable instruments, upon which holders for value without notice were entitled to prove free from equities.

But, *quære*, whether an instrument under the seal of a corporation can be a promissory note (*k*).

In *Romford Canal Co.* (*l*) the power to borrow arose upon a proper resolution being passed under the Companies Clauses Act, 1845. The resolution was passed at a meeting at which there was not a quorum, and was consequently invalid. The debentures were issued to a contractor who knew of the invalidity. He transferred some to C. for value without notice, and the transfer was registered. P. and T. became equitable transferees of others without notice of the irregularity. It was held that the company was estopped as against C., and that as between the company on the one hand and P. and T. on the other the latter had an equity to prevent the former from setting up the invalidity.

But although the company in such a case may be estopped it does not follow that other holders of securities of the company which rank *pari passu* with the invalid securities are estopped also (*m*).

As to the issue of debentures at a discount, see *ante*, p. 171.

Scrip. Scrip issued in England by the agent of a foreign government on negotiating a loan, whereby the bearer is promised, after all instalments have been duly paid, a bond for the amount with interest, is by the custom of all the stock markets of Europe a negotiable instrument, which passes by mere delivery to a *bonâ fide* holder for value, and confers a title independent of the title of the person from whom he took it (*n*).

This decision rests upon two independent grounds, the one the negotiability of the instrument according to the custom of the British Stock Exchange, the other that of estoppel (*o*). The instrument, if not strictly negotiable, may have to be treated as such between the parties (*o*).

Negotiability is to be determined not by the law of the country in which the instrument is issued, but by the law of England (*p*).

American railway shares. Several cases upon shares in American or other railway companies dealing with the question of negotiability and of the extent of authority given by execution in blank of the transfer form or transfer power endorsed upon the certificates of such shares, are here collected for convenience of reference (*q*).

Secured Creditors. In windings-up which commenced before the 1st November, 1875, and to which therefore the 10th section of the Judicature Act, 1875, does not apply (*r*), the following authorities upon the rights of secured creditors are still applicable.

Where a creditor of the company holds security for his debt he is entitled to prove in the winding-up for the whole amount that is due to him *at the time of sending in his claim*, and not merely, as in bankruptcy, for the balance remaining due after realising or valuing his security (*s*).

(*k*) *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374.

(*l*) 24 Ch. D. 85.

(*m*) *Mowatt* v. *Castle Steel Co.*, 34 Ch. Div. 58.

(*n*) *Goodwin* v. *Robarts*, L. R. 10 Ex. 76, 337; 1 App. Cas. 476.

(*o*) *Easton* v. *London Joint Stock Bank*, 34 Ch. Div. 95, 117; *sub nom. Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333, 342.; but see *Colonial Bank* v. *Hepworth*, 36 Ch. D. 36.

(*p*) *Picker* v. *London and County Bank*, 18 Q. B. D. 315; *Williams* v. *Colonial Bank*, 38 Ch. Div. 388, 403, 408; S. C. 36, Ch. D. 659; *Colonial Bank* v. *Cady*, 15 App. Cas. 267.

(*q*) *Easton* v. *London Joint Stock Bank*, 34 Ch. Div. 95, on app. *Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333; *Colonial Bank* v. *Hepworth*, 36 Ch. D. 36; *Williams* v. *Colonial Bank*, 36 Ch. D. 659; 38 Ch. Div. 388; *Colonial Bank* v. *Cady*, 15 App. Cas. 267; *London and County Bank* v. *London and River Plate Bank*, 20 Q. B. D. 232; 21 Q. B. Div. 535.

(*r*) *Suche & Co.*, 1 Ch. D. 48.

(*s*) *Kellock's Case*, 3 Ch. 769; *London, Bombay, &c., Bank, E. p. Cama*, 9 Ch. 686.

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By sending in the claim is meant a putting in of the claim under the Gen. Order of the 11th Nov. 1862 (Rules 20-28) (*t*); and it has been held (*u*) that the mere presentment of a guarantee by a notary, a mere demand, that is, for payment, with no record of it kept, was not such a sending in of the claim as was intended in *Kellock's Case* (*t*).

If, before sending in his claim, the creditor realise his security (*u*), or receive payments on account of it (*x*), or enter into a contract for the sale, which in equity is equivalent to the sale, of the property included in it (*y*), he can then only prove for so much of his debt as remains unsatisfied after deducting the amount realised on the security.

But if, a previous claim having by mistake been made for too small a sum, a claim be carried in, after realising the security, for the proper amount, it may be that the claim will be considered as made when the previous claim was made (*z*).

Kellock's Case is applicable only in the case in which the company are in the position of mortgagors, and the same principles do not apply at all where the company are in fact in the position of mortgagees.

Thus, where the B. Company, at D.'s request, gave to C., who had been instructed to purchase cotton for D., a letter of credit, authorizing him to draw upon them, the bills to be accompanied by bills of lading for cotton, to be handed to the company on their accepting the bills—and bills were accordingly drawn and accepted by the company; but before they came to maturity the company went into liquidation, and C. sent in a claim for the whole amount in the winding-up, and *subsequently* received the proceeds of the sale of the cotton, he was allowed to stand as a creditor only for the balance (a).

And in any case in which a bill-holder receives the proceeds of a security under the rule in *E. p. Waring* (*b*), he can stand as a creditor only for the balance, although the security be realised after proof made for the full amount. The proof will in such a case be reduced by the amount received by the bill-holder from the security, and any dividends received on the excess of the original over the reduced proof must be refunded (*c*).

If a company give security for a debt in various ways by documents involving only the liability of the company itself, as, *e.g.*, by acceptances for the amount of the debt, and debentures issued by the company as collateral security for the same debt, the creditor can prove only for the sum that is due to him, and cannot prove, in addition to the amount of his debt, for the amount secured by the collateral security (*d*).

The rule in bankruptcy, that there cannot be a double proof against the same estate in respect of the same debt, is applicable to the case of a winding-up (*e*).

If security be given for the debt of a company in pursuance of an ordinary contract of suretyship,—as where directors gave to the company's bankers

(*t*) *Kellock's Case*, 3 Ch. 769; *London, Bombay, &c., Bank, E. p. Cama*, 9 Ch. 686.

(*u*) *Forwood's Claim*, 5 Ch. 18.

(*x*) *E. p. Maxoudoff*, 6 Eq. 582; and see *Leech's Claim*, 6 Ch. 388.

(*y*) *Oxford and Canterbury Hall Co.*, 8 Eq. 691; 5 Ch. 432.

(*z*) *London, Bombay, &c., Bank, E. p. Cama*, 9 Ch. 686.

(*a*) *Coupland's Claim*, 8 Eq. 472; 5 Ch. 167; *Banner* v. *Johnston*, L. R. 5 H. L. 157; and see *Leech's Claim*, 6 Ch. 388.

(*b*) 19 Ves. 345.

(*c*) *Barned's Banking Co., E. p. Joint Stock Discount Co.*, 19 Eq. 1; 10 Ch. 198.

(*d*) *Blakely Ordnance Co., Metropolitan and Provincial Bank's Claim*, 8 Eq. 244; but see *Warrant Finance Co.'s Case* (No. 2), 5 Ch. 88, cited below, where there was an assignment of arrears of calls to trustees for the creditor.

(*e*) *Oriental Commercial Bank, E. p. European Bank*, 7 Ch. 99.

their promissory note by way of security for any balance due from the company to the bank—and the secured creditor recover in the winding-up a dividend from the company as principal debtor, and also recover in an action against the surety, the surety is entitled to receive from the secured creditor a share of the dividend bearing to the whole dividend the same proportion as the sum paid by him bore to the whole sum proved for in the winding-up (*f*).

Treasurer of Friendly Society.

The Friendly Societies Act, 1875 (38 & 39 Vict. c. 60, s. 15 (7)), and the Savings Bank Act, 1863 (26 & 27 Vict. c. 87, s. 14), give priority for moneys received by treasurers of those societies. The present effect of these enactments has been considered in two cases (*g*).

Judic. Act, 1875, s. 10.

The 10th section of the Judicature Act, 1875, enacts that: "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under 'The Companies Acts, 1862 & 1867,' whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate or under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

This section is not retrospective, and applies only to windings-up which commenced after the commencement of the Act, viz., 1st of November, 1875 (*h*).

After some conflict of judicial opinion in construing this difficult section the following may now be taken to be settled, viz.:—

1. That the section is confined to the administration of the fund, and is not to be applied in determining the amount of the fund to be administered. Thus no bankruptcy rule which gives a particular creditor or class of creditors priority, and thus diminishes the fund, or which avoids a security and thus enlarges the fund, is brought in by the section.

2. As regards secured and unsecured creditors, the section deals only with the rights of those two classes as conflicting classes: it does not deal with the rights of the members of either of those classes *inter se*.

The following observations on the section may be conveniently collected here:—

"As regards s. 10 of the Judicature Act, 1875, one object, and probably the principal object of that section, was to get rid of the rule established by *Mason* v. *Bogg* (*i*) as to proof in Chancery by secured creditors" (*k*).

"The sole object of the section, as it appears to me, was to get rid of the

(*f*) *Gray* v. *Seckham*, 7 Ch. 680; 26 L. T. 233; 27 L. T. 290.

(*g*) *West of England Bank, E. p. Swansea Friendly Society*, 11 Ch. D. 768; *Jones* v. *Williams*, 36 Ch. D. 573.

(*h*) *Suche & Co.*, 1 Ch. D. 48; *Sherwin* v. *Selkirk*, 12 Ch. Div. 68; and see *Phœnix Bessemer Co.*, W. N. 1875, 187; 33 L. T. 403; 45 L. J. (Ch.) 11; 24 W. R. 19.

(*i*) 2 My. & Cr. 443, adopted in winding-up by *Kellock's Case*, 3 Ch. 769.

(*k*) Jessel, M.R., *Williams* v. *Hopkins*, 18 Ch. Div. 370, 377.

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rule in Chancery under which a secured creditor could prove for the full amount of his debt and realise his security afterwards, and to put him on the same footing as in bankruptcy, where he was only entitled to prove for the balance after realising or valuing his security" (*l*).

The section "means simply that the rules in bankruptcy shall apply so far as relates to the proof and receipt of dividends out of the assets of the company. I do not find anything in the Act which says that all the rights and rules of administration under the Bankruptcy Act shall apply to the case of a company in liquidation. It appears to me that the right construction of the section is nothing more than this, that persons may in the winding-up of a company make such claim against the assets of the company as are provable under the law of bankruptcy" (*m*).

There are "no words in the section which directly or by implication" lead to the result "that whereas under certain circumstances a security is avoided in bankruptcy, therefore in the administration of the assets of a deceased person and in the winding-up of a company a security is to be avoided under similar circumstances." . . . "The question [in such case] is not as to the administration of a fund, but what is the fund to be administered. I see no reason why a person relying on his security in the administration of the assets of a deceased person or in the winding-up of a company should be deprived of it because under similar circumstances he would be deprived of it in bankruptcy" (*n*).

"What is proposed in the present case is not to apply a particular rule to the administration of the assets of the company, but to bring into the assets something which apart from this section would not be assets" (*o*).

"The whole object of s. 10, as it appears to me, was to make this rule in bankruptcy [as to valuation of security] applicable to administration of the assets of deceased persons and to winding-up" (*p*).

"The section is not intended to enlarge the assets to be administered, but only to vary the rights of the persons entitled to the assets" (*q*).

(A.) The section therefore does not introduce into winding-up the bankruptcy rules as to:—

I. *Avoidance of securities or priorities: e.g.*, unregistered bill of sale before the Bills of Sale Act, 1882 (*r*); secured creditor presenting winding-up petition must value his security (*s*); sect. 87 of Bankruptcy Act, 1869 [Act 1883, s. 46 (1)], which deprives an execution creditor of the fruits of his execution where the sheriff has notice of a bankruptcy within fourteen days after sale (*t*); reputed ownership and order and disposition (*u*); sect. 32 of the Bankruptcy Act, 1869 [Act 1883, s. 40 (4)], which provides that all debts (with certain exceptions) are to be paid *pari passu*, and consequent avoidance of priority of judgment debt (*x*), and of retainer by executor (*y*) in adminis-

(*l*) James, L.J., *Lee* v. *Nuttall*, 12 Ch. Div. 61, 65; and see *Withernsea Brickworks*, 16 Ch. Div. 337, 339.

(*m*) Jessel, M.R., *Albion Steel Co.*, 7 Ch. D. 547, 549.

(*n*) James, L.J., *Withernsea Brickworks*, 16 Ch. Div. 337, 341.

(*o*) Cotton, L.J., Ibid. 341.

(*p*) Lush, L.J., Ibid. 343.

(*q*) Fry, J., *Tadman* v. *D'Epineuil*, 20 Ch. D. 217, 219; *Gorringe* v. *Irwell India Rubber Works*, 34 Ch. Div. 128.

(*r*) *Re Knott*, 7 Ch. D. 548; *Tadman* v. *D'Epineuil*, 20 Ch. D. 217.

(*s*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

(*t*) *Richards & Co.*, 11 Ch. D. 676; *Withernsea Brickworks*, 16 Ch. Div. 337; overruling on this point *Printing and Numercial Co.*, 8 Ch. D. 535. And see *Railway Steel Co.*, *Re Taylor*, 8 Ch. D. 183.

(*u*) *Crumlin Viaduct Co.*, 11 Ch. D. 755; *Withernsea Brickworks*, 16 Ch. Div. 337, 341; *Gorringe* v. *Irwell India Rubber Works*, 34 Ch. Div. 128.

(*x*) *Smith* v. *Morgan*, 5 C. P. D. 337; *Re Maggi*, *Winehouse* v. *Winehouse*, 20 Ch. D. 545; *Jones* v. *Williams*, 36 Ch. D. 583; see however some cases on this s. 32, mentioned presently.

(*y*) *Lee* v. *Nuttall*, 12 Ch. Div. 61.

tration of deceased's estate; so much of sect. 150 of the Bankruptcy Act, 1883, as takes away the remedies of the Crown (*z*).

II. *Creation of securities or priorities: e.g.*, priority of payment of rates over other debts, Bankruptcy Act, 1869, s. 32 [Act 1883, s. 40 (1)] (a); landlord's right of distress for a year's rent, Bankruptcy Act, 1869, s. 34 [Act 1883, s. 42 (1)] (*b*); set-off as between the company and a contributory of a judgment debt due to the contributory against calls due from the contributory (c).

(B.) The section does not affect:—the right of a creditor who is also a contributory of a company in liquidation to receive a dividend on his debt if he has paid his calls (*d*).

(C.) The section does introduce the bankruptcy rules as to valuation of security and the consequences of it (*e*), sect. 31 of the Bankruptcy Act, 1869 [Act 1883, s. 37], as to debts provable (*f*), and the bankruptcy rules as to mutual credits and set-off (*g*).

There are two cases in conflict with the above principles. The one is *Association of Land Financiers* (*h*), where Malins, V.C., held that sect. 32 (2) of the Bankruptcy Act, 1869, is applicable in winding-up, and that the wages of certain clerks ought to be paid in priority to the other debts. It is conceived that as a decision this case cannot be sustained (*i*), the equity was that the amount due to the clerks was £250, and the debts were hundreds of thousands. The other is *Norton Iron Co.* (*k*). But this was an *ex parte* application, and nothing was really decided. The M.R. in appointing a provisional liquidator merely gave him authority to pay the workmen their wages for the past week. They may have been wages for a period after petition presented, and even if they were not, the result of non-payment might have been that the men would all have left their employment to the injury of the liquidating estate. There was jurisdiction under s. 159 to pay them in full. The case really decided nothing at all.

"Secured creditor" does not mean merely a creditor secured by contract (*l*); it includes a creditor who has obtained a security in any way, whether by execution or garnishee order or judgment on tort against the company itself (*m*), as distinguished from a security or right of priority which, if the case were one of bankruptcy, would be acquired for the first time by the rules of bankruptcy against, not the bankrupt, but the bankrupt's property (*n*). "Secured creditor."

There is a difficulty in knowing when to apply the section arising from the fact that to render it applicable you must know that the assets "may prove to be insufficient for the payment of the company's debts and liabilities and the costs of winding-up." As to this the words cannot mean "shall be proved to be insufficient," for the insufficiency cannot be fully "May prove to be insufficient."

(*z*) *Oriental Bank*, 28 Ch. D. 643; *cf.* as to voluntary settlement, *Re Gould*, W. N. 1887, 97.

(a) *Albion Steel Co.*, 7 Ch. D. 547; *Art Engraving Co.*, W. N. 1889, 38; and see *ante*, p. 242.

(*b*) *Coal Consumers' Association*, 4 Ch. D. 625; *Bridgewater Engineering Co.*, 12 Ch. D. 181; *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250; *Thérèse & Co.*, W. N. 1879, 31.

(*c*) *Gill's Case*, 12 Ch. D. 755.

(*d*) *West of England Bank, E. p. Brown*, 12 Ch. D. 823.

(*e*) *Williams* v. *Hopkins*, 18 Ch. Div. 370.

(*f*) *Macfarlane's Claim*, 17 Ch. D. 337; *Hill* v. *Bridges*, 17 Ch. D. 342.

(*g*) *Mersey Steel Co.* v. *Naylor, Benzon, & Co.*, 9 Q. B. Div. 648; 9 App. Cas. 434; *Lee and Chapman's Case*, 26 Ch. D. 624; 30 Ch. Div. 216; *Eberle's Hotel Co.* v. *Jonas*, 18 Q. B. Div. 459; and see *Compagnie Générale, Campbell's Case*, 3 Ch. D. 470, 475.

(*h*) 16 Ch. D. 373.

(*i*) See also *ante*, p. 349.

(*k*) 26 W. R. 53.

(*l*) See Bankruptcy Act, 1869, s. 16 (5).

(*m*) *Printing and Numerical Co.*, 8 Ch. D. 535; not touched on this point by *Withernsea Brickworks*, 16 Ch. Div. 337.

(*n*) *Albion Steel Co.*, 7 Ch. D. 547.

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established till afterwards. They must mean that there is sufficient reason to believe that the estate will turn out insolvent (*o*).

This difficulty is resolved by Earl Selborne's words in *Milan Tramway Co., E. p. Theys* (*p*); the section "must be treated as applicable to any company in liquidation until it is shewn that the assets are sufficient for payment of the debts in full." The person therefore who seeks to exclude the section must prove affirmatively that the estate is solvent.

LIQUIDATION ACT.

As to secured creditors in the case of a winding-up in which proceedings were pending on the 31st of July, 1868, see the Liquidation Act, 1868 (31 & 32 Vict. c. 68), s. 12. With a single exception (*q*) that Act is believed never to have been used, and in the present edition of this work it is omitted.

INTEREST. Winding-up by or under supervision of Court.

In the winding-up of an insolvent company by or under the supervision of the Court, creditors whose debts carry interest are entitled to dividends only upon what was due for principal and interest *at the date of the winding-up* (*i.e.* of its commencement (*r*)); and it is only in the event of there being a surplus that they have any claim for subsequent interest; and in that case the dividends will be treated as applicable, first, in payment of interest, and then in reduction of principal.

One reason assigned by Giffard, L.J., in the *Warrant Finance Co.'s Case* (*s*) for the decision there arrived at was this, that he did not see with what justice interest could be computed in favour of creditors whose debts carried interest, while creditors whose debts did not carry interest were stayed from recovering judgment, and so obtaining a right to interest (*t*). But with reference to this observation it must be noticed that, if the 26th rule of the Gen. Order, Nov. 1862, is *ultra vires*, creditors whose debts do not carry interest cannot, in the event of the company ultimately turning out to be solvent, obtain a right to interest, unless they can in the winding-up make such a demand as will found a claim to interest under the statute 3 & 4 Will. 4, c. 42, s. 28 (*u*). It is conceived, however, that whether in a compulsory or a voluntary winding-up such a demand can be made. Lord Romilly, indeed, in a compulsory winding-up has held that the claim sent in under the winding-up does not amount to a demand for this purpose, because it would not be made on the person liable to pay (*x*). But of this decision it will be remarked that, first, it does not appear what was the nature of the demand made in that case; and that, further, in the reason thus given for his Lordship's decision, the full Court of Appeal in *Re East of England Banking Co.* (*y*) seem not to agree. It is true that in *Re East of England Banking Co.* (*y*) the liquidation was not compulsory, but under supervision, and that the judgment of Lord Cairns rests upon the fact that it was so, but the liquidator, it is conceived, is equally in either case the "person who has the control of the assets" for the purpose of such a demand; and having regard to the strong disposition of the Court to avoid everything that shall draw a distinction in the principles of the administration of the assets between one sort of winding-up and another, it is submitted that *Re Herefordshire Banking*

(*o*) *Williams v. Hopkins*, 18 Ch. Div. 370, 377.

(*p*) 25 Ch. Div. 587, 591.

(*q*) See *Re Sarin*, 7 Ch. 760.

(*r*) *Infra*, p. 369 (*h*), 370 (*p*).

(*s*) *Humber Ironworks Co., Warrant Finance Co.'s Case* (No. 1), 4 Ch. 643; *Oporto Mining Co.'s Case* (Eur. Arb.), L. T. 4.

(*t*) *Per* Giffard, L.J., 4 Ch. 648.

(*u*) Upon debts in respect of which interest would have been recoverable under this statute interest is payable in the winding-up: *State Fire Insurance Co., Times Assurance Co.'s Case*, 2 H. & M. 722.

(*x*) *Herefordshire Banking Co.*, 4 Eq. 250, 253.

(*y*) 6 Eq. 368; 4 Ch. 14.

Co. (*z*) is at least shaken by *Re East of England Banking Co.* (a). At any rate the latter case is conclusive that in winding-up under supervision demand may be made for the purposes of the statute.

The winding-up order is not in the nature of a judgment whereby all simple contract creditors are converted into *quasi* judgment creditors, so as to be entitled to interest out of any surplus assets (*b*), and therefore a creditor whose debt does not carry interest may shew his right to interest.

Where a creditor has a right of proof for the same debt against the estates of two companies in liquidation, this is in principle, as against one of the companies, the same as a debt with a separate security in the right of proof against the other company, and falls, therefore, within the principle of *Kellock's Case* (*v. supra*); and the rule in the *Warrant Finance Co.'s Case* (*v. supra*) (*c*) does not, therefore, prevent the creditor from receiving dividends from both estates until the full amount of his debt and interest has been satisfied (*d*).

And there will not be an appropriation of payments made in such a way as to apply dividends received from the principal debtor to the reduction of principal only, and dividends from the other estate against which proof is made, first, in payment of interest, and then, as to the surplus, in payment of principal; but the dividends paid by either estate will be treated simply as paid on account, and as if there were no winding-up at all; and the secured creditor will not be deprived of his security until he has received his principal, interest, and costs in full (*e*).

So, if the creditor hold a collateral security for his debt, whether the security is on part of the estate of the company, or not, he may in cases to which the Judicature Act, 1875, s. 10, does not apply, receive dividends on the whole amount of his principal debt and interest at the date of winding-up, and at the same time realise his security until the full amount of principal and interest has been satisfied (*f*).

And a creditor holding security upon his insolvent debtor's property under such circumstances as that he is bound to give credit for the value of his security may, as regards interest, obtain advantage to the following extent. As against the insolvent estate he is entitled to interest only down to the date of the judgment in the administration action, as against the security he is entitled to interest until payment. Out of the proceeds of his security he may take first his interest to payment, and apply the balance, if any, to principal; and against the estate he may prove the whole or the balance of the principal, as the case may be (*g*).

The rule as to interest in a winding-up laid down in *Warrant Finance Co.'s Case* (*c*) was not merely a settlement of the practice for the future, but a declaration of the law deduced from the statute (*h*).

It is settled by the *Warrant Finance Co.'s Case* (*c*) that an insolvent company is, by the winding-up order, relieved from a liability to pay interest, and it has been held that the company is also thereby relieved from a contract to indemnify a third person against the payment of interest.

(*z*) 4 Eq. 250.

(a) 6 Eq. 368; 4 Ch. 14.

(*b*) *Hatfield Cask Co.*, 2 N. R. 502; 11 W. R. 971; 9 Jur. (N.S.) 997; 8 L. T. 846.

(*c*) *In Re Humber Ironworks Co.* (No. 1), 4 Ch. 643.

(*d*) *Joint Stock Discount Co., Warrant Finance Co.'s Case* (No. 1), 5 Ch. 86.

(*e*) *Joint Stock Discount Co., Warrant Finance Co.'s Case* (No. 2), 10 Eq. 11.

(*f*) *Humber Ironworks Co., Warrant Finance Co.'s Case* (No. 2), 5 Ch. 88; but see *Blakely Ordnance Co.*, 8 Eq. 244, cited above.

(*g*) *King* v. *Chick*, 39 Ch. D. 567.

(*h*) *Ebbw Vale Co.'s Case*, 5 Ch. 112.

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In the case referred to (*i*), A. had sold to the C. Company shares in the W. Company, but no transfer was registered before both companies went into liquidation. Calls were made upon the shares upon which A. was ultimately obliged to pay £100 for calls, and £23 7*s.* 6*d.* for interest accrued due, with the exception of a fractional part, since the winding-up order. Proof was allowed by the judge in chambers in respect of the whole sum of £123 7*s.* 6*d.*, but on a motion in Court to vary the order made in chambers it was held that the amount of interest accruing due since the winding-up order could not be admitted to proof, and the claim in respect of interest was, therefore, disallowed; but the order was made without prejudice to A.'s carrying in, if he thought fit, a claim for the *estimated* value of his right to indemnity at the winding-up, which would probably have been a larger, and certainly would have been a different, sum from that which he had actually been called upon to pay.

Solvent company.

If the company is, or ultimately turns out to be, solvent, interest is, as we have seen, payable upon any debts which carry interest, or upon which a right to interest has been acquired, out of surplus assets remaining after payment of principal, and interest up to the date of the winding-up order (*k*).

A trustee, who is compelled to pay, and does pay, moneys on behalf of the company, is entitled in the winding-up to interest at 5 per cent., although the debt which he discharged bore interest at 4 per cent. only (*l*).

In the winding-up of a solvent insurance company an annuitant is entitled to interest at 4 per cent. from the date of the winding-up on the value of his annuity, estimated according to the rule in *Lancaster's Case* (Albert Arbitration, Reil. 76; 16 Sol. J. 103; 14 Eq. 72, n.) (*m*).

But if the company be insolvent, he can prove for instalments falling due before the presentation of the petition only, with interest down to the date of the presentation, and for instalments falling due after the presentation without interest (*n*).

Voluntary winding-up; under supervision.

A mere voluntary resolution to wind up will not, *semble*, stop interest from running (*o*).

But where a supervision order is made, it relates back for all purposes, including the stoppage of interest, to the date of the resolution to wind up voluntarily; proof can, therefore, be made only for the amount of principal and interest due at the date of the resolution; and this although interest have been paid up to a later date in the voluntary winding-up (*p*).

Interest after judgment.

If a creditor whose debt carries 6 per cent. obtains a judgment for his debt and interest, he can prove only for the debt with 6 per cent. down to the date of the judgment, and 4 per cent. afterwards down to the winding-up (*q*). For in the absence of special agreement to keep the debt alive (*r*) it merges in the judgment.

Statute of Limitations.

It was held by Stuart, V.C., under the Act of 1856, that a winding-up order did not constitute the official liquidator a trustee for the creditors of the company so as to prevent the Statute of Limitations from running against a creditor (*s*), and Romily, M.R., took the same view under this Act (*t*):

(*i*) *Hughes' Claim*, 13 Eq. 623.

(*k*) *Humber Ironworks Co., Warrant Finance Co.'s Case* (No. 1), 4 Ch. 643, *v. supra.*

(*l*) *Sargood's Claim*, 15 Eq. 43.

(*m*) *Woodcock's Case* (Alb. Arb.), 16 Sol. J. 517.

(*n*) *Sullivan and Smythe's Cases* (Eur. Arb.), Reil. 65, 75, 82; L. T. 50.

(*o*) See *East of England Banking Co.*, 4 Ch. 14; *E. p. Colborne and Strawbridge*, 11 Eq. 478, 498.

(*p*) *E. p. Colborne and Strawbridge*, 11 Eq. 478; and see s. 130.

(*q*) *European Co., E. p. Oriental Corporation*, 4 Ch. D. 33.

(*r*) *Agriculturist Co., E. p. Hughes*, 4 Ch. D. 34, n.

(*s*) *Royal Bank of Australia, E. p. Forest*, 2 Giff. 42; 27 L. J. (Ch.) 295.

(*t*) *General Rolling Stock Co., Joint Stock Discount Co.'s Claim*, 26 L. T. 755.

but on appeal the Lords Justices held that the assets were to be applied in payment of all liabilities of the company subsisting at the time of the winding-up order (sect. 98), and that after the order was made the statute did not run (*u*).

But, of course, a debt barred at the date of the order cannot be proved (*x*).

Novation of Contract;

The cases on novation of contract between a customer and a firm, subject to change by the retirement of old partners and the introduction of new ones, will be found discussed in Lindley on Partnership, 5th ed. pp. 239–254. In such a case slight evidence is sufficient to shew that a creditor who continues his dealings with incoming partners accepts the new firm as his debtors instead of the old firm.

in amalgamation of companies.

"The union, however, of two companies, formed originally under separate deeds, by which the proprietors respectively stipulate for a limited liability . . . is a very different thing from the admission of a new partner into an existing firm, with all the usual consequences of such an admission; and the abandonment by a creditor of a written definite contract with one company for an unwritten engagement by a new company, to be arrived at through the medium of very special arrangements between the two companies, is a matter requiring far more cogent and precise proof than the assumption by a continuing customer of the liability of the firm with which he continues his dealing in lieu of that of its immediate predecessor" (*y*).

There is nothing, however, in such a case to prevent a novation of contract if established by sufficient evidence; and although the rights under the new contract be altered to the detriment of the creditor, and to the advantage of the new company with respect to which it is sought to establish a novation (as if the liability of the old company were unlimited, and that of the new company limited), there is nevertheless no rule of law that requires the novation to be effected by a new written contract (*z*); but the novation may be effected by implication (a). And as a general rule, where, upon the amalgamation of two companies, notice of that fact is given to a creditor of the old company, and in substance notice is given him that he may elect whether he will take the liability of the new company in lieu of that of the original company or not, then, although he do not by an express agreement assent to the novation, yet if he acts upon it and takes the benefits which he could only be entitled to upon the assumption that he has assented to it, that will be evidence on which the Court may find, and, unless there is something to contradict it, ought to find, that he has agreed to take the liability of the new company in substitution for that of the old one (*b*).

Many important cases on novation arose in the winding-up of the Albert Company and the European Company, and the companies amalgamated with those companies respectively. Several of the cases arose upon winding-up petitions, but as these all turn upon the question of the existence of a valid debt, it is thought that they may not inappropriately be collected under this section (*c*).

(*u*) 7 Ch. 646; and see s. 94, note.

(*x*) *Mitchell's Claim*, 6 Ch. 822.

(*y*) *Per* Hatherley, L.C., *In re Family Endowment Society*, 5 Ch. 118, 133; and see *Anchor Assurance Co.*, 5 Ch. 632, 638.

(*z*) But see Life Assurance Companies Act, 1872, s. 7, *infra*, as to acceptance in writing of the liability of the new company required under that Act.

(a) *Spencer's Case*, 6 Ch. 362, 371.

(*b*) This, which was said of a policy-holder in *Spencer's Case*, 6 Ch. 362, 370, is, it is conceived, *mutatis mutandis*, true of any creditor. It will be seen from the cases presently cited in the Albert Arbitration, that very slight circumstances were there accepted as evidence of novation on the part of a policy-holder. See, however, *contra*, the principles adopted by Lord Westbury in the European Arbitration noted below under this section.

(*c*) The cases in Chancery are first

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In order to constitute a novation it must be tripartite—the creditor, the original debtor, and the new debtor must all be parties to it (*d*); and in each case the whole question is one of fact (*e*), whether such a tripartite agreement has been entered into or not.

Receipt from new company of payments of an annuity.

Where company F. granted an annuity, charged upon the assets of the company, to P. in consideration of payments extending over a definite number of years, and, after the period during which payments were to be made had expired, company F. was dissolved and its assets transferred to company A.; and P. received his annuity under his grant from company F. before the amalgamation, and afterwards from company A., and gave receipts in the name of company A., until that company stopped payment, but his grant was never exchanged for a grant of company A., it was held that he had not accepted company A. as his debtor in place of company F.; for he had never paid any money to, nor received any grant from, nor made any contract with company A. He was never asked to enter into any fresh contract, and might well have supposed that the A. company were making the payments out of the assets of the F. company, and as their agents (*f*).

So where the annuity was granted in consideration of a sum of money paid down, and the annuitant had rejected a proposal that he should accept the liability of the new company, his receipt of the annuity from the new company for eleven years did not effect a novation. The deed of settlement of the old company in this case contained a provision, that on a dissolution "proper measures for the purpose of effecting such dissolution, without prejudice to the rights of the parties then assured, should be taken . . . and the debts and liabilities of, and claims on the company be satisfied, re-purchased, discharged, or otherwise sufficiently provided for by investment, or by transfer, to other existing and approved assurance offices;" under this deed Malins, V.C., was of opinion that the company had no power to transfer annuitants to another company without their consent, and James, L.J., that even without the words "without prejudice, &c.," the clause could not have been intended to provide for cases of novation (*g*).

of interest on a deposit;

A similar case was that of *Re Commercial Bank of India and the East* (*h*), where a transfer of the business of a banking company, of which J. was a creditor in respect of a deposit at interest, was made to a new company. J. received no notice of the transfer, but the interest on his deposit was in two successive half-years after the transfer sent to his agents with letters headed with the name of the new company. In the winding-up of the new company J. carried in a claim, but it was held that he had never accepted the new company as his debtors, and the claim was expunged.

of interest on a debt;

Re Smith, Knight, & Co., Ex parte Gibson (*i*), was a case in which the business of a private firm was made over to a company. G. was a creditor of S. & K. in respect of moneys advanced on promissory notes payable at five years from the completion of an undertaking for the purposes of which

noted. The Albert and European Arbitration cases will be found collected separately at the end of this section.

(*d*) *Manchester and London, &c., Association*, 9 Eq. 643, 649.

(*e*) *Family Endowment Society*, 5 Ch. 118, 132, 137.

(*f*) *Family Endowment Society*, 5 Ch. 118; and see *National Provincial Life Assurance Society, Kettle's Case*, 9 Eq. 306; *cf. Barnes' Case* (Eur. Arb.), L. T. 72; 17 Sol. J. 594; *secus*, where the annuitant takes an indorsement on his annuity contract; *Dale's Case* (Alb. Arb.), Reil. 11; 15 Sol. J. 886; *Hawtrey's Case* (Alb. Arb.), Reil. 138; 16 Sol. J. 713 (see Alb. Arb. cases, *infra*).

(*g*) *India and London Life Assurance Co.*, 7 Ch. 651.

(*h*) 16 W. R. 958; 18 L. T. 668.

(*i*) 4 Ch. 662.

the advances were made. Before any of the promissory notes were given S. & K. had transferred their business to a company, and the company had the benefit of the advances. At the time when the notes were given, G. stated by letter that he looked to S. & K. and knew nothing of the company in the matter. More than a year afterwards G. applied to the company for, and the company paid him, a year's interest. It was held that this did not rebut G.'s express repudiation of the company as his debtors, and that no novation had been effected.

of payments of an annuity.

It is conceived that *Teete's Case* (*k*) cannot stand with the above decisions. In that case the A. and B. companies having become amalgamated under a deed of amalgamation, whereby the B. company covenanted to indemnify the A. company against its liabilities, the holder of an annuity, granted by company A., had received payments of the annuity from company B. It was held that, as the claim had been recognised by the B. company by paying the annuity, the effect was the same as if a new annuity had been granted, and proof for the value of the annuity was allowed in the winding-up of the B. company.

Payment of premiums to new Company.

With respect to policy-holders in amalgamated companies it has been argued in a great number of cases that the fact of continuing to pay the annual premiums to the new company after the amalgamation amounts to an acceptance of the liability of the new company in place of that of the old company. This point will be found particularly discussed in *In re National Provincial Life Assurance Society* (*l*), where Malins, V.C., shewed considerable inclination to accede to the argument that from payment of the premiums to the new company for a considerable time a novation must be inferred by acquiescence, although he would have felt a difficulty in holding that payment for a short time (as of one premium only (*m*)) would have shewn an intention to release the original company, and accept the liability of the substituted company. It will be observed, however, that that case was not, as would appear from the head-note, an actual decision, but that, while expressing an opinion, his Lordship expressly abstained from deciding the point, and made no order upon the petition.

Subsequently, upon that case coming before Bacon, V.C., in the form of a claim in the winding-up of the society, there being evidence that the person paying the premiums knew, though it did not appear that he had formal notice of, the successive transfers of the business of the society, and it being the fact that upon the dropping of the life assured he had *sent in his claim* upon the policy to the new company, it was held that the payment of the premiums and the claim were conclusive evidence of his having accepted the new company as his debtors; and on appeal this decision was affirmed (*n*), but on additional evidence and on a completely different ground (*v. infra*, p. 375).

It does not appear, however, from subsequent cases that the Court will be very ready to draw the inference that a novation was intended from the mere fact of the payment of premiums (*o*). Thus, in *In re Manchester and London, &c., Association* (*p*), James, V.C., said: "It appears to me monstrous that a person having a contract of this kind is to be told that he has lost his right under his original contract, and must take such remedy as he may get from some other office, because he pays his premiums and takes receipts at

(*k*) *Re British Provident, &c., Co.*, 4 N. R. 48.
(*l*) 9 Eq. 306.
(*m*) *E. p. Blood*, 9 Eq. 316, 321.
(*n*) *National Provincial Life Assurance Society, Fleming's Case*, 6 Ch. 393.
(*o*) See, however, the notes of cases in the Albert Arbitration, *infra*.
(*p*) 9 Eq. 643, 649.

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the place where he is told to do so;" and, again, in *Griffith's Case* (*q*), sitting as Lord Justice: "It seems to me beyond all question that, whatever may be said as to the effect of continuing to pay premiums for a great number of years,—although I am not myself disposed to attach very much importance to such payment in any case—the payment of premiums for any number of years, where there is a particular contract between the two companies [providing expressly for the policy-holders who shall not accept the liability of the new company], cannot have the slightest operation."

A policy of insurance is not a new contract every year, but is a contract made once for all, with a condition to be performed *de anno in annum*, and if the condition is not performed in any year the contract is at an end (*r*).

It is established by *In re Manchester and London, &c., Association* (*s*) that the payment of premiums at the office of the new company, and taking receipts in the name of the new company, will not of itself, in the absence of any evidence of notice of the amalgamation and assent thereto by the creditor, whether given by the form of the receipts or otherwise, effect a novation.

And there does not appear to be any case in Chancery in which the payment of premiums, after notice of the amalgamation, has been held of itself sufficient to bind the creditor (*t*); but it is apprehended from the remarks of Hatherley, L.C., in *Re Manchester, &c., Association* (*u*), and from the case next mentioned below, that a novation may be thus effected. His Lordship there said: "Of course if he (the policy-holder) knew all that had been done, there would have been an acceptance on his part of the new company, and that company would become his debtor instead of the old one; and, taking his receipt from them, he could only maintain his claim by shewing that he had taken a receipt from persons who were competent and proper to give him that receipt" (for otherwise the policy would have dropped from non-payment of the premiums).

The case of *In re Times Life Assurance, &c., Co.* (*x*) is the case which approaches most nearly to the point in question, for it would appear from the judgment of the Lord Justice Giffard, that, apart from the acceptance of a *bonus* from the new company, which there was in that case, he would have been prepared to hold that the policy-holder, having been informed of the facts, and having received a request (founded on the statement that another and a different company was responsible for the future) that he would pay his premiums to the new company, and having assented to that request, had released the old company, and accepted the liability of the new company.

Life Assurance Companies Act, 1872.

In consequence of the decisions in the cases above cited, and of those in the similar cases noticed below, which were decided in the Albert Arbitration, the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), *v. infra*, provides, by sect. 7, that in the case of a transfer or amalgamation either before or after the passing of that Act (6th of August, 1872) no policy-holder in the transferor company shall by reason of payment of premiums to the transferee company made after the passing of the Act, or by reason of any other act done after the passing of the Act, be deemed to have abandoned any claim which he would have had against the transferor company on due payment of premiums to such company, or to have accepted in lieu thereof

(*q*) *In re Medical Invalid, &c., Society*, 6 Ch. 374, 379.

(*r*) *Per* Hatherley, L.C., see 5 Ch. 638, 642; contrast *Budden's Case* (Alb. Arb.), Reil. 120; 16 Sol. J. 462.

(*s*) 9 Eq. 643; 5 Ch. 640.

(*t*) This is to be understood of the cases in Chancery only. In the Albert Arbitration—*Werninck's Case*, Reil. Alb. 101; 15 Sol. J. 767; and *Fagan's Case*, 15 Sol. J. 855 (*v. infra*), appear to go quite the length of holding this.

(*u*) See 5 Ch. 642.

(*x*) 5 Ch. 381.

the liability of the transferee company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized.

Bonus.

If a policy-holder in the old company be offered and accept a *bonus* in the new company with a fair understanding and knowledge that he is taking what he could not be entitled to except on the assumption that he has become a policy-holder in the new company, then he accepts the offer of a novation so made to him. And such an acceptance is evidence which will override strong evidence in the opposite direction; as where the policy-holder was asked to send in his policy to be endorsed, and he never did so (*y*); where, the policy being in the A. Company, the A. Company transferred its business to the B. Association, under terms which appeared to keep those companies separate, and the B. Association was afterwards amalgamated with the Albert Company (*z*); where the agreement for amalgamation expressly provided for the case of policy-holders who should not accept the liability of the new company, and the policy-holder had not applied for a substituted policy in the new company (a).

Indorsement on policy.

Where, upon the amalgamation, a policy-holder sent in his policy to have an indorsement made on it, on the part of the new company, "guaranteeing its due fulfilment," and paid one premium to the new company, and on the dropping of the life sent in his claim to the new company, it was held that he had not merely accepted the liability of the new company as a guarantee but had effected a complete novation (*b*).

Where a policy-holder sent in his policies for indorsement, and thereupon the secretary sent him a form for his signature, whereby he was to assent to the transfer of the liability upon the policies to the new company, and he refused to sign this document, and the policies were thereupon returned to him without indorsement, there was no novation (*c*).

Where, upon the transfer of the business of company A. to company B. a policy-holder in A. paid one premium to A., by whom it was received as agents for B., and then the life dropped, and subsequently the policy was indorsed with a memorandum that the property of B. should alone be liable, and that the claim should be payable by instalments, company B.'s contention that there was no novation, and—under the circumstances under which company A. was wound up—no consideration for the memorandum, failed (*d*).

Policy-holder also shareholder.

Where a policy-holder in the N. Life Co. was also a shareholder in the N. Fire Co., and, as such shareholder, executed, upon the amalgamation of both those companies with the B. Company, the deed of settlement of the B. Company, and took shares in the B. Company in exchange for his shares in the N. Fire Co.; and under the amalgamation the B. Company took all the assets of the N. companies, and undertook to indemnify those companies against all liabilities, it was held that under those circumstances the old debt no longer subsisted as between the policy-holder and the N. Life Co., for (*semble*) a sort of merger or extinguishment of the debt had taken place. The policy-holder was, therefore, not allowed to prove as a creditor in the winding-up of the N. Life Co. (*e*).

Mutual assurance society.

Where the guarantee fund of a mutual assurance society was, under the

(*y*) *Times Life Assurance Co.*, 5 Ch. 381.

(*z*) *Anchor Assurance Co.*, 5 Ch. 632.

(a) *Medical Invalid, &c., Society, Spencer's Case*, 6 Ch. 362.

(*b*) *International Life Assurance Society, E. p. Blood*, 9 Eq. 316.

(c) *Medical Invalid, &c., Society, Griffith's Case*, 6 Ch. 374.

(*d*) *Evens' Claim*, 16 Eq. 354.

(*e*) *National Provincial Life Assurance Society, Fleming's Case*, 6 Ch. 393, cited also *supra*, p. 373. This case was remarked upon and disapproved by Lord Cairns in *Shayler's Case* (Alb. Arb.), 16 Sol. J. 501.

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resolution of a general meeting, paid off and put an end to, and subsequently, by a deed by which all the shareholders were bound, all the assets of the society were handed over to another association, and it was agreed that all the liabilities of the society in respect of the policies should be paid and satisfied out of the funds of the association, a member of the society was held by that deed to have effected a complete novation in respect of his policy entered into with the society (*f*).

Successive transfers.

If the A. Company transfer its business to the B. Company, and subsequently the B. Company transfer its business to the C. Company; then, if no novation be established as to the first transaction, the creditors of the A. Company remain unaffected by any subsequent transactions between the B. and C. Companies to which the A. Company was no party, even though notice of such transactions be brought home to them (*g*).

Albert Arbitration.

From the following short notes of the cases on novation decided by Lord Cairns as arbitrator in the *Albert Life Assurance Co. Arbitration* it will be seen that the doctrine of novation was in that arbitration carried considerably beyond the point at which it had been left by the cases in Chancery; while, on the other hand, the principles afterwards adopted by Lord Westbury in the *European Arbitration* were of a character to refuse to impute to the policy-holder an intention to accept a substitution of liability upon evidence other than unequivocal of his understanding and acceptance of the offer of substitution made to him.

Policy.

The word "novation," although proper enough in the case of an annuity contract, is not, properly speaking, applicable to the case of a policy of assurance. The policy-holder's contract, as an absolute contract, is only for the year or half-year covered by the premium he has paid. With respect to everything beyond that the contract is conditional, and the sole foundation of his right is his paying the premium, and paying it to the proper person. It is not a question of novation, it is a question of fact. Did he pay the premium to the right person? (*h*).

Nature of contract.

This, it is submitted, is the fundamental proposition which lies at the root of all Lord Cairns' decisions as respects policy-holders.

Payment of premiums to new company;

The *onus* of explaining the apparent irregularity of paying premiums to, and taking receipts from, some company other than the contracting company lies on the policy-holder. In default of his being able to shew that such payments and receipts were made to, and given by, the new company as agents of the contracting company, his original contract with the latter will have terminated for want of payment of premiums to them (*i*).

Payment of premiums by cheques drawn in favour of the old company or bearer will not be regarded as giving the assuring companies notice of the character in which the money is paid (*k*).

But where the policy-holder went abroad leaving directions with his solicitors to pay the premiums, and during his absence the amalgamation took place, and neither his solicitors nor he had any notice of it; and his

(*f*) *Merchant's and Tradesman's Assurance Society*, 9 Eq. 694.

(*g*) *Manchester and London, &c., Association*, 9 Eq. 643; 5 Ch. 640; and see judgment of James, V.C., in *Anchor Assurance Co.*, 5 Ch. 632, 636, n.

(*h*) *Western Life Assurance Society, Budden's Case*, Reil. Alb. 120, 122; 16 Sol. J. 462; *Whitehaven Bank Case*, Reil. Alb. 62, 64; and other cases cited below, *passim*.

(*i*) *Family Endowment Society, Kennedy's Case*, Reil. Alb. 5; 15 Sol. J. 729; and see *Bank of London, &c., Association, Lancaster's Case* (No. 2), Reil. Alb. 95; 15 Sol. J. 748; *Western Life Assurance Society, Budden's Case*, Reil. Alb. 120; 16 Sol. J. 462; *Glazebrook's Case*, Reil. Alb. 135; contrast *Coghlan's Case, Blundell's Case* (Eur. Arb.), *infra*, p. 379.

(*k*) *Rivaz' Case*, Reil. Alb. 104; 16 Sol. J. 590.

solicitors and, after his return to England, he, paid the premiums to the new company, and further he addressed a letter to the new company asking what was the selling value of his policy, there was no novation, for under the circumstances the new company had been treated throughout as the agents of the old (*l*).

after notice given;

The receipt of a circular giving information as to the amalgamation and the subsequent payment of premiums to the new company without protest will effect a substitution of liability (*m*).

under protest;

Subsequent payment of premiums subject to, and on the footing of a solemn protest against the amalgamation in writing addressed to the company, will not effect such a substitution (*n*); but a payment of premiums without reservation after a mere verbal protest will do so (*o*).

A distinct and continuing verbal protest, however, shewing clearly that the policy-holder had no intention of accepting a substitution of liability, and that subsequent payment of premiums was made (as in the case of this company it could under the provisions of the deed of amalgamation be made) to the new company only in order to keep on foot the existing policy and the liability of the old company thereon, will be effectual (*p*).

Where, by the rules of the old company, thirty days' grace were allowed for the payment of premiums, but by those of the new company a calendar month only, and after the amalgamation a policy-holder in the old company insisted that he was still entitled to the thirty days (from Feb. 10), and his claim was allowed, this was not such a protest as to enable him to retain his claim against the old company (*q*).

Where the policy-holder went to the office of the company and protested against the amalgamation, but on being told that he had no alternative but either to pay the premiums to the new company, or to let the policy drop, he did pay the premiums to the new company and took receipts from them, the protest was not effectual to keep alive the liability of the old company; for that although he had paid the premiums under the wrong impression that it was necessary to go over to the new company, yet he had actually paid under that impression, and had therefore accepted the liability of the new company (*r*).

in case of policy in settlement;

Where a policy of insurance on the life of a husband has been effected in the names of the trustees of his marriage settlement (*s*), or has been assigned to such trustees (*t*), a substitution of liability may, having regard to the trusts of the settlement, be effected by such a payment of premiums by the life assured as would, according to the preceding cases, have effected such a substitution if made by the trustees themselves.

by receiver in Chancery;

A policy-holder borrowed money of the assuring company on the security of her policies and of a jointure rent-charge payable to her by a receiver in Chancery, and by a consent-order it was provided that the receiver should pay to the trustees of the assuring company both the interest on the loan

(*l*) *Count D'Alte's Case*, 17 Sol. J. 365.

(*m*) *Whitehaven Bank Case*, Reil. Alb. 62; *Medical Invalid, &c., Society, Werninck's Case*, Reil. Alb. 101; 15 Sol. J. 767; *Fagan's Case*, 15 Sol. J. 855.

(*n*) *Western Life Assurance Society, Wood's Case*, Reil. Alb. 54; 15 Sol. J. 693.

(*o*) *Western Life Assurance Society, Rivaz' Case*, Reil. Alb. 104; 16 Sol. J. 590; *cf. Kelly's Case* (Eur. Arb.) L. T. 89, 92; where Lord Westbury said the protest did not improve, but was not wanted to support, the case.

(*p*) *Medical Invalid, &c., Society, Dorning's Case*, Reil. Alb. 144; 16 Sol. J. 673; and see *Clarke's Case*, 16 Sol. J. 752.

(*q*) *Warne's Case*, Reil. Alb. 113; 16 Sol. J. 631.

(*r*) *Western Life Assurance Society, Howell's Case*, Reil. Alb. 116; 16 Sol. J. 632.

(*s*) *Family Endowment Society, Balfour's Case*, 16 Sol. J. 534.

(*t*) *Western Life Assurance Society, Andrew's Case*, Reil. Alb. 107; 16 Sol. J. 609.

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and the premiums on the policies. A payment of premiums under these circumstances by the receiver to the new company after an amalgamation, of which the policy-holder knew nothing (all notices relating thereto having been sent to the receiver), was no bar to her claim against the old company, for the receiver was the agent of the trustees of the assuring company; and the only persons, therefore, who had paid premiums to the new company were the trustees of the old company (*u*).

by mortgagor.

If the mortgagor receives the amalgamation circulars and pays the premiums, the mortgagee is bound (*x*).

Receipt referring to the policy as one of the old company.

A referenee by letters in the margin of a receipt for premium given by the new company, identifying the policy as a policy of the old company, does not derogate from the force of the receipt as a receipt given by the new company in a question of substitution of liability (*y*).

Claim.

The sending in a claim, upon the dropping of the life insured, to, and its admission by, the new company after premiums have been paid to, and receipts given by, that company effects a substitution of liability, although no notice of the amalgamation has been given to the policy-holder (*z*).

Bonus.

The receipt by a policy-holder of a circular offering him four methods of receiving a bonus from the new company, and informing him that if no reply were received from him by a particular date the amount would be added to his policy, to which the policy-holder sent no reply, was held to place him in the same position as if he had accepted a bonus (a).

Where the policy-holder chose present payment, and the bonus was paid to him accordingly, there was novation (*b*).

Where the policy-holder made an inquiry as to bonus, under circumstances which tended to shew he meant bonus in the transferee company, there was novation (*c*).

But where the agent of the company told the policy-holder that he had a bonus circular for him, and the policy-holder thereupon replied that the paper need not be given him, as he did not recognise the new company, but continued to hold to the old company, his claim against the old company was unaffected (*d*).

Indorsement on policy.

An annuitant who, after receiving a circular giving him notice of the amalgamation, allows an indorsement to be placed on his annuity deed, stating that the capital of the new company will be liable for payment of the annuity, and not stating that such liability is an additional, as distinguished from a substituted, security, has thereby accepted the liability of the new company (*e*).

Where all annual payments in respect of an endowment contract had been made before the amalgamation, but after the amalgamation the holder took in the contract to be indorsed by the new company, with a voucher binding them to satisfy his claims, he had thereby accepted their liability (*f*).

(*u*) *Power's Case*, 16 Sol. J. 732.

(*x*) *Werninck's Case*, Reil. Alb. 101; 15 Sol. J. 767; *cf. Vivian's Case* (Eur. Arb.), L. T. 169; 18 Sol. J. 758.

(*y*) The cases cited above, and in particular *Anchor Assurance Co., Knox's Case*, Reil. Alb. 132; 16 Sol. J. 673.

(*z*) *Western Life Assurance Society, Budden's Case*, Reil. Alb. 120; 16 Sol. J. 462. Contrast *Wilson's Case* (Eur. Arb.), L. T. 158; 18 Sol. J. 758.

(a) *Medical Invalid, &c., Society, Allen's Case*, Reil. Alb. 127; 16 Sol. J. 657; *Glazebrook's Case*, Reil. Alb. 135; and see *Werninck's Case*, Reil. Alb. 101; 15 Sol. J. 767, where the receipt of the circular was acknowledged; contrast *Coghlan's Case* (Eur. Arb.), Reil. 46; L. T. 31, 38; 17 Sol. J. 127; *Conquest's Case* (Eur. Arb.), L. T. 67; 17 Sol. J. 328; 1 Ch. Div. 334.

(*b*) *Knox's Case*, Reil. Alb. 132; 16 Sol. J. 673.

(*c*) *Holmes' Case*, Reil. Alb. 110.

(*d*) *Clarke's Case*, 16 Sol. J. 752.

(*e*) *Dale's Case*, Reil. Alb. 11; 15 Sol. J. 886.

(*f*) *Family Endowment Society, Hawtrey's Case*, Reil. Alb. 138; 16 Sol. J. 713.

Where upon the amalgamation a trust fund had been set apart by the old company to satisfy any claim on a policy issued by the old company which the new company should not satisfy, a policy-holder who had accepted substituted policies in the new company had no claim on the trust fund (*g*). Substituted policy accepted.

Where upon the amalgamation of the W. Company with the A. Company the A. Company agreed, out of its assets, to indemnify the W. Company against all claims and demands; the holder of an annuity contract, who had not in any way accepted the substituted liability of the A. Company, but who, being a shareholder in, and director of, the W. Company, had exchanged his W. shares for A. shares, was not on that account precluded from claiming against the W. Company, for the joint effect of his being both shareholder in the A. Company and policy-holder in the W. Company was not to merge or extinguish his debt, but only to dedicate such portion of capital as might be called up from him to indemnify the old company (*h*). Annuitant also shareholder.

Where the A. Company has effected with the B. Company re-insurance policies on lives insured by the A. Company, and the A. Company is subsequently wound up, see as to the measure of the liability of the B. Company, *Re Albert Life Assurance Co.* (*i*). Re-insurance policies.

The principles upon which Lord Westbury in the *European Arbitration* regarded questions of novation will be found conveniently and exhaustively laid down in the two cases on the subject which were first heard, viz., *Coghlan's Case* (*k*) and *Blundell's Case* (*l*). These principles may be shortly stated as follows:— European Arbitration.

In any case of alleged novation, the transferee company must be required to prove:—First, that that company had legal power to grant new policies to the policy-holders of the transferor company upon the same terms as were contained in those policies, or to adopt and indorse the transferor company's policies, so as to make them equivalent to original policies of the transferee company; secondly, that this power on the part of the transferee company was made known to the policy-holder, and that an offer was made to him to accept either a new policy or an indorsed policy from the transferee company; thirdly, that the acceptance of such offer by the policy-holder is evidenced by acts which unequivocally denote his understanding and acceptance of that proposal (*m*). Onus is on company.

It is not for the policy-holder to prove that he did not intend to accept by way of substitution the liability of the transferee company. That is quite an inversion of the proper order. It is incumbent on the company which alleges the substitution of novation to prove an agreement by the policy-holder to make that novation, and to prove acts of the policy-holder in the absence of any written declaration, which unequivocally involve the evidence of that intention on the part of the policy-holder to accept the new company instead of the old (*n*).

To raise the new contract there must be, on the part of the transferee company, a power to make it; there must be, on the part of the policy-holder, a knowledge of the company's right so to contract with him; and there must be conduct on the part of the policy-holder, when it is an in-

(*g*) *Sovereign Life Assurance Co.'s Case*, 15 Sol. J. 816; *Bowring's Case*, 16 Sol. J. 305; *Butler's Case*, 16 Sol. J. 399; and see *Jull's Case*, 16 Sol. J. 341.

(*h*) *Shayler's Case*, 16 Sol. J. 501, disapproving *Fleming's Case*, 6 Ch. 393.

(*i*) 16 Sol. J. 917.

(*k*) (Eur. Arb.), Reil. 46; L. T. 31; 17 Sol. J. 127.

(*l*) (Eur. Arb.), Reil. 84; L. T. 39; 17 Sol. J. 87.

(*m*) See (Eur. Arb.), Reil. 54, 99; L. T. 30, 46; 17 Sol. J. 91.

(*n*) See (Eur. Arb.), Reil. 61; L. T. 38; 17 Sol. J. 129. Contrast in the Alb. Arb. *Kennedy's Case, Lancaster's Case, Budden's Case*, *supra*, p. 376.

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complete contract, or where there is no evidence in writing, that unmistakably shews his intention to accept the new contractor and to discharge the old one (*o*).

Payment of premiums to new company.

The transfer of its business by company A. to company B. involves an authority to company B. to carry on that business, including the power to receive, in the case of policies granted by company A., the premiums payable on those policies. Company B. will receive those premiums by virtue of the authority impliedly given in the transfer, and the premiums thenceforth paid will *primâ facie* be considered as received by company B. under that implied authority. The *onus* of proving the contrary is on the company (*p*).

A covenant by company B. to indemnify company A. is evidence in the policy-holder's favour, for it necessarily involves the continued existence of the liability indemnified against (*p*).

The form of receipt given by B. for premiums is immaterial. If that company gives a receipt in its own name it is equivalent only to an attorney giving under a power of attorney a receipt in his own name without adding that he signs as attorney. Under such circumstances the receipt must be referred to the right that the attorney had to receive, and unless it can be shewn that he had some other right to receive than the delegated authority, the receipt must be referred to that authority. It follows that it is by no means clear from the mere fact that a policy-holder has paid his premium to, and accepted the receipt of, company B., that he therefore paid company B. in its own right, and not in the right of company A. The bare fact of such payment and acceptance is no evidence of intention by the policy-holder to accept a substitution of liability (*q*).

The intention to effect a novation must be proved: it cannot be inferred from the heading of the receipt (*r*). "The obligation, the *onus probandi*, the duty of proving, lies on the company that alleges a novation. It is a question of intent, to be evidenced in the clearest manner, and unless that intent is evidenced, the simple payment of the premiums will be referred to the old contract, and the old rule, which will be considered as still kept up by the assignee of the business, who, by virtue of the transfer, has a right to receive the premiums on old policies as authorized by the company granting those policies" (*s*).

The enactment of sect. 7 of the Life Assurance Companies Act, 1872 (*v. infra*), shews that the legislature thought more unequivocal evidence of intention should be required than has been sometimes accepted. "I cannot legislate to the extent of saying that I will require a writing. But I will require evidence of an intention to make a new contract as plain as if it was expressed in writing" (*t*).

The principles thus enunciated are illustrated by a number of cases which may now be conveniently collected in the same order as has been observed with the decisions in Chancery, and in the Albert Arbitration.

Receipt of payments of annuity.

A. was the grantee of an annuity contract in company I. Immediately after the grant I. transferred its business to the E. Society, and purported to

(*o*) See (Eur. Arb.), Reil. 64; L. T. 39; 17 Sol. J. 130.

(*p*) See (Eur. Arb.), Reil. 93; L. T. 43; 17 Sol. J. 90; *cf. Conquest's Case*, 1 Ch. Div. 334, 340.

(*q*) See (Eur. Arb.), Reil. 94; L. T. 44; 17 Sol. J. 90; *cf. Swift's Case, Kelly's Case* (Eur. Arb.), L. T. 89.

(*r*) Contrast in the Alb. Arb. *Knox's Case*, Reil. 132; 16 Sol. J. 673.

(*s*) See (Eur. Arb.), Reil. 97; L. T. 45; 17 Sol. J. 91. Contrast in the Alb. Arb. *Kennedy's Case*, and others, *supra*, p. 376.

(*t*) See (Eur. Arb.), Reil. 94, 96; L. T. 44, 45; 17 Sol. J. 90.

dissolve itself under a power in its deed of settlement. A. received payment of the annuity from E. for seventeen years, gave receipts to E., and sent to E. certificates of her identity, in which the annuity was described as payable by E. At the end of the seventeen years A. obtained from the Court of Chancery an order to wind up L., and in the European Arbitration the order was held to have been properly made, for there was no novation (*u*), and the dissolution was not effectual as against creditors (*x*).

B. was the grantee of an annuity contract in company X. For two years X. paid the annuity, and then, having transferred its business to company Y., an order was made to wind up X., and the usual advertisements were issued for creditors to come in and prove against X. B. made no proof. Y. paid the annuity for three years, and then transferred to the E. Society E. paid the annuity for six years. E. being then wound up, B. claimed to prove against X., and was held entitled so to do. For B. had never done anything but receive the annuity from the successive companies by whom, according to the arrangements made between the companies themselves, it was payable; and as to the winding-up, until there was default in paying the annuity there was nothing to prove (*y*).

Payment of premiums to new company.

If a policy-holder in company A. receive notice of the transfer to company B. of the business of company A. his subsequent payment of premiums to, and acceptance of receipts from, B. cannot possibly, if made under strong, although not continuing, protest, and with a refusal to have anything to do with any one but A., work a novation (*z*).

If the policy-holder have received no notice of the amalgamation, and have continued to pay his premiums to the same local agent, the acceptance of receipts given in the name of the transferee company is utterly insufficient to shew an intention to effect a novation (a).

If a policy-holder in A. receive a letter requesting and encouraging him to become a policy-holder in B., and then, without answering the letter, he immediately goes and pays his premium to B., this may be a practical answer to the letter and an acceptance (*b*).

Payment of premiums to B. without protest, after receipt of a circular announcing the amalgamation and stating that the terms and conditions of the policies "will remain unaltered," does not effect a novation (*c*).

But where A. was a policy-holder in X., and X. transferred to Y., and Y. to Z., and ten years after an order had been made for winding up X. the executors of A. claimed to prove against X., it was held that by payment of premium to Y. and Z., A. had novated. For A. was a person to whom knowledge of the winding-up order could fairly be imputed, and thereafter he must be taken to have known that the implied authority to Y. and Z. to receive the premiums as agents of X. came to an end (*d*).

(*u*) *Barnes' Case* (Eur. Arb.), L. T. 72; 17 Sol. J. 594; *cf. Gardiner's Case* (Eur. Arb.), L. T. 63; 17 Sol. J. 464; where there were both payment of premiums to, and payment of the annuity by, the transferee company. The case was however argued on the effect of a statutory enactment.

(*x*) See *supra*, pp. 40, 331.

(*y*) *Burns' Case* (Eur. Arb.), L. T. 127.

(*z*) *Coghlan's Case* (Eur. Arb.), Reil. 46; L. T. 31; 17 Sol. J. 127.

(a) *Blundell's Case* (Eur. Arb.), Reil. 84; L. T. 39; 17 Sol. J. 87.

(*b*) See in *Blundell's Case* (Eur. Arb.), Reil. p. 90; L. T. p. 43; referring to *Rivaz' Case* (Alb. Arb.), Reil. 104; 16 Sol. J. 590. But there is no case in which Lord Westbury held novation to have been actually so effected.

(*c*) *Conquest's Case* (No. 1) (Eur. Arb.), L. T. 67; 17 Sol. J. 328; 1 Ch. Div. 334; *Swift's Case*, *Kelly's Case* (Eur. Arb.), L. T. 89.

(*d*) *Carpmael's Case* (Eur. Arb.), L. T. 95. There was a further ground for the decision, see *infra*, p. 383; *cf. Lines' Case* (No. 1) (Eur. Arb.), L. T. 151; 18 Sol. J. 418 (Lord Romilly).

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Claim.

The sending in a claim, upon the dropping of the life insured, to and its admission by the new company after premiums have been paid to that company, is not sufficient evidence to effect a novation (*e*). This decision follows from those noticed below, which shew that there is, unless the contrary is shewn, a double right of proof. To prove, therefore, an intention to hold B. liable is not equivalent to proving a release of the liability of A.

Bonus.

If the policy-holder after notice of the amalgamation received from the transferee company notice that he is entitled to a reversionary bonus, and took no notice of the letter (*f*); and even, *semble*, if, after having been told in the notice of the amalgamation that the terms and conditions of his policy "will remain unaltered" and that union increases bonus, and that in all future bonuses he will "participate on an equality with the other policy-holders in the conjoint companies," he were to accept the bonus (*g*), this will not effect a novation; for the benefit will have been accepted as an addition, and not by way of substitution.

Indorsement on policy.

If a policy-holder refuse to exchange, or to take an indorsement on, his policy, this, of course, is strong evidence against novation (*f*).

If the notice of amalgamation state that the policy will remain unaltered and premiums are paid to the new company without any notice taken of an offer of exchange or endorsement, there is no novation (*h*); and even if the policy be sent in for indorsement and be indorsed to the effect that the B. Company shall be liable for the payment of the sum assured (with profits) (*i*) or (without profits) (*k*) this will not be a novation, if, upon the wording of the documents, the indorsement be a contract additional to, and not substitutional for, the original contract. The words "with profit" in such a case are descriptive only of the nature of the policy in the old company, viz., a participating policy.

Semble, if the indorsement goes beyond the original contract and confers an additional benefit, the original contract will not be superseded, but there will be two coherent and concurrent obligations, unless it be shewn that the second purports to effect an alteration in the terms of the first (*l*).

Where A. and B. were respectively policy-holders in W., and W. transferred to X., X. to Y., and Y. to Z., and A. accepted from X. an additional guarantee, and then X. being wound up, B. accepted an indorsement from Y., and premiums were of course in succession paid to each of the four companies, Lord Westbury held that there was no novation, but a right of proof against each of the four companies (*m*).

An indorsement by the transferee company that, in consideration of an additional premium, the assured might go abroad "without prejudice to this assurance" was not evidence of novation (*n*).

But where, the transferor company having been wound up in 1862, the

(*e*) *Wilson's Case* (Eur. Arb.), L. T. 158; 18 Sol. J. 758 (Lord Romilly). Contrast *Budden's Case* (Alb. Arb.), *supra*, p. 378.

(*f*) *Coghlan's Case* (Eur. Arb.), Reil. 46; L. T. 31; 17 Sol. J. 127.

(*g*) *Conquest's Case* (No. 1) (Eur. Arb.), L. T. 67; 17 Sol. J. 328; S. C. 1 Ch. Div. 334.

(*h*) *Conquest's Case* (No. 1), *ubi supra*; *Swift's Case*, *Kelly's Case* (Eur. Arb.), L. T. 89.

(*i*) *Scott's Case* (Eur. Arb.), L. T. 109.

(*k*) *Hort's Case* (Eur. Arb.), L. T. 109; S. C. 1 Ch. Div. 307.

(*l*) *Scott's Case*, *Hort's Case*, *ubi supra*. It is extremely difficult to gather accurately the effect of these cases, for Lord Westbury seems to have changed his mind between the first and second hearings.

(*m*) *Harman's Case*, *Pratt's Case* (Eur. Arb.), L. T. 129; 18 Sol. J. 25; but see *infra*, p. 384 (*z*) (a).

(*n*) *Grain's Case* (Eur. Arb.), L. T. 157; 18 Sol. J. 758 (Lord Romilly). But see S. C. 1 Ch. Div. 307.

policy-holder in 1868, discovering that the life was two years older than was stated in the proposal for the policy, took from the transferee company an indorsement reducing the sum assured accordingly, novation was held to be proved (*o*).

Statutory liability.

The effect of a statutory enactment, after the amalgamation of companies A. and B., that B. shall be liable on any policy whether issued by A. or B., is, not to create a novation, but to define the nature of the right against B. (*p*).

Concurrent proof.

The result of the decisions in several of the foregoing cases being that the policy-holder had a right of proof against more than one company, Lord Westbury further held that, where this was the case, he might prove against all concurrently, subject of course to the limitation of not receiving more than 20*s.* in the pound (*q*).

Lord Romilly.

But Lord Romilly, succeeding after Lord Westbury's death to the office of arbitrator, refused to allow the policy-holder to exercise individually his right of concurrent proof, and held that, at any rate as a matter of convenience, the liquidator of the transferor company must prove *en bloc* against the transferee company the latter's liabilities under a covenant to indemnify (*r*).

The tendency of the decision last noticed is obviously to merge that which Lord Westbury held to be the right of the individual policy-holder (*q*) in a liability, not to the policy-holder, but to the transferor company. It is, in fact, a sign of a divergence from the lines marked out by Lord Westbury, which afterwards increased to such an extent, as that on questions of novation Lord Romilly must be said to have wholly parted company from his predecessor.

Thus Lord Romilly held that where A., after offer of either an exchange of policy "without altering any of the terms, &c.," or of an indorsement "in a manner which will fully secure the responsibility and guarantee" of the transferee company,—accepted an indorsement whereby "in consideration of A.'s agreeing to the transfer of this policy" to the transferee company, that company agreed to perform all the stipulations of the policy "on behalf of" the transferor company; and again in the case of B., who under similar circumstances accepted an indorsement nearly identical with that in *Scott's Case* and *Hort's Case* (*s*), and containing no such words as "agreeing to the transfer, &c.,"—there was a novation (*t*). And although upon the words "agreeing to the transfer, &c.," the decision in the former of these cases might perhaps be reconciled with those of Lord Westbury, and upon the language of the amalgamation circular a distinction might perhaps be found in the case of the latter, the difficulty cannot thus be evaded, for Lord Romilly expressly stated that he could not distinguish *Pratt's Case* (*u*) before Lord Westbury, and refused to follow it.

After stating that he found it impossible to reconcile the decisions, his Lordship said: "Having arrived at the conclusion that it is necessary that I should follow either Lord Cairns or Lord Westbury, I have come to the conclusion that I must follow Lord Cairns." And again: "Lord Westbury seems to have held . . . that the three parties must concur and all join together to make a fresh contract in order to constitute novation. Now,

(*o*) *Carpmael's Case* (Eur. Arb.), L. T. 95.

(*p*) *Gardiner's Case* (Eur. Arb.), L. T. 63; 17 Sol. J. 464.

(*q*) *Harman's Case, Pratt's Case* (Eur. Arb.), L. T. 129; 18 Sol. J. 25; but see *infra*, p. 384 (*z*) (a).

(*r*) *Lines' Case* (No. 2), *Leah's Case, Deas' Case* (Eur. Arb.), L. T. 167; 18 Sol. J. 879.

(*s*) (Eur. Arb.), L. T. 109; see *supra*.

(*t*) *Talbot's Case, Vivian's Case* (Eur. Arb.), L. T. 169; 18 Sol. J. 758.

(*u*) (Eur. Arb.), L. T. 129; 18 Sol. J. 25.

Sect. 159. I shall not hold that doctrine; it is not doctrine that I think is to be found in the cases." In this sentence appears to be involved a complete departure from that which was the very basis of Lord Westbury's decisions.

Consistently with these statements Lord Romilly held novation to be effected by payment of premiums after notice of successive amalgamations, although no notice had been taken of *bonus* circulars, and an offer of indorsement had not been accepted (*x*); and also, under similar circumstances, where an indorsement had been taken (*y*); and, re-hearing *Harman's Case* and *Pratt's Case* (*z*), reversed the decision of his predecessor in the arbitration (a).

European Arbitration appeals.

The appeals brought in the European Arbitration under the special Act (38 & 39 Vict. c. clvii.) did little or nothing to decide between the conflicting opinions thus expressed on the question of novation.

Hort's Case (*b*) and *Grain's Case* (*c*) were carried on appeal (*d*), and, independently altogether of the question of novation, were held to be governed by the particular provisions of the deed of settlement. The policy-holder had contracted for payment out of a fund which, by the constitution of the company, imported into the contract with the policy-holder, was liable to be transferred to another company. The fund having been transferred under the power, the policy-holder was by his contract bound to follow it, and independent of novation the original owners of the fund were discharged.

Harman's Case (*z*) was also appealed (*e*) and decided upon similar principles. The policy-holders there had votes, and it was held that the minority were bound by the transfer carried out under the deed by the vote of the majority.

Cocker's Case (*f*) added to the foregoing a decision that the fund handed over became general assets of the transferee company, and that the transferor company were under no obligation to see it appropriated towards payment of the policies handed over: and in *Dowse's Case* (*g*), the Court refused to find a distinction from *Hort's Case* in the fact that the policy did not expressly refer to the deed of settlement.

The only two cases decided on the footing of novation were *Conquest's Case* (*h*) and *Miller's Case* (*i*). The former of these proceeds upon the footing that where, in the absence of a special power in the deed, a transfer is made, and the policy-holder is told to pay his premiums to the new company, such a payment is no evidence of novation, a decision which to a great extent supports Lord Westbury's views on this subject. The latter was a case in which there was made on the policy an indorsement which was held from its form to constitute a complete novation.

General scheme of liquidation may be sanctioned.

159. The liquidators may, with the sanction of the Court (*a*), where the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution (β) of the company, where the company is being wound up altogether voluntarily, pay any classes of creditors in full, or make such compromise or other arrangement (γ) as

(*x*) *Benjamin Smith's Case* (Eur. Arb.), L. T. 173.
(*y*) *Glanfield's Case* (Eur. Arb.), L. T. 173.
(*z*) (Eur. Arb.), L. T. 129; 18 Sol. J. 25.
(a) 19 Sol. J. 68.
(*b*) (Eur. Arb.), L. T. 109; 17 Sol. J. 765.
(*c*) (Eur. Arb.), L. T. 157; 18 Sol. J. 758.
(*d*) 1 Ch. Div. 307.
(*e*) 1 Ch. Div. 326.
(*f*) 3 Ch. Div. 1.
(*g*) 3 Ch. Div. 384.
(*h*) 1 Ch. Div. 334.
(*i*) 3 Ch. Div. 391.

the liquidators may deem expedient with creditors or persons claiming to be creditors, or persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable (δ). Sect. 160.

(α) Gen. Order, Nov. 1862, Rule 50; Comp. (W. Up) Act, 1890, s. 12 (1).
(β) ss. 129, 139.
(γ) *Cf.* s. 136.
(δ) Joint Stock Companies Arrangement Act, 1870, s. 2.

As to the effect of this section, and in particular as to the application of sect. 136 to a winding-up under supervision, see the notes to sect. 160.

A claim made against a company in voluntary liquidation was under sect. 138 submitted to the Court for adjudication. After some proceedings a compromise was entered into by the liquidator and sanctioned by an extraordinary resolution of the company. It was held that although the winding-up was altogether voluntary, it was not competent for the liquidator to enter into such a compromise without the sanction of the Court, the Court having seisin of that particular claim for the purpose of adjudication; but that the compromise having been sanctioned by a general meeting, the *onus* of impeaching it was thrown upon the parties who objected to it (*k*). Voluntary winding-up.

The Court has no jurisdiction to compel the liquidator to consent to a compromise with a creditor (*l*). Consent of liquidator.

And where a petition for the sanction of the Court to a compromise with creditors under this section and sect. 2 of the Joint Stock Companies Arrangement Act, 1870, was presented by a person who was not a creditor, but had bought up the debts and petitioned, in fact, for his own personal benefit, the Court held that, even if there were jurisdiction, no order ought to be made on the petition (*l*).

Under 19 & 20 Vict. c. 47, s. 90, and 21 & 22 Vict. c. 60, s. 19, a compromise was sanctioned whereby a creditor for unpaid purchase-money accepted half his demand, and certain contributories were taken off the list (*m*). Compromise.

A compromise which has been approved by the shareholders, but upon a suppression of material facts, may be set aside. Thus, where a company had contracted to purchase an estate, and the contract not having been completed, the matter was compromised in the winding-up, but there was concealed from the meeting which approved the compromise the fact that the beneficial owner of the estate was one of the directors of the company, and that there was therefore a question whether the contract was valid at all, the compromise was set aside (*n*).

If the necessary consents to a compromise have in fact been given the Court will not be astute to find technical defects in the proceedings, *e.g.* that the proper order of the several proceedings has not been followed (*o*). Technical informalities.

160. The liquidators may, with the sanction of the Court (α), where the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution (β) of the company where the company Power to compromise.

(*k*) *Lama Coal Co., E. p. Miller*, 2 Ch. 692.
(*l*) *International Contract Co., Hankey's Case*, 26 L. T. 358; W. N. 1872, 63; and see s. 160 as to a contributory.
(*m*) *Risca Coal and Iron Co.*, 30 Beav. 528.
(*n*) *Central Darjeeling Tea Co.*, W. N. 1866, 361.
(*o*) *Dynevor Collieries Co.*, 11 Ch. Div. 605. See as to this case, *infra*, note to s. 2 of the Arrangement Act, 1870.

Sect. 160. is being wound up altogether voluntarily, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company, or the winding-up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debt or liabilities, and to give complete discharges in respect of all or any of such calls, debts, or liabilities (γ).

(α) Gen. Order, Nov. 1862, Rule 49; Comp. (W. Up) Act, 1890, s. 12 (1).
(β) ss. 129, 139.
(γ) Joint Stock Companies Arrangement Act, 1870, s. 2.

A going company has, as an incident to its existence, the same power of compromising claims against it as an individual has (*p*).

Effect of section.

This section and the preceding section appear to provide that a company in liquidation by its official liquidators, with the sanction of the Court, shall have exactly the same power of compromising both with its creditors and its debtors as an individual would have (*q*).

Compromise with a class.

And the power of compromise is not confined to entering into a compromise with individual creditors or contributories, but extends to making a general compromise with contributories or creditors as a class, as *e.g.* a general compromise with contributories, notwithstanding differences of position among them, and without inquiring closely into the means of each individual contributory.

This was held upon the construction of sects. 173 and 174 of the Indian Companies Act, No. X. of 1866 (*r*), which are almost *verbatim* the same as sects. 159 and 160 of this Act (*s*), and was followed by Romilly, M.R., with respect to this Act (*t*).

A compromise with contributories is of course *pro tanto* in derogation of the rights of creditors, and to this extent, therefore, it is conceived that under the Companies Act, 1862, a compromise which will prejudicially affect the creditors of the company, may be entered into by the official liquidators with the sanction of the Court, and become binding upon the creditors, notwithstanding that they dissent and oppose the confirmation of the compromise.

As where a compromise was sanctioned under which a call of £25 per share was made payable in instalments, and discount allowed on payment of the instalments before they became due, although the assets would not be sufficient to pay the creditors in full (*u*).

Again, where it was shewn that it was practically impossible to recover

(*p*) *Norwich Provident Society, Bath's Case*, 8 Ch. Div. 334.
(*q*) *Albert Life Assurance Co.*, 6 Ch. 381, 386.
(*r*) See L. R. 2 P. C. 490, where the sections are given.
(*s*) *Bank of Hindustan, China, and Japan* v. *Eastern Financial Association*, L. R. 2 P. C. 489.
(*t*) *Commercial Bank Corporation of India and the East*, 8 Eq. 241.
(*u*) *Smith, Knight & Co.*, 16 W. R. 1104.

calls from the shareholders in a foreign country, the Court sanctioned an agreement whereby the official liquidator in consideration of a lump sum agreed to sell all the company's assets in that country, and to release all the company's rights against the shareholders there (*x*). In this case there was no opposition.

But it is submitted that it is only in this way, indirectly, that under the Act of 1862 a minority of dissentient creditors can be compelled to accept a composition in respect of what is due to them; and *quære* whether, as in *In re Commercial Bank Corporation of India and the East* (*y*), a dissentient creditor can under the Act of 1862 be directly compelled to accept a composition of 17*s.* in the pound.

This point is put very clearly by James, L.J., in *In re Albert Life Assurance Co.* (*z*). The compromise which the Act authorizes is, "a compromise, in the one case, between the company and its creditors who choose to accept it, and in the other between the company and its debtors who choose to accept it. There is nothing in the Act which enables one creditor to bind another creditor to accept a compromise, or which enables one debtor to bind another debtor with respect to paying a composition."

This is a difficulty for which sect. 2 of the Joint Stock Companies Arrangement Act, 1870 (*v. infra*), was intended to provide—and that section adds a power to enable a statutory majority of creditors to bind a minority to accept a compromise as between a company and its creditors.

Consent of liquidator.

The Court has no jurisdiction to compel the liquidator to consent to a compromise with a contributory. The compromise can only be made with the consent both of the liquidator and of the Court (a).

Winding-up under supervision.

It is not easy to say how far liquidators in a winding-up under supervision may by virtue of sect. 151 act without the sanction of the Court.

In a case where the directors, after winding-up under supervision commenced, purported to compromise with a contributory, and the liquidators were said to have adopted the deed, the House of Lords held the deed invalid, and it was said that no such release could be made but with the sanction of the Court (*b*).

Lord Justice Giffard, however, thought that in such a liquidation the liquidator has, by sect. 151, authority to exercise the powers he would have in a purely voluntary winding-up, subject to any restriction imposed by the Court, and that any arrangement therefore which he might, with the sanction of a general meeting, have made in a voluntary winding-up (*c*), he might make in a winding-up under supervision, and that the sanction of the Court would not be necessary unless a restriction had been placed upon his powers (*d*).

It is conceivable that, in *Wright's Case* (*d*), last referred to, sect. 139 is referred to by mistake for sect. 136; and it will be observed that if sect. 136 is to be taken to be applicable to a winding-up under supervision, a very important additional power of compromise is thereby given which in a compulsory winding-up is not, under this Act, applicable. For sect. 136 gives power to a majority of creditors to bind a minority, and disposes of the difficulty in this respect above referred to in all cases to which it applies.

A comparison of sects. 136 and 159 of this Act, and sect. 2 of the Joint

(*x*) *Paraguassu Tramway Co., Wilson's Offer*, 28 L. T. 463; W. N. 1873, 73.
(*y*) 8 Eq. 241.
(*z*) 6 Ch. 381, 386.
(a) *East of England Banking Co., Pearson's Case*, 7 Ch. 309; and see s. 159 as to a creditor.
(*b*) *James* v. *May*, L. R. 6 H. L. 328.
(*c*) See s. 136.
(*d*) *Wright's Case*, 5 Ch. 437.

Sect. 160. Stock Companies Arrangement Act of 1870, will shew (*e*) how perplexing, even in a voluntary winding-up, are the enactments relating to powers of compromise, and the hybrid nature of a winding-up under supervision renders it even more difficult to say what are the powers of compromise exercisable in that case.

A liquidator who is entering into a compromise may of course for his own protection apply for the sanction of the Court; and in a purely voluntary winding-up he may make a like application under sect. 138 (*f*).

Compromise with directors.

Where a compromise of certain claims by the contributories against the late directors of the company had been effected, and had been assented to by forty-nine out of fifty-one contributories and sanctioned by the Court, it was held that there was no jurisdiction to stay actions against the late directors commenced by the two dissentients (*g*).

Composition deed.

If a debtor relies as against execution creditors on a composition deed which has been assented to by the official liquidator, *semble* it is for the debtor to prove that the official liquidator was duly appointed, and was duly authorized to assent to the deed (*h*).

Rescission of compromise.

The Court or the Judge in Chambers has jurisdiction to rescind a compromise made with its sanction if obtained by misrepresentation (*i*).

The form of agreement of compromise in the rules (*k*) provides that, if the contributory does not perform the same, the official liquidator may enforce or abandon it; upon which it was held that the official liquidator was not precluded from abandoning the agreement by reason of having obtained a four-day order to enforce it, nothing having been done under that order (*l*).

Sanction of Court.

In sanctioning a compromise the Court is exercising a judicial discretion. The Court will, therefore, not give its sanction without having the means of itself forming an opinion of the propriety of the compromise proposed (*m*).

But the sanction need not be that of the judge himself; the approval of the Chief Clerk is sufficient. The parties have a right, if they wish it, to bring every question before the judge personally, but it is not necessary to do so to make the compromise binding (*n*).

Compromise with class A. does not discharge B.

A compromise entered into with a contributory in class A. does not discharge his transferor from liability as a contributory in class B. They do not stand to each other in the relation of principal and surety (*o*).

But if the B. contributory is called upon to pay, his transferee remains liable, notwithstanding the compromise, to indemnify him (*p*).

Apportionment.

As between the limited and unlimited assets of an unlimited company whose contracts stipulate for a limit of liability, difficult questions arise as to the application of sums received under compromises. Some of these will be found referred to *ante*, p. 297.

(*e*) See note to s. 136, *supra*, and to s. 2 of the Arrangement Act, 1870.

(*f*) *Scinde, Punjaub, &c., Corporation*, 15 L. T. 602.

(*g*) *New Zealand Banking Corporation, E. p. Hankey*, 21 L. T. 481; W. N. 1869, 226.

(*h*) *Drew* v. *Myers*, 19 L. T. 740.

(*i*) *E. p. Clarke*, 14 W. R. 856; 14 L. T. 789; and see *Central Darjeeling Tea Co.*, W. N. 1866, 361; *E. p. Garstin*, 10 W. R. 457; 6 L. T. 374.

(*k*) See Gen. Order, Nov. 1862, Form 50, *infra*.

(*l*) *Legal, &c., Co-operative Society*, W. N. 1873, 135.

(*m*) *Northumberland and Durham District Banking Co., E. p. Totty*, 1 Dr. & Sm. 273; 6 Jnr. (N.S.) 849; decided under the 21 & 22 Vict. c. 60, s. 19.

(*n*) *E. p. Garstin*, 10 W. R. 457; 6 L. T. 374; and see *Drew* v. *Myers*, 19 L. T. 740.

(*o*) *Nevill's Case*, 6 Ch. 43; *Hudson's Case*, 12 Eq. 1; *Helbert* v. *Banner*, L. R. 5 H. L. 28; and see *supra*, p. 145.

(*p*) *Roberts* v. *Crowe*, L. R. 7 C. P. 629; see further *supra*, p. 145.

Sect. 161.

Power for liquidators to accept shares, &c., as a consideration for sale of property of company.

161. Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution (*a*) of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefits from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned (*β*), such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution; no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding-up the company, or for appointing liquidators; but if an order be made within a year for winding-up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court (*γ*).

(*a*) s. 51.
(*β*) s. 162.
(*γ*) *i.e.* by the order so to wind up or a subsequent order, *Callao Bis Co*, 42 Ch. Div. 169.

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Sales for shares under compulsory or supervision order.

This section relates only to a purely voluntary winding-up, but where the matter is before the Court under either a supervision order (*q*) or a compulsory order a sale of the property of the company can be made under sect. 95, and all things necessary, &c., may be done under the last words of sect. 95, and to such a sale the principles embodied in the 161st section are applicable. For it cannot be intended that when the matter is before the Court, the Court shall have less power than the liquidators have in a voluntary winding-up. On the contrary, the Court has more power, as not being bound down by the majorities and formalities which are required in proceedings out of Court (*r*).

Compulsory winding-up.

In the cases above referred to the winding-up was under supervision, and the decisions as decisions must no doubt be strictly taken to be directed to the facts of the particular cases. This was the view taken by Lord Romilly (*s*), where his Lordship held that notwithstanding *Re Agra and Masterman's Bank* (*t*) he could not apply this section to a company in liquidation under a compulsory order.

It is submitted, however, that the distinction is not well drawn. The principle of the observations in *Re Agra and Masterman's Bank* (*t*) and the language of the judgment in *Cambrian Mining Co.* (*q*) are founded upon there being power to sell for shares under a compulsory order as the argument to show the existence of such a power under a supervision order, and the tendency of recent decisions is to refuse to draw distinctions between one and another sort of winding-up without substantial reason.

And further, the wording of the section is strictly applicable only to the case where the order of events is (1) voluntary winding-up and special resolution under the section either before or contemporaneously with or after the winding-up resolutions, (2) supervision or compulsory order, and not to the case where the supervision order precedes the special resolution under the section. But in the cases above referred to (*u*), not only did the supervision order precede the resolution of the company, but the resolution itself was an ordinary and not a special resolution, so that in fact the Court cannot in strictness have been applying the section itself, but must have been exercising a power which it held that it had elsewhere, and not under this section: and, in fact, Wood, V.C., said he had the power under sect. 95.

Where the winding-up is not purely voluntary a special resolution is not necessary, and the dissentient shareholder's rights under sects. 161, 162, do not attach. But the Court will in its discretion give similar rights to the dissentient (*x*).

Arrangement binds creditors.

A sale under this section is binding on the creditors of the selling company: their remedy if they are injured is to come within a year for a supervision order or a compulsory order (*y*).

And on the other hand, for their protection, the true construction of the concluding words of the section is that the sanction of the Court must be given in and not before the winding-up by or subject to the supervision of the Court. Under sect. 138 no doubt application may be made to the Court in a voluntary winding-up as to a sale under sect. 161, but the effect of the last words of the section is that upon such an application no order can be made which binds the creditors. The sanction to render the resolution valid

(*q*) *Imperial Mercantile Credit Association*, 12 Eq. 504; *Cambrian Mining Co.*, 48 L. T. 114.

(*r*) *Agra and Masterman's Bank*, 15 W. R. 554; 12 Eq. 509, n.

(*s*) *London and Exchange Bank*, 16 L. T. 340.

(*t*) 12 Eq. 509, n.

(*u*) See notes (*q*) (*r*).

(*x*) *Cambrian Mining Co.*, 48 L. T. 114.

(*y*) *City and County Investment Co.*, 13 Ch. Div. 475.

if the company be wound up by or under the supervision of the Court must be given by the order so to wind up or a subsequent and not by an antecedent order (*z*).

This may in some cases render a supervision order expedient in order to give jurisdiction for the sanction (a).

Wishes of majority.

In sanctioning a scheme of reconstruction by sale and transfer of the assets to a new company under this section, the Court will have regard to the wishes of a majority of shareholders and creditors as against a dissentient minority; and although a dissentient shareholder cannot be compelled to accept shares in the new company (*v. infra*), or the valuation put upon his interest by the official liquidator, yet if he will accept neither of these alternatives, the value of his interest must be settled by arbitration under sect. 162 (*b*).

And the Court will not be deterred from sanctioning an arrangement which is approved by the majority, and which is clearly advantageous, by suggestions of possible liabilities which may be brought on the dissentients, unless it is satisfied that such liabilities will in fact ensue.

Thus where the M. Company had transferred its business to the M. Corporation, the latter undertaking to satisfy all the company's obligations, and then, by reason of the failure of the corporation, the company had to pay a debt of £7000, against which the corporation ought to have indemnified it, and as regards the two companies the position of affairs was this:—the company was being wound up under supervision and all its debts were paid; the shares of the corporation were fully paid up, its debts considerable, its assets substantially nil, except some ship-building property of speculative value, which could not be sold immediately except at a loss—the Court, under the circumstances, sanctioned an arrangement whereby the company was to take over the corporation's assets, pay the creditors of the corporation a composition, indemnify the corporation against all its debts, whether proved in the winding-up or not, and out of the assets recover what it could of the £7000, dissentient shareholders to be paid the amount of a valuation of their interests, and release their interests to the liquidator (*c*).

The principle of the cases last mentioned is equally applicable to a dissentient minority of creditors.

Thus a dissentient minority of debenture-holders has been compelled to accept a scheme of reconstruction, under which they, as dissentients, were to receive the then value of their debentures (*d*).

An elaborate scheme of reconstruction at the instance of debenture-holders providing for the continuance of the liquidation for some purposes only, and the immediate election of new directors, issue of new shares, and creation of new debentures, was sanctioned in *Re Western of Canada Oil Co.* (*e*).

Unallotted shares.

Where company L. sold its business to company M., and it was part of the arrangement that M. should allot 10,000 new M. shares "to the directors" of L. "for distribution among their shareholders," it was held in the subsequent winding-up of both companies that the L. liquidators were not entitled to a return of surplus M. assets proportionate to the number of the 10,000 shares which had never been applied for and allotted to L. shareholders (*f*).

(*z*) *Callao Bis Co.*, 42 Ch. Div. 169.

(a) *New Flagstaff Co.*, W. N. 1889, 123.

(*b*) *Imperial Mercantile Credit Association*, 12 Eq. 504; *Irrigation Co. of France, E. p. Fox*, 6 Ch. 176.

(*c*) *Marine Investment Co., E. p. Poole's Executors*, 8 Ch. 702.

(*d*) *Tunis Railways Co.*, 10 Ch. D. 270, n.; affirmed W. N. 1874, 165; 30 L. T. 512; 31 L. T. 264.

(*e*) W. N. 1874, 148.

(*f*) *Mercantile and Exchange Bank, E. p. London Bank of Scotland*, 12 Eq. 268.

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In drawing agreements under this section it is necessary so to word the clause which provides for the issue of shares in the new company in exchange for shares in the old company, that the number of shares in the new company and the persons to be entitled to them shall be ascertained within some reasonable time. It is not uncommon to find these agreements so expressed that the new company is bound in respect of a certain fixed number of shares, while the persons who have the option to take them are left at large as to the time within which their option is to be exercised. Both the number of shares to be issued and the persons entitled to take them should be limited by providing that application for or acceptance of such shares shall be made by defined persons within a defined time. A provision for this purpose is valid (*g*).

In *Callao Bis Co.* v. *Ronaldson* (*h*) the Court was able so to construe the agreement as to extricate the new company from the difficulty.

What is meant by a scale.

That which is contemplated by this section is a handing over of the assets of the company which is in liquidation to another company, as a result of the purchase of those assets by the new company in consideration of shares in the new company. But the section does not contemplate the subjecting of the shareholders of the selling company, without their unanimous consent, to any fresh liability.

And, therefore, an agreement by which the selling company is to take a certain fixed number of shares in the new company, and if its assets shall prove insufficient for the purpose is then to raise the necessary amount by a call on its shareholders, is not within the section (*i*).

The assets to be sold are the assets at the time of the liquidation, not assets to be got by subsequent calls (*i*).

Semble, such an arrangement would not be within the section if even only those who accepted shares in the new company were to be liable to the call (*k*).

No arrangement under this section can be valid if it contain a condition precedent on the individual shareholder to pay something, not towards the capital of the new company in respect of which he is to receive profit, but by way of premium for shares (*l*). But an agreement under which the holder of fully paid shares is to take shares only partly paid is valid (*m*).

Part of assets and debts may be sold.

It is no objection to an agreement that it stipulates that the purchasing company shall or may at their option take over only part of the assets and liabilities, leaving the rest of the debts to be paid by the liquidator (*m*).

Purchase shares may be distributed direct to shareholders.

The agreement may provide that the shares to be allotted by the purchasing company shall be given to the shareholders direct, and not to the liquidator (*m*).

A transfer or amalgamation under this section cannot be impeached under the winding-up jurisdiction; its validity can only be decided in an action (*n*).

Invalid transfer how impeached.

The action may be brought by a dissentient shareholder on behalf of himself and all the other shareholders, although a large number of shareholders have assented to the scheme, and although it has been even actually carried into effect (*o*).

(*g*) *Zuccani* v. *Nacupai Co.*, 61 L. T. 176; 1 Megone, 230; *Postlethwaite* v. *Port Phillip Co.*, 43 Ch. D. 452.

(*h*) W. N. 1887, 176.

(*i*) *Clinch* v. *Financial Corporation*, 5 Eq. 450; 4 Ch. 117.

(*k*) 4 Ch. 122.

(*l*) *Imperial Bank of China, &c.*, v. *Bank of Hindustan, China, and Japan*, 6 Eq. 91; and see 1 Ch. 339.

(*m*) *City and County Investment Co.*, 13 Ch. Div. 475; *Postlethwaite* v. *Port Phillip Co.*, 43 Ch. D. 452.

(*n*) *Imperial Bank of China, &c.*, 1 Ch. 339, 347; *Financial Corporation*, W. N. 1866, 162; *International Life Assurance Society*, 20 L. T. 433.

(*o*) *Clinch* v. *Financial Corporation*, 5 Eq.

But in a case where it seems to have been conceded before Fry, J., that the validity of the agreement could not be determined in the winding-up proceedings, and that if it was to be rescinded it must be in a substantive proceeding, the question whether the agreement was *ultra vires* or not was argued and determined on appeal; but whether by consent does not appear (*p*).

Sale to foreign company.

The company to which the sale is effected need not be an English company or a company formed under this Act (*q*).

Sale to an individual.

A sale under this section must be, not to an individual who is to be a speculator in the matter, and who is to form and make such profit as he can in forming a new company, but must be a sale direct from one company to the other (*r*).

Sale *ultra vires* the directors.

A contract which is *ultra vires* the directors of the selling company, but within the terms of this section, may be supported under this section. This is assumed in *Clinch* v. *Financial Corporation* (*s*), and:

An unregistered company which has under its deed of settlement no power to sell or transfer its business to another company, but which has the power of dissolving itself, may effect a sale by registering under this Act, passing a resolution to wind up voluntarily, and proceeding under this section (*t*).

And the power given by the section "to receive in compensation . . . policies . . . in such other company" shews that this mode of dealing is expressly applicable to mutual insurance societies (*t*).

The Court will not set aside an unauthorized sale by the official liquidator of the property of the company, if made *bonâ fide*, where there has been constructive acquiescence or long delay on the part of the parties applying to set it aside (*u*).

Dissentient shareholder cannot be compelled to take shares.

The majority of shareholders cannot in a sale under this section bind the minority in respect of taking shares in the company to which the assets are to be transferred, and a dissentient shareholder does not, by failing to express his dissent within the seven days limited by the section, become thereby compelled to take shares. But if he do not so express his dissent he cannot take advantage of the provision for purchase of his interest, but must submit to lose his shares altogether if he refuse to accept the new shares. A shareholder can either (1) assent, or (2) dissent, and within seven days require his interest to be purchased, or (3) dissent and abandon all his interest in the company (*x*).

And where a company, being in difficulties, passed special resolutions altering the articles so as to give power to carry out an arrangement similar to that provided for by this section, without giving dissentient shareholders the option to receive the value of their shares in cash, this was held invalid, and a dissentient shareholder was held entitled to have the value of his shares ascertained and paid as here provided (*y*).

450; 4 Ch. 117; *Bird* v. *Bird's Sewage Co.*, 9 Ch. 358.

(*p*) *City and County Investment Co.*, 13 Ch. Div. 475; *Postlethwaite* v. *Port Phillip Co.*, 43 Ch. D. 452.

(*q*) *Irrigation Co. of France, E. p. Fox*, 5 Ch. 176, 192.

(*r*) *Bird* v. *Bird's Sewage Co.*, 9 Ch. 358.

(*s*) 5 Eq. 450; 4 Ch. 117.

(*t*) *Southall* v. *British Mutual Life Assurance Society*, 11 Eq. 65; 6 Ch. 614.

(*u*) *Hafod Hotel Co.*, 18 L. T. 144. As to what is acquiescence see the note to Table A. (17)—(19). And as to estoppel, *Campbell's Case*, 9 Ch. 1.

(*x*) *Bank of Hindustan, &c., Los' Case*, 13 W. R. 883; 12 L. T. 690; 34 L. J. (Ch.) 609; 11 Jur. (N.S.) 661; *Higgs' Case*, 2 H. & M. 657; *Martin's Case*, 2 H. & M. 669.

(*y*) *Irrigation Co. of France, E. p. Fox*, 6 Ch. 176; and see *Dougan's Case*, 8 Ch. at p. 545.

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Again, where the articles of association of a company provided that the directors might, "with the consent of an extraordinary general meeting, transfer and sell the business of the company, or purchase or amalgamate with the business of any other company of a like nature," it was held that, on an amalgamation, a dissentient shareholder could not be compelled to become a member in a new company with more extended objects, or (*semble*) in any new company at all (*z*).

So where the articles of association of the company provided that the objects of the company should include the subscribing for or taking shares in, the entering into treaty, acting or uniting with, the buying up or absorbing any other company having the like objects, and the sale or transfer of the business and property of the company to any other company or individuals, a shareholder who had not assented in any way to the amalgamation with another company or accepted the new shares could not be compelled to be a shareholder in the amalgamated company (a).

As to what will constitute, in the case of an amalgamation, an acceptance of shares in the new company, see *Challis' Case* (*b*) and *supra*, p. 71.

See, further, as to amalgamation or transfer, in the case of life assurance companies, the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), ss. 14, 15, *infra*.

Distribution of proceeds of sale.

The proceeds of sale, whether they be shares or anything else, must be distributed according to the rights of the members in the surplus assets of the company. The section gives no authority to a majority to control a minority to the prejudice of the latter in the distribution of the proceeds (*c*).

The proceeds may be shares, whether fully paid or partly paid, and may be given direct to the shareholders in the old company without being first allotted to the liquidator (*d*). And inasmuch as the shareholders cannot be compelled to take the shares (*e*), an agreement by which the shareholder is bound within a reasonable time (*f*), or a limited time being a reasonable time (*g*), to elect whether he will take the shares or not, and in default the liquidator is to be at liberty to dispose of them and make the most of them on the shareholder's behalf, is valid. Whether an agreement would be valid by which shares not applied for by the shareholders are to be at the disposal of the new company, *quære* (*h*).

Liability of dissentient shareholder as a contributory.

A shareholder, whose interest has been purchased by the liquidators, is not thereby relieved from liability to the creditors of the company. The section does not contemplate any alteration of liability as between the dissentient shareholder and the creditors, but provides only for the purchase of the dissentient shareholder's interest, that is, of his right to a share in whatever surplus there may be after all debts are paid. And the fact that the purchase of such interest had been made by the liquidators taking a transfer under sect. 131 of the dissentient member's shares, a method of purchase which under the resolutions passed by the company they had no right to adopt, was no further release to him from liability (*i*).

(*z*) *Empire Assurance Corporation, E. p. Bagshaw*, 4 Eq. 341; and see *Driver's Executors' Case* (Alb. Arb.), Reil. 36; 15 Sol. J. 637.

(*a*) *London, Bombay, and Mediterranean Bank, Drew's Case*, 16 L. T. 657; 15 W. R. 1057; 36 L. J. (Ch.) 785.

(*b*) 6 Ch. 266.

(*c*) *Griffith* v. *Paget*, 5 Ch. D. 894; 6 Ch. D. 511; *ante*, pp. 295, 323.

(*d*) *City and County Investment Co.*, 13 Ch. Div. 475, 482; *Postlethwaite* v. *Port Phillip Co.*, 43 Ch. D. 452.

(*e*) *Higgs' Case*, 2 H. & M. 657, 665.

(*f*) *Zuccani* v. *Nacupai Gold Mining Co.*, 61 L. T. 176; 1 Megone, 230.

(*g*) *Postlethwaite* v. *Port Phillip Co.*, 43 Ch. D. 452; *Weston* v. *New Guston Co.*, 1 Megone, 225, 352.

(*h*) *Nicholl* v. *Eberhardt Co.*, 61 L. T. 489; 1 Megone, 402.

(*i*) *Imperial Land Co. of Marseilles, Vining's Case*, 6 Ch. 96.

But a transfer to the liquidators does, *semble*, so far as regards any costs of winding-up, entirely relieve the transferring shareholder from any future liability, not only with respect to the costs of the winding-up, but any costs of any liabilities incurred by reason of the transaction which is the subject matter of the dissent (*k*).

Recovery of purchase-money for shareholder's interest.

Upon non-payment of the purchase-money in respect of his interest the shareholder has a right of action upon the agreement or the award as in ordinary cases (*l*).

If the company is going to part with all its assets at once, leaving nothing but the shares in the new company to answer the claim of the dissentients, it may be put upon terms to retain the assets until satisfaction of the dissentients' claims (*m*).

Notice of meeting.

The notices convening the meeting, at which the resolution in favour of proceeding under this section is to be submitted, must give the shareholders distinctly to understand that it is under this section that it is proposed to proceed (*n*).

Notice of dissent.

The dissentient shareholder's notice ought to be not merely that he dissents, but that he dissents and requires the liquidators to do one of the two things mentioned in the section (*o*).

A notice served after the passing but before the confirmation of the resolution, and not objected to until a month after the confirmation, has been held valid (*p*).

Mode of determining price.

162. The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement, but if the parties dispute about the same such dispute shall be settled by arbitration, and for the purposes of such arbitration the provisions of "The Companies Clauses Consolidation Act, 1845," with respect to the settlement of disputes by arbitration (*a*), shall be incorporated with this Act; and in the construction of such provisions this Act shall be deemed to be the special Act, and "the company" shall mean the company that is being wound up, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, if only one, or any two or more of the liquidators if more than one.

8 & 9 Vict. c. 16.

(*a*) 8 & 9 Vict. c. 16, provides for: Appointment of arbitrator when questions are to be determined by arbitration (s. 128); vacancy of arbitrator to be supplied (s. 129); appointment of umpire (s. 130); appointment of umpire on neglect of arbitrators in case of railway companies (s. 131); power of arbitrators to call for books, &c. (s. 132); costs in their discretion (s. 133); submission to arbitration a rule of Court (s. 134).

Arbitration.

This section does not compel resort to the Companies Clauses Consolidation Act where the articles of association provide the means of arbitration. It

(*k*) *Marine Investment Co., E. p. Poole's Executors*, 8 Ch. 702, 710.

(*l*) *De Rosaz* v. *Anglo-Italian Bank*, L. R. 4 Q. B. 462.

(*m*) *Hester & Co.*, W. N. 1875, 179; 44 L. J. (Ch.) 757.

(*n*) *Imperial Bank of China, &c.*, v. *Bank of Hindustan, &c.*, 6 Eq. 91; *E. p. Fox*, 6 Ch. 176, 193; and see notes to s. 51.

(*o*) *Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808.

(*p*) *London Bread Co.*, W. N. 1890, 3.

Sect. 163. merely enacts that resort may be had to that Act, as if it were incorporated in the articles of association, where a special Act or the articles of association do not contain the necessary provisions (*q*).

The Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) provides by s. 130, that the arbitrators are to appoint an umpire, and by s. 131 that on default of the arbitrators to appoint an umpire the Board of Trade may, if a *railway company* is one party to the arbitration, appoint an umpire; but contains no similar provision in case of any company other than a railway company. In such a case an umpire might be appointed by a judge under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 12 (*r*).

Costs. Where no direct sum has been tendered by the official liquidator as the price of the dissentient shareholder's interest, the costs of the arbitration will not be at the risk of the shareholder, but will remain in the discretion of the Court (*s*).

Inspection. A dissentient who proceeds to arbitration is not entitled to inspection of the company's books to see whether he will go on with his arbitration or not (*t*).

Commission to take evidence. In the arbitration the Court has power upon application made under s. 138 to order, under Order XXXVII. Rule 5, a commission to issue for the examination of witnesses abroad (*u*).

Certain attachments, sequestrations, and executions, to be void.

163. Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force (*a*) against the estate or effects of the company after the commencement of the winding-up shall be void to all intents (β).

(*a*) *i.e.* by the entry of the sheriff, *London and Devon Biscuit Co.*, 12 Eq. 190, 193; see *supra*, p. 235.

(β) *Conf.* ss. 85, 87, 153, 197, 198, 201, 202. See also *Traders' North Staffordshire Carrying Co.*, 19 Eq. 60.

Effect of section. This section is to be read with, and is controlled by, the 85th and 87th sections. This was so decided in 1864 (*x*), and although the reasoning upon which the decision was founded may be difficult to follow, the Court is now bound by it (*y*). For the joint effect of these sections, and the cases which have been decided under them, see sects. 85 and 87.

The section avoids the execution "to all intents," and may thus in fact benefit people other than the company. For instance, as between execution creditor and holder of the company's unregistered bill of sale the bill of sale is void, and none the less so because the company is in liquidation. But if the execution is levied after winding-up commenced, it is void "to all intents." At the same time the unregistered bill of sale is good as between debenture-holder and liquidator. The result, therefore, is that the debenture-holder retains his security upon the chattels which, but for the winding-up, the execution creditor would have taken from him (*z*).

Voluntary winding-up. *Semble*, the section applies in a voluntary winding-up (a), and, at any

(*q*) *De Rosaz* v. *Anglo-Italian Bank*, L. R. 4 Q. B. 462.

(*r*) *Re Anglo-Italian Bank and De Rosaz*, L. R. 2 Q. B. 452; and see *Re Lord*, 1 K. & J. 90; 24 L. J. (Ch.) 145. See now 52 & 53 Vict. ch. 49 s. 5.

(*s*) *Imperial Mercantile Credit Association*, 12 Eq. 504.

(*t*) *Glamorganshire Banking Co., Morgan's Case*, 28 Ch. D. 620.

(*u*) *Mysore Gold Co.*, 42 Ch. D. 535.

(*x*) *Exhall Mining Co.*, 4 D. J. & S. 377.

(*y*) *Lancashire Cotton Co., E. p. Carnelley*, 35 Ch. Div. 656.

(*z*) *Artistic Colour Co., E. p. Fourdrinier*, 21 Ch. Div. 510. Contrast *New City Club*, 34 Ch. Div. 646; *Willmott* v. *London Celluloid Co.*, 31 Ch. D. 425; 34 Ch. Div. 147; *Cannock and Rugeley Co., E. p. Harrison*, 28 Ch. Div. 363.

(a) *Thomas* v. *Patent Lionite Co.*, 17 Ch.

rate, the joint effect of sects. 133, 138, 87, and 163, is to make the principle of this section applicable to such case.

Lien.

The N. Company, having a credit account with the M. Railway Company for the carriage of goods under an agreement whereby the railway company were to have a lien on goods in their hands for moneys due to them and unpaid, were indebted to the M. Company for carriage at the time of the presentation of a petition to wind up the N. Company. The provisional official liquidator then sent goods to be carried by the railway company, and subsequently a winding-up order was made. The M. Company claiming a lien on the goods in their hands for the moneys previously due, it was held that the liquidator must pay the debt to the M. Company, if he wished to obtain possession of the goods in their hands (*b*).

This case must have turned, it is conceived, on the words of the agreement. It is difficult to see upon what general principle it can be supported (*c*).

In the following similar case goods were sent after the winding-up order.

An iron company, having a credit account with a railway company under an agreement that the latter should have a general lien upon the waggons and goods of the iron company for all moneys due to them, was ordered to be wound up. It was held that the general lien was put an end to by the winding-up order, at any rate as respects property acquired by the iron company after the order (*d*).

A company employed an agent to sell goods in a shop taken for that purpose. The agent was to be paid a commission on the sale and was to accept bills for the company for such a reasonable amount as was represented by goods on his premises, and if, on the bills arriving at maturity, the agent had not in hand sufficient funds to meet the bills the company were to make good the difference. The company was wound up, and at that time a bill accepted by the agent had not arrived at maturity: it was held that the agent had a lien on the goods in his hands for the amount of the bill (*e*).

Execution.

Whether the section applies to an execution on a judgment obtained against a company in a proceeding brought by the liquidators, *quære* (*f*).

In *In re United English, &c., Co.* (*g*) an action at law by a judgment creditor of the company against an alleged debtor of the company as a garnishee in respect of his judgment, was allowed to proceed, but an injunction was granted to restrain the creditor, if he should obtain a verdict, from putting in force any attachment, sequestration, distress, or execution against the estate or effects of the company in the hands of the garnishee.

Fraudulent preference.

164. Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to

Div. 250; *Thurso New Gas Co.*, 42 Ch. D. 486.

(*b*) *Northfield Iron Co.*, 14 L. T. 695; W. N. 1866, 253.

(*c*) *Cf. Great Western Railway Co., Re Bushell*, 22 Ch. Div. 470.

(*d*) *Wiltshire Iron Co.* v. *Great Western Railway Co.*, L. R. 6 Q. B. 101, 776.

Quære this case, *cf. E. p. Harding*, 3 Eq. 341; *Llangennech Coal Co.*, W. N. 1887, 22.

(*e*) *Pavy's Felted Fabric Co.*, 1 Ch. D. 631.

(*f*) *E. p. Smith*, 3 Ch. 125; see *supra*, p. 243.

(*g*) 5 Eq. 300.

Sect. 164. have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section the presentation of a petition for winding-up a company shall, in the case of a company being wound up by the Court or subject to the supervision of the Court, and a resolution for winding-up the company shall, in the case of a voluntary winding-up, be deemed to correspond with the act of bankruptcy in the case of an individual trader; and any conveyance or assignment made by any company formed under this Act of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents.

This Act was passed, of course, before the Bankruptcy Act, 1869; but it is the law of bankruptcy for the time being that is to be applied, and therefore sect. 92 of the Bankruptcy Act, 1869 (and now sect. 48 of the Bankruptcy Act, 1883), is the law applicable (*h*).

Where directors of a company were authorized to borrow money "upon mortgage, or otherwise," debentures issued under an arrangement with creditors in payment for goods actually supplied were held valid; and, although the company was insolvent at the time of such issue, the debentures were held not to constitute a fraudulent preference within this section, the scheme being, not in contemplation of a winding-up, but its whole object being to avoid a winding-up (*i*).

To constitute a fraudulent preference, there must be a contemplation of winding-up, and an absence of pressure on the part of the creditor (*i*).

A security, not tendered by the debtor but asked for by the creditor, not exhausting the property on which it is charged, and given at a time when there is nothing to shew that a winding-up was contemplated, is not a fraudulent preference (*k*).

Under the present law, regard is to be had simply to the statutory definition (*l*) of fraudulent preference (*m*).

Winding-up petition presented by K. on March 13: K. on April 2 arranged with the directors that which was attacked as a fraudulent preference; petition presented by X. on April 5; K.'s petition withdrawn on April 17; winding-up order on X.'s petition on April 20; transaction held to be a fraudulent preference (*n*).

Directors. A security given by an insolvent company to a director, who is cognisant of the state of the company's affairs, is a fraudulent preference; and the fact that he has pressed for payment will make no difference. It is impossible to predicate of a director of a company pressure against the company while he remains a director (*o*).

But it is not every payment made to a director when the company is in difficulties that will be declared fraudulent.

Thus where a company, whose articles allowed directors to participate in

(*h*) *Liverpool Guarantee Co.*, W. N. 1882, 18; 30 W. R. 378; 46 L. T. 54.

(*i*) *Inns of Court Hotel Co.*, 6 Eq. 82; *cf. Willmott* v. *London Celluloid Co.*, 34 Ch. Div. 147.

(*k*) *Patent File Co., E. p. Birmingham Banking Co.*, 6 Ch. 83.

(*l*) Bankruptcy Act, 1869, s. 92; Bankruptcy Act, 1883, s. 48.

(*m*) *E. p. Griffith*, 23 Ch. Div. 69.

(*n*) *Kent's Case*, 37 Ch. D. 508; 39 Ch. Div. 259.

(*o*) *Gaslight Improvement Co.* v. *Terrell*, 10 Eq. 168; and see *Habershon's Case*, 5 Eq. 286; *cf. Sykes' Case*, 13 Eq. 255.

the profits of contracts with the company, being under an onerous contract with a director, agreed with him to annul the contract and pay him compensation, the money to be applied in part in paying up his shares in full, his liability on the shares was held to have been thereby properly discharged (*p*).

In *Poole's Case* (*q*) three directors had given the company's bankers a guarantee for payment of the company's overdraft, upon which the bankers had recovered judgment against them; the directors were also respectively the holders of unpaid shares; under these circumstances, two days before winding-up petition presented on which an order was afterwards made, each of the three paid £250 (being the amount uncalled on his shares), and the money was paid into the bank to the company's account. The result of course was that two liabilities, viz., that on the shares and *pro tanto* that on the judgment, were satisfied by one payment. It was held that as against the directors this section did not apply, for if anyone had been fraudulently preferred it was the bank not the directors, that the directors had been guilty of no breach of trust, and that their shares were well paid up. Directors are not trustees for the creditors (*q*), notwithstanding what was said in *Gaslight Improvement Co.* v. *Terrell* (*r*), by Romilly, M.R., and are only trustees for the shareholders in a qualified sense (*s*).

And whether the transaction was a fraudulent preference or not it cannot be impeached as such for the benefit of a single creditor or class of creditors, but only for the benefit of the general body of creditors (*t*) (*u*). Thus where debenture-holders of the company brought an action impeaching as a fraudulent preference a transaction by which directors had on the eve of winding-up in effect repaid themselves advances which they had made to the company, their claim failed (*u*). For the debenture-holder's case is that the goods are his, not the company's, and how can there be a fraudulent preference by delivery of goods that do not belong to the liquidating company? (*u*).

Dividend paid before winding-up.

Where, before a winding-up, a company executed a deed of inspectorship under which a dividend was paid to some creditors, and not to others, there being no question of fraudulent preference, it was held that those who had not received any dividend under the deed were not entitled to any priority in the distribution of the assets in the winding-up over those who had (*x*).

Power of Court to assess damages against delinquent directors and officers.

165. *Where in the course of the winding-up of any company under this Act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible* (*a*), *examine into the conduct of*

(*p*) *Adamson's Case*, 18 Eq. 670.

(*q*) 9 Ch. Div. 322; *cf. Willmott* v. *London Celluloid Co.*, 31 Ch. D. 425; 34 Ch. Div. 147; *Ramwell's Case*, 29 W. R. 882; *Liverpool Guarantee Co.*, W. N. 1882, 18; 30 W. R. 378; 46 L. T. 54; *South London Fishmarket Co.*, 39 Ch. Div. 324.

(*r*) 10 Eq. 168, 175.

(*s*) *Forest of Dean Coal Co.*, 10 Ch. D. 450.

(*t*) *E. p. Cooper*, 10 Ch. 510.

(*u*) *Willmott* v. *London Celluloid Co.*, 31 Ch. D. 425; 34 Ch. Div. 147.

(*x*) *E. p. Ashbury*, 5 Eq. 223; and see s. 133.

Sect. 165. *such director, manager, or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just* (β).

(α) By 24 & 25 Vict. c. 96, directors fraudulently appropriating property (s. 81), or keeping fraudulent accounts (s. 82), or wilfully destroying books (s. 83), or publishing fraudulent statements (s. 84), shall be guilty of a misdemeanour, and be punishable as therein mentioned.

(β) *Cf.* s. 100.

By the Comp. (W. Up) Act, 1890, this section is repealed, but by sect. 10 is re-enacted in substantially the identical words, with the addition of words to include promoters, and the addition of the words "or property" after "moneys" in the fifth line.

Under these circumstances it is convenient to retain here untouched the authorities to the present time on sect. 165 of this Act.

Who may apply.

The section may be put in force on the application of the liquidator or a creditor or a contributory, so that *semble* if the Court thinks proper to make an order it may make it on the application of any one of these (*y*). Thus, whether or not the liquidator can recover anything which the company could not have recovered, *semble* an order for repayment by directors of dividends paid out of capital might be made on the liquidator's application (*y*), but in order to obviate any question leave was given to join a creditor (*z*).

But *semble* the applicant must be a person having a pecuniary interest in the result of the application, so that a fully paid shareholder in a company whose assets are insufficient to pay its debts has probably no *locus standi* to apply under the section to recover moneys on the ground of misfeasance (a).

As regards application by the liquidator, the Act gives after winding-up new rights which did not exist before winding-up, and which can be enforced only in the winding-up, so that it is not correct to say that the liquidator can recover only what the company could have recovered (*b*). This section creates no new rights (*c*), but it gives power to enforce the new rights created by the winding-up (*d*).

"Misfeasance:"—

The cases to which the section applies are where the person attacked has misapplied or retained or become accountable for moneys of the company, or has been guilty of a misfeasance or breach of trust in relation to the company. By "misfeasance" is meant "misfeasance in the nature of a breach of trust": it must be an act resulting in actual loss to the company. The section does not give the Court power to fine a director for misconduct. It gives no new rights, but simply provides a summary mode of enforcing rights which must otherwise have been enforced by action (*c*).

Where, therefore, persons had acted as directors without holding the shares necessary to render them eligible for the office, and the holding of

(*y*) *National Funds Co.*, 10 Ch. D. 118.

(*z*) *National Funds Co.*, 10 Ch. D. 118; and see *British Guardian Co.*, 14 Ch. D. 335.

(a) *Bentinck* v. *Fenn*, 12 App. Cas. 652, 662, 664, 669.

(*b*) 10 Ch. D. 118, 125; and see *Whitehouse & Co.*, 9 Ch. D. 595, and *ante*, pp. 118, 142.

(c) *Coventry and Dixon's Case*, 14 Ch. Div. 660, 670, 673 (this case was criticized but treated as binding by Brett, L.J., in *Anglo-French Soc., E. p. Pelly*, 21 Ch. Div. 492); *cf. Forest of Dean Coal Co.*, 10 Ch. D. 450, 459; *Bentinck* v. *Fenn*, 12 App. Cas. 652.

(*d*) *Flitcroft's Case*, 21 Ch. Div. 519, 530.

the shares was a condition precedent to eligibility, so that they never were directors at all, and never came under contract to take the shares, they had been guilty no doubt of a misfeasance in the abstract by acting as directors when they knew or ought to have known that they were not duly elected; but in order to render them liable some damage to the company resulting from their acts must have been shewn, they could not be fined in the nominal amount of the shares which they ought to have had (*e*).

The section is not applicable to cases where an action would lie for breach of duty resulting in the recovery of nominal damages. There is no duty owing to the creditor or contributory for breach of which he could maintain an action: his right is to have the assets of the company recouped any loss which they have sustained by reason of a misfeasance or breach of duty. To sustain a claim under this section the applicant must show (1) breach of trust or misfeasance in the nature of breach of trust, (2) loss arising therefrom, (3) an interest in the result of the application (*f*).

must be proved.

The onus of proving misfeasance is on the applicant, so that even if the misfeasance alleged be non-disclosure, the applicant must prove non-disclosure (*f*). Thus if the case be sale by director of his own property to the company, in action for rescission it is of course not for the company to prove non-disclosure: in such a case disclosure and assent is matter of defence, and it is for the defendant to prove it affirmatively, not for the company to prove the negative. But if the proceedings are not for rescission, but for misfeasance, then it is for the applicant to make out his case and to prove that the director sold without disclosing to his co-directors his interest (*g*).

Misrepresentation to individuals.

Where representations have been made by directors to a particular class of creditors, as for instance where, in a circular or prospectus inviting persons to effect policies with the company, it has been stated that the directors have given a certain guarantee to secure the policy-holders or that a certain proportion of the premiums will be set apart and invested, there have been from time to time applications by liquidators under this section to recover against directors on the ground that the representation was untrue or had not been performed, and on such applications orders have been made. But *quære* whether the liquidator can recover in any case where that which he seeks to enforce is the individual right of each person deceived (*h*). You cannot say or prove that a whole class has been deceived in the aggregate, for A. may have become a member of the class before the representation was made, B. may have known the facts when he contracted, C. may have subsequently ascertained the facts and acquiesced, every man's case in fact may be different. It is clear that one could not in such a case bring an action on behalf of himself and all others, and how can the liquidator enforce the right on behalf of all? The words of the section are very wide, and the Court has consistently refused to cut them down; and if the case be one in which one might sue on behalf of himself and all others, it is conceived that under the section one on behalf of all, or possibly the liquidator as representing all, might enforce the liability, and where one could not sue on behalf of himself and all others, then possibly under the section each might separately enforce it for himself; but in the latter case it is submitted that the liquidator could not in one application enforce the liability on behalf of all. That which the liquidator administers and that which the liquidator can recover is assets of

(*e*) See note (*c*), p. 400.

(*f*) *Bentinck* v. *Fenn*, 12 App. Cas. 652, 662, 664, 669.

(*g*) *Bentinck* v. *Fenn*, 12 App. Cas. 652, 661.

(*h*) *Cf. Ambrose Lake Co., E. p. Taylor* 14 Ch. Div. 390, 397.

Sect. 165. the company, not necessarily general assets, for there may be different groups of assets of the company to be administered separately, *e.g.*, fire assets and life assets of a Fire and Life Insurance Company. But they must be assets of the company. Damages for misrepresentation in inducing a contract with the company belong to the person misled, and are not assets of the company at all.

The judgment of Jessel, M.R., in *Railway Accident Mutual Assurance Co.* (*i*), is unfortunately not reported. His Lordship there said that "It was not intended when a company was wound up that a special class of shareholders or a special class of policy-holders or of creditors should bring actions by one or more on behalf of others or against some of the directors. What was intended was that the whole affairs of the company should be wound up in one proceeding, and that the liabilities of all the directors and shareholders and contributories should be settled in the same proceeding." That was a case in which a statement was put forward by directors that a guarantee fund had been subscribed which would be supplementary to the ordinary resources of the company and limited to insurances granted after a particular date, and the amount said to have been subscribed was included in the accounts as an asset. His Lordship made an order (*i*), on the application of the liquidator, for payment by each of the directors of the amount he was said to have guaranteed, the amount to be carried to a separate account; and on a subsequent application made a declaration (*k*), that the fund was specially applicable for paying the policy-holders whose policies were issued after the particular date above referred to. The following passage appears to give his Lordship's reasons for holding that the directors were liable on the liquidator's application. "He is liable according to law, and if I think these people are liable on this misrepresentation, whether to the company as a whole on the theory that they made the representation on behalf of the company and so made the company liable, or on the theory that they made the representation to the company through the policy-holders so as to be liable to the policy-holders as a body, in either way I think the Act of Parliament applies."

The writer has always felt great difficulty in understanding this case, but the observations already made contain, it is hoped, nothing inconsistent with its principle. The judgment is a useful one in shewing the extent to which the words "in relation to the company" will be carried, and in bringing within the section a large class of cases which otherwise would be left outside the winding-up, and must have been the subject of actions. It is conceived that the case would not be rightly understood if it could be taken to decide that the liquidator can enforce the individual rights of creditors or contributories, or can be made the administrator of special funds, which are not in fact assets of the company at all.

British Guardian Co. (*l*) was another case of this kind, and an order was there made on the joint application of the liquidator and a policy-holder. But there was there a resolution of the company that a certain proportion of the premiums should be invested, and for breach of the duty which the company had thus imposed upon them, resulting, as it must, in involving the contributories in greater liability, the directors were no doubt responsible to the company and the contributories by their representative the liquidator.

In the same company, in *Scholefield's Case* (*m*), the further point was raised that the trust of the premiums to be invested was for the particular policy-

(*i*) 6th March, 1880.
(*k*) 4th Feb., 1881.
(*l*) 14 Ch. D. 335.
(*m*) W. N. 1882, 22.

holder, and that as regards lapsed policies the directors were discharged. This contention did not succeed. **Sect. 165.**

Power, when to be exercised.

The summary power given by the section is not to be exercised only in cases where the charge against the director or officer is clearly and distinctly made out, and there is no question or law to be determined. The Court is empowered to "examine into the conduct" of the director. This section and the 101st section "were introduced in order that by proceedings under the Act, without any double process, or double set of proceedings, complete justice might be done between the parties, and a complete winding-up effected; the instances are rare in which the jurisdiction ought not to be exercised" (*n*).

In some of the earlier cases (*o*) a narrower construction was put upon the Act, but the jurisdiction is fully discussed, and its limit defined, in *Stringer's Case* (*p*), where the earlier cases (*o*) were reviewed, and *Re Royal Hotel Co. of Great Yarmouth* (*q*) was disapproved; and it is there laid down that on a summary proceeding under this section the Court may examine into the conduct of the officer, and compel him to refund; that a narrow construction ought not to be put upon the section, but that its terms are expressly large and comprehensive to obviate the necessity of bringing an action to impeach the transactions here dealt with.

Banker.

The bankers of the company are not officers of the company so as to be amenable to the jurisdiction given by this section (*r*), but a trustee in whose name a certain proportion of the premiums on policies ought to have been invested is such an officer (*s*).

Solicitor.

The solicitor stands in a position similar to that of the banker, he is not within the section (*t*).

Service out of jurisdiction.

Before it had been decided (*u*) that there is no jurisdiction to give leave to serve process under the Act out of the jurisdiction, leave was given to serve a summons under this section in Scotland (*x*). It was held that the application for leave should be supported by evidence that the director is resident in Scotland and is within the provisions of the section (*y*).

Voluntary winding-up.

This section is, upon an application under sect. 138, applicable to a voluntary winding-up in exactly the same way as to a compulsory winding-up, or a winding-up under supervision (*z*).

Extent of power.

The section is personal only as against the director or officer, and does not apply as against the executors of a deceased director or officer (a).

But where the acts of a body of officers are impeached, some of whom are dead, the survivors can be proceeded against under the section (*b*).

The section is available against directors and officers of the company *de facto*, who are not such *de jure* (*c*).

(*n*) *Per* Giffard, L.J., in *Stringer's Case*, 4 Ch. 475, 493; and see *Rance's Case*, 6 Ch. 104, 114, 120.

(*o*) *Re Bank of Gibraltar and Malta*, 34 L. J. (Ch.) 617; 34 Beav. 556; 1 Ch. 69; *In re Royal Hotel Co. of Great Yarmouth*, 4 Eq. 244; *Re Brighton Brewery Co., Hunt's Case*, 16 W. R. 472; 37 L. J. (Ch.) 278.

(*p*) 4 Ch. 475.

(*q*) 4 Eq. 244.

(*r*) *Imperial Land Co. of Marseilles, In re National Bank*, 10 Eq. 298; *cf. Re General Provident Assurance Co., E. p. National Bank*, 14 Eq. 507.

(*s*) *British Guardian Co.*, W. N. 1880, 63; reported, but not on this point, 14 Ch. D. 335. Contrast *Cornell* v. *Hay*, L. R. 8 C. P. 328.

(*t*) *Carter's Case*, 31 Ch. D. 496; *Great Wheal Polgooth, Re Turner*, W. N. 1883, 114; 53 L. J. (Ch.) 42; 49 L. T. 20; 32 W. R. 107.

(*u*) See *ante*, p. 309.

(*x*) *British Imperial Co.*, 5 Ch. D. 749.

(*y*) *Household Insurance Co.*, W. N. 1878, 26.

(*z*) *Rance's Case*, 6 Ch. 104; and see s. 138, and *In re Bank of Gibraltar and Malta*, 1 Ch. 69.

(a) *Feltom's Executors' Case*, 1 Eq. 219; *British Guardian Co.*, 14 Ch. D. 335.

(*b*) *British Guardian Co.*, 14 Ch. D. 335.

(*c*) *Coventry and Dixon's Case*, 14 Ch. Div. 660; *Gibson* v. *Barton*, L. R. 10 Q. B. 329.

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Liability of deceased's estate in an action.

Even in an action, the estate of a deceased director cannot be rendered liable in any proceeding which is of the nature of an action of negligence (as where it was sought to charge directors for loss beyond the amount of the money placed in their hands (*d*)), or of the nature of an action for deceit (as where it was sought to charge directors on the ground of fraudulent misrepresentation in the prospectus (*e*)), for in such a case the rule *actio personalis moritur cum personâ* applies. But it can be rendered liable in respect of any claim in the nature of a breach of trust (*f*).

And so an action to compel repayment by promoters who have combined to obtain a profit upon a sale to the company is an action against partners in which they are all jointly and severally liable for the acts of misfeasance committed, and the estate of a deceased partner may therefore be rendered liable (*g*).

The application of the rule *actio personalis moritur cum personâ* in cases other than cases of breach of contract, express or implied, is most exhaustively dealt with in *Phillips* v. *Homfray* (*h*). As against directors or promoters the claim is most generally no doubt upon contract express or implied, but in some cases, *e.g.*, cases of misrepresentation in prospectus, the claim is in tort, so that a short statement of the principles may be useful.

In *Phillips* v. *Homfray* (*h*) the plaintiffs claimed against the defendants in respect of (1) wrongfully working the plaintiffs' mines, (2) and (3) wrongfully using a way-leave through the plaintiffs' lands, (4) injuring the plaintiffs' farm and mineral property by the manner in which they wrongfully worked the plaintiffs' mines. One of the defendants, W. H. F., died before judgment; another, R. F., died after judgment directing inquiries and before the damages were assessed. It was held that the maxim *actio personalis*, etc., applied as to both W. H. F. and R. F. as to (2), (3), and (4). The principles are best given by the following extracts:—

"The only cases in which, apart from questions of breach of contract express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys. . . . Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. . . . The profits arising from a wrong done by a deceased man which can be followed against his estate are only such profits as take the shape of property, or the proceeds or value of property, withdrawn from the rightful owner and acquired by the wrong-doer" (*i*).

Dividend or bonus.

An order may be made under this section to compel a director to repay a dividend paid under a delusive or fraudulent balance-sheet (*k*).

Where a dividend or bonus has, after proper investigation, been proposed by directors, and agreed to by shareholders, the Court will not lightly inter-

(*d*) *Overend, Gurney, & Co.* v. *Gurney*, 4 Ch. 701; affirmed *sub nom. Overend, Gurney, & Co.* v. *Gibb*, L. R. 5 H. L. 480.

(*e*) *Peek* v. *Gurney*, L. R. 6 H. L. 377; S. C. 13 Eq. 79. *Secus* in case of death of plaintiff in the action, *Twycross* v. *Grant*, 4 C. P. Div. 40.

(*f*) *Ramskill* v. *Edwards*, 31 Ch. D. 100.

(*g*) *New Sombrero Co.* v. *Erlanger*, 5 Ch. Div. 73; 3 App. Cas. 1218; *Bagnall* v. *Carlton*, 6 Ch. D. 371, 389.

(*h*) 24 Ch. Div. 439, 453; and see 44 Ch. D. 694.

(*i*) 24 Ch. Div. 454, 455, 457.

(*k*) *Stringer's Case*, 4 Ch. 475.

fere with its payment. But where no profit and loss account had been made out, and no allowance made for the risks to which the company was liable, a bonus declared under such circumstances was held to have been declared under a delusive and fraudulent balance-sheet within the meaning of *Stringer's Case* (*l*), and an order was made upon a director to repay the bonus paid to him (*m*).

A bonus declared and credited to a director against payments due from him on calls is money paid to or retained by him within the section (*n*).

If directors pay dividends out of capital they are responsible not only for that which they have themselves received, but for the whole amount so misapplied (*o*). The order will be expressed to be without prejudice to any right they may have to recover from each shareholder the amount he has received (*o*), and such orders as these have, in fact, always been so expressed (*p*), but there is no instance of an application having been made to recover over from the shareholder, and it is not easy to see how such an application could be sustained. No one can recover money paid voluntarily under a mistake of law or money paid on an illegal contract (*q*).

The authorities on payment of dividends out of capital are more fully discussed under Table A., art. (56).

Promotion money.

It is a familiar rule of equity that "commission received by an agent or trustee of a purchaser from a vendor without the knowledge of his principal is in a Court of Equity a bribe; it is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge" (*r*).

That a director acting on behalf of the company in carrying out a contract for sale to the company, stands in a fiduciary relation towards the company on whose behalf he acts is a proposition which no one would seek to contravene (*s*), and (subject to the difficulty of defining what "promoter" means and includes) it is conceived (see Companies Act, 1867, s. 38) that there is no doubt that a promoter stands in a fiduciary relation towards the company which he creates.

It follows therefore that director or promoter acquiring profit in the matter of a sale to the company in which he takes part is guilty of a misfeasance and can be made to refund.

Officer.

To bring the case within the summary jurisdiction of this section, it is necessary that the person summoned shall have been an officer of the company at the time when the wrongful act complained of was committed. But he need not have been an officer during the whole transaction. Thus where the agreement for sale was entered into before the company existed, and therefore before the misfeasant (who in that case was the secretary) had become an officer, and the transfer of the shares to him was made after he had ceased to be an officer, yet inasmuch as during the time he was an officer he had concealed and assisted to carry out the wrongful agreement, he was rendered liable under this section (*t*).

Promoter.

Notwithstanding what was said by Bacon, V.C. (*u*), it is conceived that the

(*l*) 4 Ch. 475.

(*m*) *Rance's Case*, 6 Ch. 104. As to the liability of directors, see further. *Turquand* v. *Marshall*, 6 Eq. 112; 4 Ch. 376.

(*n*) *Rance's Case*, 6 Ch. 104.

(*o*) *National Funds Co.*, 10 Ch. D. 118; *Flitcroft's Case*, 21 Ch. Div. 519; *Oxford Building Soc.*, 35 Ch. D. 502; *Leeds Estate Co.* v. *Shepherd*, 36 Ch. D. 787.

(*p*) See, *e.g.*, *Evans* v. *Coventry*, 25 L. J. (Ch.) 489; 8 D. M. & G. 835.

(*q*) *Per* Cotton, L.J., *Blackburn Soc.* v. *Brooks*, 29 Ch. Div. 910; *cf. E. p. Simmonds*, 16 Q. B. Div. 308; *Rogers* v. *Ingham*, 3 Ch. Div. 351; *Currie* v. *Goold*, 2 Madd. 163.

(*r*) *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. Div. 394, 457.

(*s*) See *Hay's Case*, 10 Ch. 593, 601.

(*t*) *McKay's Case*, 2 Ch. Div. 1.

(*u*) *Great Wheal Polgooth, Re Turner.* W. N. 1883, 114; 53 L. J. (Ch.) 42; 49 L. T. 20; 32 W. R. 107.

Sect. 165. promoter as such is not within the section, but can be reached under it only if he was an officer.

DIRECTORS. Arrangements under which promoters find directors and agree to provide them gratuitously with their qualification are unfortunately only too common.

In cases of this sort the authorities seem clearly to bear out the two following propositions:—

1. If a man becomes a director at a time when a contract for sale to the company is not absolutely completed, so that it is his duty to act for the company in the matter of the purchase, he can be compelled to make good at any time the full possible value of any present which he has accepted from the vendor.

It is immaterial that the contract to receive the bribe was made before the person to be bribed was an agent; it is immaterial that the contract for sale and price were all fixed before the bribe was paid, or the agreement made to pay it. If the contract for sale be conditional, the case against the director is so much the stronger, for it might have been his duty to refuse to adopt it, and how is he to discharge this duty if he have accepted a bribe? but if it be not conditional, or if being conditional it have been made absolute, there is little difference, for until the contract is adopted so as to bind the company (*x*), and further until the sale is complete (*y*), the director has still duties to perform, inasmuch as he might be bound to repudiate if he discovered fraud (*z*).

Accordingly a director who assisted to carry out a contract which was conditional in form (a), a secretary who as trustee for the company entered into the preliminary agreement for purchase (*b*), a director who received from a promoter his qualification shares, and then took an active part in carrying out a conditional contract (*c*), a director appointed on the nomination of H. on the understanding that 200 paid-up shares for his qualification were to be found for him by H., and the object of whose appointment was that he might carry out an agreement under which H. was to receive a large number of paid-up shares as consideration for placing new shares in the company (*d*), directors who, having a discretion as to payment of preliminary expenses, paid £3500 to a promoter for preliminary expenses, out of which sum the calls on their qualification shares were paid (*e*), a director who purchased from the vendor 500 shares, part of the fully paid vendor's shares, at 50 per cent. of their par value (*x*), a director who received from the promoter 200 fully paid shares (*y*), have been held liable; and as regards the case last cited, notwithstanding that there was a contract binding as between the promoter and the company before the gift was suggested or agreed.

The principles of the foregoing cases are equally applicable in a going company, although the liability must then be enforced by action (*f*).

2. And apart from any question of incomplete contract, and from any suggestion that the purchase-money has been fictitiously increased by amounts never intended really to remain in the vendor's pocket, it is quite sufficient to establish liability that it is shewn that the director has received in the matter of his agency a gift from the vendor.

Thus, if a purely voluntary payment have been made by the vendor out of

(*x*) *Weston's Case*, 10 Ch. Div. 579.
(*y*) *Eden* v. *Ridsdale's Lamp Co.*, 23 Q. B. Div. 368.
(*z*) See and consider *Hay's Case*, 10 Ch. 593; *McKay's Case*, 2 Ch. Div. 1.
(a) *Hay's Case*, 10 Ch. 593.
(*b*) *McKay's Case*, 2 Ch. Div. 1.
(*c*) *Pearson's Case*, 4 Ch. D. 222; 5 Ch. Div. 336.
(*d*) *De Ruvigne's Case*, 5 Ch. Div. 306.
(*e*) *Englefield Colliery Co.*, 8 Ch. Div. 388.
(*f*) *Nant-y-Glo Co.* v. *Grave*, 12 Ch. D. 738; *Eden* v. *Ridsdale's Lamp Co.*, 23 Q. B. Div. 368.

a purchase price previously and independently determined (*g*) it must be repaid. A director cannot retain a consideration given him by a person involved in the transactions of the company, given, in fact, by way of hire for his consenting to fill the office of director (*h*). A director cannot bargain and sell to a promoter his services as an officer of the company (*i*), and *quære*, whether if a sum of money were promised to A. if he could induce B. to become a director, and he went to B. suppressing the promise, the promise would not be one given for an immoral consideration so that A. could not recover (*k*).

And if each of several directors has received something with the knowledge and approval of the others they are all jointly and severally liable for the whole (*l*).

In *Clarke and Helden's Case* (*m*) the articles, after providing for the allotment to the vendor of paid-up shares in respect of the sale, continued: "and it shall be lawful for the vendor to give shares or pay any moneys either to the directors or any other person or persons for the purpose of promoting the company." This clause Malins, V.C., rejected as fraudulent, and held directors whose qualification shares had been provided by the vendor out of the purchase shares, liable for misfeasance. This decision does not necessarily conflict with *Miller's Case* (*n*) as the application there was to render liable as a contributory and not for misfeasance.

If directors, having a discretionary power of paying preliminary expenses, disqualify themselves for duly exercising their discretion by an agreement with the promoter that he shall qualify them free of expense, they may be rendered jointly and severally liable for sums which they have voted by way of preliminary expenses without proper investigation, and that independently of the fact that the moneys so voted were in fact applied in paying their qualification shares (*o*).

So in an earlier case where the promoter entered into a secret agreement with four directors, who signed the memorandum of association, to give each of them ten shares, or the money to pay for them, and the directors, being empowered under the articles to pay the promoter certain moneys in respect of the promotion of the company, drew a cheque for £400, which the promoter returned to them, to pay for the promised shares, they were held jointly and severally liable to repay the money (*p*).

So where directors had received from the promoter moneys in consideration of their becoming directors, the payment being made out of the moneys of the company; and had also paid themselves fees, after winding-up petition presented, and after notice served on them not to part with the moneys of the company, they were by summary order under this section made to repay both of these (*q*). Where each of five directors with the knowledge and approval of each other received from the promoter twenty fully paid shares (being a director's qualification) which the promoter had received under the

(*g*) See *Hay's Case*, 10 Ch. 593, 603; *McKay's Case*, 2 Ch. Div. 1, 5; *Carriage Co-op. Ass.*, 27 Ch. D. 322.

(*h*) *Ormerod's Case*, 37 L. T. 244; 25 W. R. 765.

(*i*) See *Pearson's Case*, 4 Ch. D. 222, 225.

(*k*) See *Englefield Colliery Co.*, 8 Ch. Div. 388, 398.

(*l*) *Carriage Co-op. Ass.*, 27 Ch. D. 322. Why was each director in *Oxford Building Soc.*, 35 Ch. D. 502, charged only as respects remuneration with that which he had received?

(*m*) 37 L. T. 222.

(*n*) 3 Ch. D. 661; 5 Ch. Div. 70.

(*o*) *Englefield Colliery Co.*, 8 Ch. Div. 388.

(*p*) *London and Provincial Starch Co.*, 20 L. T. 390; and see *Orgill's Case*, 21 L. T. 221 (doubted in *Hay's Case*, 10 Ch. 593, 600); *cf. Madrid Bank, E. p. Williams*, 2 Eq. 216; *Madrid Bank* v. *Pelly*, 7 Eq. 442; *Preston's Claim*, 19 L. T. 138.

(*q*) *Brighton Brewery Co., Hunt's Case*, 37 L. J. (Ch.) 278; 16 W. R. 472.

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purchase agreement from the company, all were jointly and severally liable for the nominal amount of one hundred shares (*r*).

Where the directors passed a resolution to pay a promoter £3000 for services upon an unwritten understanding that he should expend £400 in advertising, and advance the residue to the company on debentures, and he did so, and divided the debentures between himself and certain of the directors; the directors were jointly and severally liable to repay the £2600 (*s*).

But where the shareholders in a cost-book mining company sold the mine to a limited company at a price which was held to be about four times its value, and payment was made by the allotment amongst the vendors of the whole share capital of the limited Company as to some part as fully paid and as to the rest as partly paid, each shareholder in the cost-book company taking his proper proportionate amount in the limited company, there was no liability to the company, for each shareholder's holding simply represented the same proportion of the mine as before (*t*).

Knowledge and acquiescence.

If directors receive a bonus with the knowledge and assent of every shareholder, and at a time when no one contemplates that any one else will become a member, they are entitled to retain it (*u*).

Non-feasance.

The section applies to misfeasance, not to non-feasance (*x*). On the formation of a company in 1872–1873, £10,000 promotion money was paid, and B. was informed of the fact at the time. In December, 1875, he became a director. In 1877 the company went into liquidation. An application by the liquidator to render him liable for misfeasance for not having communicated to the shareholders what he knew was dismissed (*y*).

Loss by allotments to infants.

A director induced three of his children who were infants to apply for shares. Shares were allotted to them, and he gave them money to make the payments on allotment. In the winding-up, the children being still infants and therefore not liable for calls, the father was under this section held liable to pay the calls, as a loss occasioned to the company by his breach of duty. All the shares were allotted, and the argument that there was no sufficient proof that the company had sustained a loss was therefore rejected (*z*).

Bonâ fide payment.

A *bonâ fide* payment made to a director as part of an arrangement which the company considers for its benefit may be upheld, even if made at a time when the company is in difficulties (a).

PROMOTERS.

If a promoter from whom it is sought to enforce repayment of promotion money is, or has been at the time of the misfeasance, an officer of the company within this section, the summary jurisdiction may be employed against him. The important recent cases upon the liability of promoters having arisen mainly under Companies Act, 1857, s. 38, are collected in the note to that section. The following upon the right of promoters to prove in respect of services rendered, may be added here.

"If the promoter of a company procures a company to be formed by improper and fraudulent means, and for the purpose of securing a profit to himself, which if the company was successful it would be unjust and inequitable to allow him to retain, and the company proves abortive, and is

(*r*) *Carriage Co-op. Ass.*, 27 Ch. D. 322.
(*s*) *Anglo-French Soc., E. p. Pelly*, 21 Ch. Div. 492.
(*t*) *Ambrose Lake Co., E. p. Taylor*, 14 Ch. Div. 390.
(*u*) *British Seamless Paper Box Co.*, 17 Ch. Div. 467.
(*x*) *Wedgwood Coal Co.*, W. N., 1882, 164.
(*y*) *Forest of Dean Coal Co.*, 10 Ch. D. 450.
(*z*) *Crenver Co., E. p. Wilson*, 8 Ch. 45.
(a) *Adamson's Case*, 18 Eq. 670, cited *supra*, p. 399.

ordered to be wound up without doing any business, the promoter cannot be allowed to prove against the company in the winding-up, either in respect of his services in forming the company, or in respect of his services as an officer of the company, after the company was registered" (*b*).

The ground of this decision would seem to be that the fraud lies at the very root of the formation of the company, that but for the fraud there never would have been a company at all, and that the promoters cannot claim against the thing created by their own fraud for services which have conferred no benefit. The decision does not go so far as to hold that if the company had gone on, and had the benefit of the services, it could have escaped paying for them (*c*). If the company takes the benefit of the services, then it may become liable, not because it becomes bound by a contract entered into before it came into existence, for that is legally impossible, but because it becomes bound in equity by a new contract or a newly created equitable liability (*d*). But it is by no means universally true that the company becomes liable to pay for that of which it has had the benefit (*e*).

Contributory or debtor.

Where a director or promoter has accepted improperly a present of paid-up shares, there is sometimes a difficulty in ascertaining whether the right application is to fix him as a contributory, treating his shares as unpaid, or to seek payment from him under this section of a sum of money, treating him as a debtor to the company for the full nominal amount of the shares, or some other sum, as measuring the damage which the company has sustained by his misfeasance.

If there has been a contract between the company and the misfeasant to take the shares, and the payment on them is shewn to have been made by a fictitious proceeding under which the company has really never received the amount payable on the shares at all, the misfeasant may be rendered liable as a contributory (*f*), and where (there being no contract with a third person under which the director was to acquire from the third person shares which he was to transfer to the director as paid) the directors made each other presents of shares which they intended to take as paid, but which were not paid in fact (*g*), it may have been rightly decided (*h*), that the shares could be treated as unpaid, although the intention was to take paid-up shares. But you cannot alter the contract under which the misfeasant acquires the shares, and unless there is a contract with the company to take shares (which by necessary implication involves a contract to pay for them) you cannot make a man liable as a contributory (*i*).

Where, therefore, the misfeasance consisted in accepting an allotment of shares forming part of shares to which the vendor was under a duly

(*b*) *Hereford Waggon Co.*, 2 Ch. Div. 621, 626.

(*c*) *Cf. Bagnall* v. *Carlton*, 6 Ch. Div. 371; *Emma Mining Co.* v. *Grant*, 11 Ch. D. 918.

(*d*) *Empress Engineering Co.*, 16 Ch. Div. 125; *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156.

(*e*) *Rotherham Alum Co.*, 25 Ch. Div. 103.

(*f*) *Hay's Case*, 10 Ch. 593; and see *Carriage Co-op. Ass.*, 27 Ch. D. 322, 332; *Aspinall's Case*, 36 L. T. 362. Contrast *Eastwick's Case*, 34 L. T. 84.

(*g*) *E. p. Daniell*, 1 De G. & J. 372.

(*h*) See *Carling's Case*, 1 Ch. Div. 115, 125, 127.

(*i*) *Carling's Case*, 1 Ch. Div. 115; reversing 20 Eq. 580; *De Ruvigne's Case*, 5 Ch. Div. 306; *Anderson's Case*, 7 Ch. Div. 75, 95. It is easy to distinguish cases of this sort from cases under Comp. Act, 1867, s. 25 (*e.g. Pagin's Case*, 6 Ch. D. 681), where a person contracting to take shares which he intends shall be paid up, obtains an allotment of shares which the statute renders unpaid. In such a case the man meant to be a shareholder, and meant to pay for his shares, but he meant to pay in a manner not allowed by law. The payment therefore falling to the ground, he remains a holder of shares unpaid. See Comp. Act, 1867, s. 25, note.

Sect. 165. registered contract entitled as fully paid up, the matter was treated as if the shares had been allotted to the vendor and then transferred, and an order of Jessel, M.R., rendering the allottees liable as contributories (*k*) was discharged without prejudice to any application under this section to render the allottees liable for misfeasance (*l*).

Amount of damages.

Assuming then that a director or promoter has obtained by misfeasance shares which, if he hold them at all he must hold as paid up, the company's remedy is to make him account for that which he has acquired by breach of trust. This it may do in any one of three ways: first, if the misfeasant still holds the shares, and they are valuable, the company can recover them from him; secondly, if he has sold the shares at a profit, they can recover the profit; thirdly, if the shares are valueless, or have been sold at a loss, the company can recover as damages the sum which they have lost by being deprived of the right of allotting the shares to persons who would have paid them up (*m*).

In the third case the Court will estimate the damages at the largest amount of damage which could at any time have been incurred, that is, at the full value of the shares at the time the misfeasant acquired them, or at any subsequent time. If shares in the company were taken by solvent persons it will be assumed against the misfeasant that these shares would have been so taken, and the damages will be the full nominal amount of the shares (*n*); or if the person attacked purchased them at less than their full nominal amount, then the difference between the full nominal amount and what he paid (*o*). And even where it was shewn that the misfeasant had in fact transferred some of the shares for a nominal consideration and had made no profit out of them, he was charged with the full nominal amount, for he had deprived the company of the power of allotting them to other persons who might have paid the full nominal amount (*p*).

The principle is that if that which the agent has received is money he must hand over the money; if something else, then the principal may insist on having it or, if he chooses, the value of it. The value is to be measured by the best price which the principal could have obtained if the agent had at once told him the facts, and the principal had then taken the property and subsequently sold it at the highest value reached. The value, therefore, is the highest value between the date of the wrongful act and the date when it came to the knowledge of the principal (*q*).

Action by going company.

A going company may of course enforce by action a remedy against a director who accepts a gift in the matter of his trust. And its remedy is the same as above described as enforceable under this section if the company is in liquidation. It is not enough for the director to give back the shares; if they have fallen in value the company may enforce payment of damages to be calculated on the principles above stated. Thus where a director had accepted a gift of fifty shares of £100 each, and an action was brought by a going company, judgment was given for payment of £80 a share, being the price at which the shares were quoted soon after the allotment, although five years were allowed to elapse before the action was brought, and at that time the shares had fallen to £1 (*r*).

(*k*) 20 Eq. 580.

(*l*) *Carling's Case*, 1 Ch. Div. 115.

(*m*) Sco *Carling's Case*, 1 Ch. Div. 115, 126.

(*n*) *McKay's Case*, 2 Ch. Div. 1; *De Ruvigne's Case*, 5 Ch. Div. 306; *Pearson's Case*, 4 Ch. D. 222; 5 Ch. Div. 336; *Ormerod's Case*, 37 L. T. 244; 25 W. R. 765.

(*o*) *Weston's Case*, 10 Ch. Div. 579.

(*p*) *Metcalfe's Case*, 13 Ch. Div. 169; *cf. Nant-y-Glo Co.* v. *Grave*, 12 Ch. D. 738.

(*q*) *Eden* v. *Ridsdale's Lamp Co.*, 23 Q. B. Div. 368.

(*r*) *Nant-y-Glo Co.* v. *Grave*, 12 Ch. D. 738.

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"Where a trustee has a fund in his possession, and wastes it either by neglect of duty or by doing an act not justified, and the *cestui que trust* comes to recover his money, no time will bar his suit, for it is a claim by the *cestui que trust* against the trustee for money or property which was in the possession of the trustee, and must be considered as in the possession of the trustee for the benefit of the *cestui que trust* until the trustee duly discharges himself. To such a suit there is no bar by statute" (*s*). Statute of Limitations.

But where the claim of the *cestui que trust* is that the trustee has received a bribe, or has received money under such circumstances that the receipt was a fraud on the *cestui que trust*, then the claim is only for an equitable debt, and the Statute of Limitations runs from the date, or rather a Court of Equity by analogy applies the statute as from the date at which the *cestui que trust* knows the facts (*t*).

Therefore where directors paid dividends out of capital, they could not set up the Statute of Limitations (*u*); but where the charge was that a debtor to the company paid a director a sum of money to induce him to use his influence to persuade the company to accept a small sum in settlement of the debt, the statute ran from the date at which the other directors knew the facts (*x*).

In the *Mammoth Copperopolis of Utah* (*y*) the dates were:—dividend paid, 1872; winding-up, Nov. 1876; official liquidator appointed Dec. 1876; summons against directors for repayment of dividend, July 1879. Hall, V.C., dismissed the summons on the ground of stale demand: but *quære* this decision. In the *Alexandra Palace Co.* (*z*) the dates were:—dividends paid Jan. 1874 to June 1875; winding-up, Oct. 1876; summons, Feb. 1880. Fry, J., made an order. *Stringer's Case* (a), which was referred to in these cases, is really no authority at all on stale demand, for the Court decided that the dividend was not there paid out of capital.

The debt incurred to a company by a promoter [and equally it is conceived by a director] who makes a secret profit out of the company is a debt incurred by "fraud" and by "breach of trust" within Bankruptcy Act, 1869, s. 49 (Bankruptcy Act, 1883, s. 30), and if the party liable liquidate by arrangement he is not released from the debt by his discharge (*b*). Bankruptcy Act. Discharge.

And the same is true of a claim for misapplication of the company's funds (*c*).

But default in payment of the amount is not "default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control" within sect. 4 of the Debtors' Act, 1869, and the defaulter cannot, therefore, be committed for non-payment (*d*). *Secus*, if he had received money belonging to the company and had misappropriated it (*d*). Debtors' Act.

A claim by a director against the company cannot be set off against liability of the director enforced under this section (*e*). Set-off.

A claim by the company against a director for misfeasance is assignable (*f*), and is within sect. 95 a "thing in action" of the company which the Misfeasance claim:—assignment of;

(*s*) Cotton, L.J., *Metropolitan Bank* v. *Heiron*, 5 Ex. Div. 319, 325. See, however, now the Trustee Act, 1888, 51 & 52 Vict. c. 59.

(*t*) *Metropolitan Bank* v. *Heiron*, 5 Ex. Div. 319.

(*u*) *Flitcroft's Case*, 21 Ch. Div. 519.

(*x*) *Metropolitan Bank* v. *Heiron*, 5 Ex. Div. 319.

(*y*) 59 L. J. (Ch.) 11.

(*z*) 21 Ch. D. 149.

(a) 4 Ch. 475.

(*b*) *Emma Mining Co.* v. *Grant*, 17 Ch. D. 122; S. C. 11 Ch. D. 918, 933.

(*c*) *Ramskill* v. *Edwards*, 31 Ch. D. 100.

(*d*) *Metcalfe's Case*, 13 Ch. D. 815.

(*e*) *Anglo-French Soc., E. p. Pelly*, 21 Ch. Div. 492; *Flitcroft's Case*, 21 Ch. Div. 519.

(*f*) *New Westminster Brewery Co.* v. *Hannah*, W. N. 1876, 215; 1877, 35. Contrast *Prosser* v. *Edmonds*, 1 Y. & C. (Exc.) 481; *Hill* v. *Boyle*, 4 Eq. 260.

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is not against director as member.

A claim for misfeasance against a director is not a dispute with him "in his capacity of a member" to be referred to arbitration within the Building Societies Act, 1884 (*h*).

Penalty on falsification of books.

166. If any director, officer, or contributory of any company wound up under this Act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company, with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanour, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour (*a*).

(*a*) *Cf.* 24 & 25 Vict. c. 96, s. 83.

Prosecution of delinquent directors in the case of winding-up by Court.

167. Where any order is made for winding-up a company by the Court or subject to the supervision of the Court, if it appear in the course of such winding-up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible (*a*), the Court may on the application (β) of any person interested in such winding-up, or of its own motion, direct the official liquidators, or the liquidators (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company.

(*a*) 24 & 25 Vict. c. 96, ss. 81-84; and *v.* note to s. 165.

(β) By petition, Gen. Order, Nov. 1862, Rule 51.

An application under this section, on the part of the official liquidator, for leave to conduct a prosecution, and that the costs might be paid out of the assets, was refused in the *Eupion Fuel and Gas Co.* (*i*). But in *Mercantile Marine Insurance Co.* (*k*), North, J., made an order, and Chitty, J., did so in *Denham and Co.* (*l*).

Prosecution of delinquent directors, &c., in case of voluntary winding-up.

168. Where a company is being wound up altogether voluntarily, if it appear to the liquidators conducting such winding-up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible (*a*), it shall be lawful for the liquidators, with the previous sanction of the Court (β), to prosecute such offender, and all expenses properly

(*g*) *Park Gate Wagon Co.*, 17 Ch. Div. 234.

(*h*) *Municipal Society* v. *Richards*, 39 Ch. Div. 372.

(*i*) W. N. 1875, 10.

(*k*) May, 1882.

(*l*) W. N. 1884, 122; 53 L. J. (Ch.) 1113; 51 L. T. 570; 32 W. R. 920.

incurred by them in such prosecution shall be payable out of the assets of the company in priority to all other liabilities. **Sect. 169.**

(α) 24 & 25 Vict. c. 96, ss. 81–84; and v. note to s. 165.

(β) Obtained on petition, Gen. Order, Nov. 1862, Rule 51.

Penalty of perjury.

169. If any person, upon any examination upon oath or affirmation authorized under this Act, or in any affidavit, deposition, or solemn affirmation in or about the winding-up of any company under this Act, or otherwise in or about any matter arising under this Act, wilfully and corruptly gives false evidence, he shall, upon conviction, be liable to the penalties of wilful perjury.

Power of Courts to make Rules.

Power of Lord Chancellor of Great Britain to make Rules.

170. *In England the Lord Chancellor of Great Britain, with the advice and consent of the Master of the Rolls, and any one of the Vice-Chancellors for the time being, or with the advice and consent of any two of the Vice-Chancellors, may, as often as circumstances require, make such Rules concerning the mode of proceeding to be had for winding-up a company* (α) *in the Court of Chancery as may from time to time seem necessary, but until such Rules are made, the general practice of the Court of Chancery, including the practice hitherto in use in winding-up companies, shall, so far as the same is applicable and not inconsistent with this Act, apply to all proceedings for winding-up a company* (β).

(α) This was extended to making Rules under the Comp. Act, 1867, by Comp. Act, 1867, s. 20.

(β) See Gen. Ord. Nov. 1862, and Rule 74 of that Order.

This section is repealed by 44 & 45 Vict. c. 59, having been superseded by the provisions as to Rules in the Judicature Acts.

Power of Court of Session in Scotland to make Rules.

171. In Scotland the Court of Session may make such Rules concerning the mode of winding up (α) as may be necessary by Act of Sederunt; but, until such Rules are made, the general practice of the Court of Session in suits pending in such Court shall, so far as the same is applicable, and not inconsistent with this Act, apply to all proceedings for winding-up a company, and official liquidators shall in all respects be considered as possessing the same powers as any trustee on a bankrupt estate (α).

(α) This is extended to making Rules under the Comp. Act, 1867; v. Comp. Act, 1867, s. 20.

Power to make Rules in Stannaries Court.

172. The Vice-Warden of the Stannaries may from time to time, with the consent provided for by section twenty-three of the Act of eighteenth of Victoria, chapter thirty-two, make Rules for carrying into effect the powers conferred by this Act upon

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the Court of the Vice-Warden (*a*), but, subject to such Rules, the general practice of the said Court and of the Registrar's Office in the said Court, including the present practice of the said Court in winding-up companies, may be applied to all proceedings under this Act; the said Vice-Warden may likewise, with the same consent, make from time to time Rules for specifying the fees to be taken in his said Court in proceedings under this Act; and any Rules so made shall be of the same force as if they had been enacted in the body of this Act; and the fees paid in respect of proceedings taken under this Act, including fees taken under "The Joint Stock Campanies Act, 1856," in the matter of winding-up companies, shall be applied exclusively towards payment of such additional officers, or such increase of the salaries of existing officers, or pensions to retired officers, or such other needful expenses of the Court, as the Lord Warden of the Stannaries shall from time to time, on the application of the Vice-Warden or otherwise, think fit to direct, sanction, or assign, and meanwhile shall be kept as a separate fund apart from the ordinary fees of the Court arising from other business to await such direction and order of the Lord Warden herein, and to accumulate by investment in Government securities until the whole shall have been so appropriated.

(*a*) This is extended to making Rules under the Comp. Act, 1867; *v.* Comp. Act, 1867, s. 20.

Power of Lord Chancellor of Ireland to make Rules.

173. In Ireland the Lord Chancellor of Ireland may, as respects the winding-up of companies in Ireland (*a*), with the advice and consent of the Master of the Rolls in Ireland, exercise the same power of making Rules as is by this Act hereinbefore given to the Lord Chancellor of Great Britain; but until such Rules are made the general practice of the Court of Chancery in Ireland, including the practice hitherto in use in Ireland in winding-up companies, shall, so far as the same is applicable, and not inconsistent with this Act, apply to all proceedings for winding-up a company.

(*a*) This is extended to making Rules under the Comp. Act, 1867; *v.* Comp. Act, 1867, s. 20.

PART V.

Registration Office.

Constitution of Registration Office.

174. The registration of companies under this Act shall be conducted as follows: (that is to say,)

(1.) The Board of Trade may from time to time appoint such registrars, assistant registrars, clerks, and servants as they may think necessary for the registration of companies under this Act, and remove them at pleasure:

(2.) The Board of Trade may make such regulations as they think fit with respect to the duties to be performed by any such registrars, assistant registrars, clerks, and servants as aforesaid:

(3.) The Board of Trade may from time to time determine the places at which offices for the registration of companies are to be established, so that there be at all times maintained in each of the three parts of the United Kingdom at least one such office, and that no company shall be registered except at an office within that part of the United Kingdom in which by the memorandum of association the registered office of the company is declared to be established; and the Board may require that the registrar's office of the Court of the Vice-Warden of the Stannaries shall be one of the offices for the registration of companies formed for working mines within the jurisdiction of the Court (*a*):

(4.) The Board of Trade may from time to time direct a seal or seals to be prepared for the authentication of any documents required for or connected with the registration of companies:

(5.) Every person may inspect the documents kept by the Registrar of Joint Stock Companies; and there shall be paid for such inspection such fees as may be appointed by the Board of Trade, not exceeding one shilling for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document, or any part of any other document, to be certified by the registrar; and there shall be paid for such certificate of incorporation, certified copy or extract, such fees as the Board of Trade may appoint, not exceeding five shillings for the certificate of incorporation, and not exceeding sixpence for each folio of such copy or extract, or in Scotland for each sheet of two hundred words:

(6.) The existing registrar, assistant registrars, clerks, and other officers and servants in the office for the registration of joint stock companies shall, during the pleasure of the Board of Trade, hold the offices and receive the

Sect. 175.

salaries hitherto held and received by them, but they shall in the execution of their duties conform to any regulations that may be issued by the Board of Trade:

(7.) There shall be paid to any registrar, assistant registrar, clerk, or servant that may hereafter be employed in the registration of joint stock companies such salary as the Board of Trade may, with the sanction of the Commissioners of the Treasury, direct:

(8.) Whenever any act is herein directed to be done to or by the Registrar of Joint Stock Companies, such act shall, until the Board of Trade otherwise directs, be done in England to or by the existing Registrar of Joint Stock Companies, or in his absence to or by such person as the Board of Trade may for the time being authorize; in Scotland to or by the existing Registrar of Joint Stock Companies in Scotland; and in Ireland to or by the existing Assistant Registrar of Joint Stock Companies for Ireland, or by such person as the Board of Trade may for the time being authorize in Scotland or Ireland in the absence of the registrar; but in the event of the Board of Trade altering the constitution of the existing registry office, such act shall be done to or by such officer or officers, and at such place or places with reference to the local situation of the registered offices of the companies to be registered as the Board of Trade may appoint.

(a) See Stannaries Act, 1887, s. 31, as to duplicate registration of companies engaged in or formed for working mines in the Stannaries.

PART VI.

Application of Act to Companies registered under the Joint Stock Companies Acts.

Definition of Joint Stock Companies Acts.
19 & 20 Vict. c. 47.
20 & 21 Vict. c. 14.
20 & 21 Vict. c. 49.
21 & 22 Vict. c. 91.
7 & 8 Vict. c. 110.

175. The expression "Joint Stock Companies Acts" as used in this Act shall mean "The Joint Stock Companies Act, 1856," "The Joint Stock Companies Act, 1856, 1857" (a), "The Joint Stock Banking Companies Act, 1857," and "The Act to enable Joint Stock Banking Companies to be formed on the principle of Limited Liability," or any one or more of such Acts, as the case may require, but shall not include the Act passed in the eighth year of the reign of her present Majesty, chapter one hundred and

ten, and intituled "An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies." Sect. 176.

(α) See 20 & 21 Vict. c. 14, s. 2.

Application of Act to companies formed under Joint Stock companies Acts.

176. Subject as hereinafter mentioned (α), this Act, with the exception of Table A. in the first schedule, shall apply to companies formed and registered under the Joint Stock Companies Acts (β), or any of them, in the same manner in the case of a limited company as if such company had been formed and registered under this Act as a company limited by shares, and in the case of a company other than a limited company as if such company had been formed and registered as an unlimited company under this Act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint Stock Companies Acts or any of them, and the power of altering regulations by special resolution given by this Act (γ) shall, in the case of any company formed and registered under the said Joint Stock Companies Acts or any of them, extend to altering any provisions contained in the table marked B. annexed to "The Joint Stock Companies Act, 1856," and shall also in the case of an unlimited company formed and registered as last aforesaid extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding such regulations are contained in the memorandum of association.

(α) As to what these words refer to, see *London India Rubber Co.*, 1 Ch. 329.
(β) s. 175.
(γ) ss. 50, 196 (3), (4).

A company formed and registered under the Joint Stock Companies Acts (*supra*, sect. 175), is, by virtue of this section, a company under this Act. Such a company is, therefore, under no necessity of registering under the power given in the 180th section, and is not included under the term "unregistered company" in sect. 199 (*m*).

As to companies registered, but not formed, under the Joint Stock Companies Acts, see next section.

Application of Act to companies registered under Joint Stock Companies Acts.

177. This Act shall apply to companies registered but not formed under the said Joint Stock Companies Acts (α) or any of them, in the same manner as it is hereinafter declared (β) to apply to companies registered but not formed under this Act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively

(*m*) *London India Rubber Co.*, 1 Ch. 329; and see notes to ss. 129, 199.

Sect. 178. registered under the said Joint Stock Companies Acts or any of them.

(α) s. 175. (β) s. 196.

By sect. 196 "all the provisions of this Act shall apply," &c. It is conceived, therefore, that the note to sect. 176, *supra*, is equally true in the case of a company registered, but not formed, under the Joint Stock Companies Acts.

Mode of transferring shares.

178. Any company registered under the said Joint Stock Companies Acts or any of them may cause its shares to be transferred in manner hitherto in use, or in such other manner as the company may direct.

PART VII.

COMPANIES AUTHORIZED TO REGISTER UNDER THIS ACT.

Regulations as to registration of existing companies.

179. The following regulations shall be observed with respect to the registration of companies under this part of this Act; (that is to say,)

(1.) No company having the liability of its members limited by Act of Parliament or letters patent, and not being a joint stock company as hereinafter defined (α), shall register under this Act in pursuance of this part thereof:

(2.) No company having the liability of its members limited by Act of Parliament or by letters patent shall register under this Act in pursuance of this part thereof as an unlimited company, or as a company limited by guarantee:

(3.) No company that is not a joint stock company as hereinafter defined (α) shall in pursuance of this part of this Act register under this Act as a company limited by shares:

(4.) No company shall register under this Act in pursuance of this part thereof unless an assent to its so registering is given by a majority of such of its members as may be present personally or by proxy, in cases where proxies are allowed by the regulations of the company, at some general meeting summoned for the purpose:

(5.) Where a company not having the liability of its members limited by Act of Parliament or letters patent is about to register as a limited company the majority required to assent as aforesaid shall consist of not less than

three-fourths of the members present, personally or by proxy, at such last-mentioned general meeting:

(6.) Where a company is about to register as a company limited by guarantee the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceased to be a member, and of the costs, charges, and expenses of winding-up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount (β):

In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the regulations of the company of which he is a member.

(α) s. 181. (β) s. 9.

If a poll is not demanded the voting will be by show of hands, not counting shares (n).

Companies capable of being registered.

180. With the above exceptions, and subject to the foregoing regulations (α), every company existing (β) at the time of the commencement of this Act, including any company registered under the said Joint Stock Companies Acts (γ) consisting of seven or more members, and any company hereafter formed in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this Act as an unlimited company, or a company limited by shares, or a company limited by guarantee; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up.

(α) See also ss. 182–188.

(β) Registration subsequent to the presentation of a winding-up petition must be a mere nullity: *Hercules Insurance Co.*, 11 Eq. 321; see s. 153, n.

(γ) These companies may register under this Act, but the Act applies to them, although not so registered, s. 176.

By registration under the Act a company may acquire powers which it had not before. This section expressly provides that registration shall not be invalid by reason that it has taken place with a view to winding-up, and

(n) *Horbury Bridge Co.*, 11 Ch. Div. 109.

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thus a company, which has no power of selling and transferring its business, may by registration followed by voluntary liquidation acquire the power of sale given by sect. 161 (*o*).

In *Dresser* v. *Gray* (*p*), the A. Company, unlimited and unincorporated, formed under 7 Geo. IV. c. 46, was first registered in 1874 as an unlimited company under the Act of 1862, and subsequently in 1883 as a limited company under the Act of 1879. The shares in the unlimited company were £100 shares. When the company was registered as limited the provisions of the Acts of 1867 and 1879 were utilized, and by subdivision and increase of nominal amount each £100 share was converted into two shares of £60. A testator who died in 1887 by his will made in 1882 bequeathed "50 shares in the A. Company." In 1882 he held 70 shares of £100; at his death he held 140 shares of £60, being the shares converted as above described. Kay, J., held that the legacy was not specific but general: that it was in effect a gift of so much money as would buy 50 shares in the A. Company, an unlimited company: that no one could tell what this would be, and that the gift failed.

Definition of joint stock company.

181. For the purposes of this part of this Act, so far as the same relates to the description of companies empowered to register as companies limited by shares, a joint stock company shall be deemed to be a company having a permanent paid-up or nominal capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital, or the holders of such stock, and no other persons; and such company when registered with limited liability under this Act shall be deemed to be a company limited by shares.

Proviso as to banking company.

182. *No banking company claiming to issue notes in the United Kingdom shall be entitled to limited liability in respect of such issue, but shall continue subject to unlimited liability in respect thereof, and, if necessary, the assets shall be marshalled for the benefit of the general creditors, and the members shall be liable for the whole amount of the issue, in addition to the sum for which they would be liable as members of a limited company* (*a*).

(*a*) See further, s. 188.

By Companies Act, 1879, s. 6 (see *infra*), this section is repealed and a substituted section enacted.

Requisitions for registration by companies.

183. Previously to the registration in pursuance of this part of this Act of any joint stock company (*a*) there shall be delivered to the registrar the following documents; (that is to say,)

(1.) A list shewing the names, addresses, and occupations of all persons who on a day named in such list, and not being more than six clear days before the day of registration,

(*o*) *Southall* v. *British Mutual Society*, 6 Ch. 614.
(*p*) 36 Ch. D. 205.

were members of such company, with the addition of the shares held by such persons respectively, distinguishing, in cases where such shares are numbered, each share by its number:

(2.) A copy of any Act of Parliament, royal charter, letters patent, deed of settlement (β), contract of copartnery, cost book regulations, or other instrument constituting or regulating the company:

(3.) If any such joint stock company is intended to be registered as a limited company, the above list and copy shall be accompanied by a statement specifying the following particulars; (that is to say,)

The nominal capital of the company and the number of shares into which it is divided:

The number of shares taken and the amount paid on each share:

The name of the company, with the addition of the word "limited" as the last word thereof: (γ)

With the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of the guarantee.

(α) s. 181.
(β) s. 209 as to insurance companies registered under 7 & 8 Vict. c. 110.
(γ) s. 190.

Requisitions for registration by existing company not being a joint stock company.

184. Previously to the registration in pursuance of this part of this Act of any company not being a joint stock company (α) there shall be delivered to the registrar (β) a list shewing the names, addresses, and occupations of the directors or other managers (if any) of the company, also a copy of any Act of Parliament, letters patent, deed of settlement, contract of copartnery, cost book regulations, or other instrument constituting or regulating the company, with the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of guarantee.

(α) s. 181. (β) Comp. Act, 1879, s. 9.

Power for existing company to register amount of stock instead of shares.

185. Where a joint stock company (α) authorized to register under this Act has had the whole or any portion of its capital converted into stock, such company shall, as to the capital so converted, instead of delivering to the registrar a statement of shares, deliver to the registrar a statement of the amount of stock belonging to the company, and the names of the persons who

Sect. 186. were holders of such stock, on some day to be named in the statement, not more than six clear days before the day of registration.

(*a*) s. 181.

Authentication of statements of existing companies.

186. The list of members and directors and any other particulars relating to the company hereby required to be delivered to the registrar shall be verified by a declaration of the directors of the company delivering the same, or any two of them, or of any two other principal officers of the company, made in pursuance of the Act passed in the sixth year of the reign of his late Majesty King William the Fourth, chapter sixty-two.

Registrar may require evidence as to nature of company.

187. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether an existing company is or not a joint stock company as hereinbefore defined (*a*).

(*a*) s. 181.

On registration of banking company with limited liability, notice to be given to customers.

188. Every banking company (*a*) existing at the date of the passing of this Act which registers itself as a limited company shall at least thirty days previous to obtaining a certificate of registration with limited liability, give notice that it is intended so to register the same to every person and partnership firm who have a banking account with the company, and such notice shall be given either by delivering the same to such person or firm, or leaving the same or putting the same into the post addressed to him or them at such address as shall have been last communicated or otherwise become known as his or their address to or by the company; and in case the company omits to give any such notice as is hereinbefore required to be given, then as between the company and the person or persons only who are for the time being interested in the account in respect of which such notice ought to have been given, and so far as respects such account and all variations thereof down to the time at which such notice shall be given, but not further or otherwise, the certificate of registration with limited liability shall have no operation (*β*).

(*a*) See further, Comp. Act, 1879, s. 6. (*β*) ss. 18, 192.

Exemption of certain companies from payment of fees.

189. No fees shall be charged in respect of the registration in pursuance of this part of this Act of any company in cases where such company is not registered as a limited company, or where previously to its being registered as a limited company the liability of the shareholders was limited by some other Act of Parliament, or by letters patent.

Power to company to change name.

190. Any company authorized by this part of this Act to register with limited liability shall, for the purpose of obtaining

registration with limited liability, change its name by adding thereto the word "limited" (a). **Sect. 191.**

(a) s. 133.

The word "limited" is, it is conceived, added to the company's name by virtue of this section, and the course (not infrequently taken) of including in the resolution to register a resolution to add "limited" to the name is, it is conceived, erroneous. The company has no power to alter its name except under a special resolution and the approval of the Board of Trade (sect. 13). But the resolution under sect. 179 is not a special resolution, and even if a special resolution were passed, it is of course idle to suppose that the approval of the Board of Trade can be required in a case where the statute requires the alteration to be made.

Certificate of registration of existing companies.

191. Upon compliance with the requisitions in this part of this Act contained with respect to registration, and on payment of such fees, if any, as are payable under the Tables marked B. and C. in the first schedule hereto, the registrar shall certify under his hand that the company so applying for registration is incorporated as a company under this Act, and in the case of a limited company, that it is limited; and thereupon such company shall be incorporated, and shall have perpetual succession and a common seal, with power to hold lands (a); and any banking company in Scotland so incorporated shall be deemed and taken to be a bank incorporated, constituted, or established by or under Act of Parliament.

(a) s. 18.

Certificate to be evidence of compliance with Act.

192. A certificate of incorporation given at any time to any company registered in pursuance of this part of this Act shall be conclusive evidence that all the requisitions herein contained in respect of registration under this Act have been complied with (a), and that the company is authorized to be registered under this Act as a limited or unlimited company, as the case may be (β), and the date of incorporation mentioned in such certificate shall be deemed to be the date at which the company is incorporated under this Act (γ).

(a) But see s. 188, as to a banking company.

(β) See note to s. 18.

(γ) *Cf.* s. 18.

Where a railway company had registered under the Act, the certificate was by virtue of this section conclusive that it was authorized so to register (q).

Transfer of property to company.

193. All such property, real and personal, including all interests and rights in, to, and out of property, real and personal, and including obligations and things in action, as may belong to or be vested in the company at the date of its registration under this Act, shall on registration pass to and vest in the company as

(q) *Ennis and West Clare Railway Co.*, 3 L. R. Irish, 94.

Sect. 194. incorporated under this Act for all the estate and interest of the company therein.

Registration under this Act not to affect obligations incurred previously to registration.

194. The registration in pursuance of this part of this Act of any company shall not affect or prejudice the liability of such company to have enforced against it, or its right to enforce, any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of such company previously to such registration.

Liability of contributory.

This section has no application to the case of a pure contributory. The right of contribution is founded on the contract of partnership; and if a previously unlimited company has been registered with limited liability, the contract is one which excludes all liability to contribute beyond the amount of the shares (*r*).

The result of this has been said to be that if an unlimited company is registered with limited liability and is subsequently wound up, persons who were members of the unlimited company cannot, even in respect of debts contracted before the registration with limited liability, be called upon to contribute beyond the limit of their shares (*r*).

Under the Act of 1856, this was not so, for the 116th section of that Act saved the rights of creditors as against the company and the members of the company after registration (*s*). This Act contains no similar provision: but *quære*, is not sect. 196 (5) sufficient to preserve unlimited liability for debts contracted before registration?

And in any case *quære* whether the rights of creditors as distinguished from the right of contribution as between the members *inter se* could not be enforced in some other proceeding than the winding-up.

Where under the policies of an unregistered assurance society the assets of the company alone were liable, and the society being insolvent was registered as an unlimited company and immediately afterwards wound up, it was held that there was no liability beyond the amount of the shares for any breach of contract in ceasing to carry on business; for the policy-holders were bound by their contract, and could not make the shareholders liable beyond the expressed contract of limited liability (*t*).

Continuation of existing actions and suits.

195. All such actions, suits, and other legal proceedings as may at the time of the registration of any company registered in pursuance of this part of this Act have been commenced by or against such company, or the public officer or any member thereof, may be continued in the same manner as if such registration had not taken place; nevertheless, execution shall not issue against the effects of any individual member of such company upon any judgment, decree, or order obtained in any action, suit, or proceeding so commenced as aforesaid; but in the event of the property and effects of the company being insufficient to satisfy

(*r*) *Sheffield and Hallamshire, &c., Society, Fountain's Case*, 4 D. J. & S. 699; 6 N. R. 75; 11 Jur. (N.S.) 553; 13 W. R. 667; 34 L. J. (Ch.) 593; 12 L. T. 335.

(*s*) *Liverpool Tradesmen's Loan Co., Ex p. Stevenson*, 32 L. J. (Ch.) 96; 11 W. R. 131; 7 L. T. 453; 1 N. R. 145; *Garnett Mining Co.* v. *Sutton*, 3 Best & Sm. 321; 34 L. J. (Q.B.) 118; 13 W. R. 412; *Exhall Mining Co., Bleckley's Case*, 16 L. T. 478.

(*t*) *Lethbridge* v. *Adams*, 13 Eq. 547.

such judgment, decree, or order, an order may be obtained for winding-up the company. Sect. 196.

A shareholder in an unregistered company which, after he has parted with all his shares, is registered, is not a contributory of the registered company, for he never was a member of it, but he remains liable for all debts incurred by the unregistered company while he was a shareholder in it (*u*). Liability of contributory.

196. When a company is registered under this Act in pursuance of this part thereof, all provisions contained in any Act of Parliament, deed of settlement, contract of copartnery, cost book regulations, letters patent, or other instrument, constituting or regulating the company, including in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if they were contained in a registered memorandum of association and articles of association; and all the provisions of this Act (*a*) shall apply to such company and the members, contributories, and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject to the provisions following: (that is to say,) Effect of registration under Act.

(1.) That Table A, in the first schedule to this Act, shall not, unless adopted by special resolution (β), apply to any company registered under this Act in pursuance of this part thereof:

(2.) That the provisions of this Act relating to the numbering of shares (γ) shall not apply to any joint stock company whose shares are not numbered (δ):

(3.) That no company shall have power to alter any provision contained in any Act of Parliament relating to the company (δ):

(4.) That no company shall have power, without the sanction of the Board of Trade, to alter any provision contained in any letters patent relating to the company (δ):

(5.) That in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted prior to registration, who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company contracted prior to registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves in respect of any such debt or liability; or to pay or con-

(*u*) *Lanyon* v. *Smith*, 3 B. & Sm. 938; 2 N. R. 118; *Harvey* v. *Clough*, 2 N. R. 204.

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tribute to the payment of the costs, charges, and expenses of winding-up the company so far as relates to such debts or liabilities as aforesaid; and every such contributory shall be liable to contribute to the assets of the company, in the course of the winding-up, all sums due from him in respect of any such liability as aforesaid (ε); and in the event of the death, bankruptcy, or insolvency of any such contributory as last aforesaid, or marriage of any such contributory, being a female, the provisions hereinbefore contained (ζ) with respect to the representatives, heirs, and devisees of deceased contributories, and with reference to the assignees of bankrupt or insolvent contributories, and to the husbands of married contributories, shall apply:

(6.) That nothing herein contained shall authorize any company to alter any such provisions contained in any deed of settlement, contract of copartnery, cost book regulations, letters patent, or other instrument constituting or regulating the company, as would, if such company had originally been formed under this Act, have been contained in the memorandum of association (η), and are not authorized to be altered by this Act:

But nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any company registering under this Act in pursuance of this part thereof by virtue of any Act of Parliament, deed of settlement, contract of copartnery, letters patent, or other instrument constituting or regulating the company.

(α) A company registering compulsorily under s. 209, is also subject to all the provisions of the Act, *Ramsay's Case*, 3 Ch. Div. 388.
(β) s. 51.
(γ) s. 22.
(δ) Comp. Act, 1867, s. 47.
(ε) ss. 38, 200.
(ζ) ss. 76, 77, 78, 105, 106.
(η) ss. 8, 9, 10.

The Comp. (Mem. of Association) Act, 1890, now gives power to substitute a memorandum and articles of association for a deed of settlement.

Contributories. Past members.

It will be observed that, as respects debts contracted prior to registration, sub-section (5) contains nothing similar to the provision of sect. 38 exonerating past members who have ceased to be members for more than a year from liability in respect of debts contracted before they left the company.

(6)

The proviso at the end of this clause must be read as continuing to the company "any *lawful* power of altering, &c.," *i.e.*, any power which can be exercised consistently with justice and with the objects of the Act. And therefore (before the Comp. Act, 1867) a company, who have under their deed of settlement a power to reduce their capital, have, by reason of sects. 8 and 12, lost such power by registering under the Act (x).

(x) *Droitwich Salt Co.* v. *Curzon*, L. R. 3 Ex. 35; and see s. 12.

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Power of Court to restrain further proceedings.

197. The Court may, at any time after the presentation of a petition for winding-up a company registered in pursuance of this part of this Act, and before making an order for winding-up the company, upon the application by motion of any creditor of the company, restrain further proceedings in any action, suit, or legal proceeding against any contributory of the company, as well as against the company as hereinbefore provided, upon such terms as the Court thinks fit (*a*).

(*a*) ss. 85, 195; *et cf.* s. 201.

See the notes to sect. 85, *supra*, p. 233, where will be found some observations on the frame of this section which provides only for application by a creditor, and not for application by company or contributory.

Order for winding-up company.

198. Where an order has been made for winding-up a company registered in pursuance of this part of the Act, in addition to the provisions hereinbefore contained (*a*), it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the Court, and subject to such terms as the Court may impose.

(*a*) ss. 89, 195; *et cf.* s. 202.

See the notes to sect. 87, *supra*, p. 254.

PART VIII.

Application of Act to Unregistered Companies.

Winding-up of unregistered companies.

199. Subject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by Act of Parliament (*a*), consisting of more than seven members (*β*), and not registered under this Act (*γ*), and hereinafter included under the term unregistered company, may be wound up under this Act, and all the provisions of this Act with respect to winding-up shall apply to such company, with the following exceptions and additions:—

(1.) An unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or, if it has a principal place of business situate in more than one part of the United

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Kingdom, then in each part of the United Kingdom where it has a principal place of business; moreover, the principal place of business of an unregistered company, or (where it has a principal place of business situate in more than one part of the United Kingdom) such one of its principal places of business as is situate in that part of the United Kingdom in which proceedings are being instituted, shall for all the purposes of the winding-up of such company be deemed to be the registered office of the company (δ):

(2.) No unregistered company shall be wound up under this Act voluntarily or subject to the supervision of the Court (ε):

(3.) The circumstances under which an unregistered company may be wound up are as follows; (that is to say,) (ζ)

(*a.*) Whenever the company has dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;

(*b.*) Whenever the company is unable to pay its debts;

(*c.*) Whenever the Court is of opinion that it is just and equitable that the company shall be wound up:

(4.) An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts (η).

(*a.*) Whenever a creditor to whom the company is indebted, at law or in equity, by assignment or otherwise, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at the principal place of business of the company, or by delivering to the secretary or some director or principal officer of the company, or by otherwise serving the same in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum or to secure or compound for the same to the satisfaction of the creditor:

(*b.*) Whenever any action, suit, or other proceeding has been instituted against any member of the company for any debt or demand due, or claimed to be due, from the company, or from him in his character of member of the company, and notice in writing of the institution of such action, suit, or other legal proceeding

having been served upon the company by leaving the same at the principal place of business of the company, or by delivering it to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of such notice paid, secured, or compounded for such debt or demand, or procured such action, suit, or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against such action, suit, or other legal proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same:

(*c.*) Whenever, in England or Ireland, execution or other process issued on a judgment, decree, or order obtained in any Court in favour of any creditor in any proceeding at law or in equity instituted by such creditor against the company, or any member thereof as such, or against any person authorized to be sued as nominal defendant on behalf of the company, is returned unsatisfied:

(*d.*) Whenever, in the case of an unregistered company engaged in working mines within and subject to the jurisdiction of the Stannaries, a customary decree or order absolute for the sale of the machinery, materials, and effects of such mine has been made in a creditor's suit in the Court of the Vice-Warden:

(*e.*) Whenever, in Scotland, the inducie of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made:

(*f.*) Whenever it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

(*α*) See note, pp. 431, 432, *infra*.
(*β*) Seven members, but not necessarily seven shareholders. *South London Fish-market Co.*, 39 Ch. Div. 324; *cf.* s. 79 (3).
(*γ*) *Cf.* ss. 176, 177.
(*δ*) s. 39.
(*ε*) See note to s. 129.
(*ζ*) *Cf.* s. 79.
(*η*) *Cf.* s. 80.

Meaning of "unregistered company."

The meaning to be attached to the term "unregistered company" in this section has been the subject of conflicting *dicta* in several cases (*y*).

The principal difficulty appears to have been raised by the words used by

(*y*) See *Torquay Bath Co.*, 32 Beav. 581; *Bowes* v. *Hope, &c., Insurance Society*, 11 H. L. C. 389; *London India Rubber Co.*, 1 Ch. 329; *Bank of London, &c., Association*, 6 Ch. 421.

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Companies registered under previous Acts;

Lord Westbury in *Bowes* v. *The Hope, &c., Insurance Society* (*z*): "The term 'unregistered companies' found in the 8th part of the Act I think plainly includes all companies that had been registered, other than companies registered under that particular Act of 1862. The meaning of the phraseology of that Act appears to be this, that the words 'registered companies,' when used in the Acts (*sic*), mean companies registered under the Act itself; and unregistered companies mean those companies which had been registered antecedently to the passing of the Act. This company had been registered under the original Act of 1844; it was, therefore, what the Act of 1862 called an unregistered company." It will be observed that the company in respect of which a winding-up order was here made, was a company registered under the Act of 1844—an Act which is expressly excepted from sect. 175 of this Act. The decision in this case, therefore, is not in conflict with the cases cited under sects. 129, 176; but the *dicta* above quoted seem clearly to be in conflict with them. It will, moreover, be observed, that the attention of the House had been called to sects. 175 and 176, and to the case of *Re Torquay Bath Co.* (a), cited *supra*, sect. 129.

The above cases were, however, commented upon in *In re London India Rubber Co.* (*b*), and that case is a direct authority that a company registered under the Joint Stock Companies Acts (sect. 175) is not an unregistered company within this section.

In *In re Bank of London, &c., Association* (*c*), Hatherley, L.C., is reported to have said, "Every company registered under any other Act than the Act of 1862 is considered unregistered for the purposes of that Act;" but it is conceived that these words must not be pressed.

Companies illegal from want of registration;

A company which ought to be but is not registered under the Act, is an illegal association of individuals: and no member who was *particeps criminis* in the matter, could, it is conceived, avail himself of the provisions of the Act to wind up a concern whose very existence is a defiance of the law.

Whether such a company could be wound up upon the petition of a *bonâ fide* creditor, or even in some cases upon that of a contributory, see *ante*, p. 4.

unincorporated companies not registered under any Act;

Unincorporated companies which have never been registered under any Act are included in the term "unregistered companies," and may be wound up under this section.

Thus, where an unregistered company had been dissolved by resolutions passed by the proprietors pursuant to their deed of settlement, its place of business abandoned, and its assets and liabilities transferred to another company, before the passing of this Act, the company was within the Act; and so long as anything remained to be done with reference to the winding-up its affairs, either as regarded the parties *inter se*, or the creditors of the company, it was carrying on business for the purpose of winding-up its affairs within sect. 199 (3); and a winding-up order was accordingly made (*d*).

So a company provisionally registered under the Act of 1844 (7 & 8 Vict. c. 110), but not otherwise registered, has been wound up (*e*).

Insurance companies formed in the interval between the passing of the Act of 1856 (19 & 20 Vict. c. 47) and that of 1857 were not required to be registered; such companies may, therefore, be wound up as unregistered companies under this Act (*e*).

(*z*) 11 H. L. C. 389.
(a) 32 Beav. 581; 11 W. R. 653; 2 N. R. 98.
(*b*) 1 Ch. 329.
(*c*) 6 Ch. 421, 425.
(*d*) *Family Endowment Society*, 5 Ch. 118.
(*e*) *Bank of London, &c., Association*, 6 Ch. 421; and see *Womersley* v. *Merritt*, 4 Eq. 695 (cited *infra*, s. 209).

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A friendly and provident society, which had ceased to carry on business for many years, was wound up (*f*).

other companies.

A company incorporated in another jurisdiction, but not in this country, whose principal place of business is in another jurisdiction, but which has an office and has assets in this country, may be wound up here (*g*), and the pendency of a foreign liquidation does not affect the jurisdiction of the Court to make a winding-up order (*h*). But there is no jurisdiction to wind up a company established in a foreign jurisdiction which has no office or branch in this country, but which carries on business here by means of agents (*i*). It is to be observed that in this case the company had no assets here and that the petition was that of the company itself (*i*).

Foreign companies.

Where there is a winding-up order in the foreign jurisdiction and a winding-up order is made here, the latter may no doubt be conveniently conducted as ancillary to the former (*h*).

Railway company.

The exception from this section of railway companies incorporated by Act of Parliament applies only to companies whose principal object is the construction of a railway. A company whose principal object is the construction of docks is not brought within the exception by reason of having power also to make a branch railway for purposes connected with the docks (*k*).

The Railway Companies Act, 1867, s. 3, defines a railway company to be for the purposes of that Act "a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose)." Within this statute a dock company authorized to construct short railways to connect the dock with other railways is a "railway company" (*l*). And a company formed by Act of Parliament for making a dock which was afterwards authorized by an Act obtained by another company a railway company, to make a short railway over the dock company's land connected with the line of the railway company, and to work it for through traffic, was held to be a railway company within the same section (*m*).

It would seem, upon the authority of *Jones* v. *Charlemont* (*n*) and *Clements* v. *Bowes* (*o*), that the jurisdiction of the Court to wind up an incorporated company upon action brought is not ousted by the Winding-up Acts (*p*); and such companies not being included in sect. 5 of the Bankruptcy Act, 1869, or sect. 123 of Act of 1883, it is conceived that they may be adjudged bankrupt.

Where provision had been made by special Act of Parliament for the dissolution of a railway company, and the winding-up of its affairs, a demurrer for want of equity to a bill filed praying that the company might be wound up and the accounts taken was overruled (*q*).

Abandoned railways.

By the Abandonment of Railways Act, 1869 (*r*):—"Where a warrant has been granted under the principal Acts for the abandonment of the whole

(*f*) *Alfreton District, &c., Society*, 11 W. R. 301; 7 L. T. 817.

(*g*) *Commercial Bank of India*, 6 Eq. 517; *Matheson Brothers, Limited*, 27 Ch. D. 225; *Commercial Bank of South Australia*, 33 Ch. D. 174. See further as to foreign companies, s. 79, note.

(*h*) *Matheson Brothers, Limited*, 27 Ch. D. 225; *Commercial Bank of South Australia*, 33 Ch. D. 174.

(*i*) *Lloyd Générale Italiano*, 29 Ch. D. 219.

(*k*) *Exmouth Docks Co.*, 17 Eq. 181.

(*l*) *Great Northern Railway Co.* v. *Tahourdin*, 13 Q. B. Div. 320.

(*m*) *East and West India Dock Co.*, 38 Ch. Div. 576. But as to the Railway and Canal Traffic Act, 1854, see *East and West India Dock Co.* v. *Shaw*, 39 Ch. D. 524.

(*n*) 16 Sim. 271; 12 Jur. 532.

(*o*) 17 Sim. 167, 174.

(*p*) See these cases noticed in *Ward* v. *Sittingbourne Railway Co.*, 9 Ch. 488, 492.

(*q*) *Ward* v. *Sittingbourne Railway Co.*, 9 Ch. 488.

(*r*) 32 & 33 Vict. c. 114, s. 4.

Sect. 199. railway of any railway company a petition for winding-up the affairs of such company may be presented under the Companies Acts, 1862 and 1867, by the company, or by any person who under the last-mentioned Acts is authorized to present a petition for winding-up a company, or by any person upon whose application the Board of Trade may proceed in pursuance of sect. 32 of the Railway Companies (Scotland) Act, 1867, and the Railway Companies Act, 1867, as the case may be, and for that purpose the railway company whose railway is so authorized to be abandoned shall be deemed to be an unregistered company, which may be wound up under the Companies Acts, 1862 and 1867, and the provisions of the principal Acts which remain in force relating to winding-up shall be construed as if the Companies Acts, 1862 and 1867, and the winding-up provided by this section, were therein referred to."

By this Act the difficulty which had arisen under the previous Acts (*s*), above called the principal Acts, under which it was held that a creditor could not petition for a winding-up order (*t*), has been removed.

Under these Acts a compulsory order has been made upon the petition of the holder of only one share, three out of the four directors being in favour of the winding-up (*u*).

Some recent cases as to the application of the Parliamentary Deposit where a railway company or other company incorporated by special Act is wound up are discussed, *ante*, pp. 283, 284.

Railway company can register and then wind up.

It has been decided in Ireland that a railway company may be registered under the Companies Act, and wound up under its provisions (*x*).

A tramway company incorporated by special Act is not a "railway company," and may be wound up (*y*).

Companies incorporated by special Act of Parliament.

An order has been made to wind up a ferry company incorporated by special Act of Parliament, although it was urged that the company was in its nature similar to a railway company (*z*). So also a telegraph company (a) and a waterworks company (*b*) have been wound up.

The Court has jurisdiction to wind up a canal company incorporated by special Act of Parliament (*c*), and will make an order when it considers it "just and equitable" that the company should be wound up, even although the special Act contemplated its existence in perpetuity, and the winding-up petition be opposed (*d*); and the Court will not be deterred from making an order by the fact that the company cannot be fully wound up and its property sold without an application to Parliament (*b*), for it is the constant course of the Court to sanction in chambers an application to Parliament (*e*).

The order may be made on the petition of the company itself (*e*).

But where, in an Act of Parliament incorporating a company, it is stated that the construction of the works authorized by the Act is of public advantage, the Court will be reluctant to make a winding-up order unless

(*s*) viz., the Abandonment of Railways Act, 1850, 13 & 14 Vict. c. 83; the Railway Companies Act, 1867, 30 & 31 Vict. c. 127; and the Railway Companies (Scotland) Act, 1867, 30 & 31 Vict. c. 126.

(*t*) *North Kent Railway Extension*, 8 Eq. 356.

(*u*) *Skipton and Wharfdale Railway Co.*, 20 L. T. 359; W. N. 1869, 88.

(*x*) *Ennis and West Clare Railway Co.*, 3 L. R. Irish, 94.

(*y*) *Brentford Tramway Co.*, 26 Ch. D. 527.

(*z*) *Isle of Wight Ferry Co.*, 2 H. & M. 597.

(a) *Electric Telegraph Co. of Ireland*, 22 Beav. 471.

(*b*) *Barton Water Co.*, 42 Ch. D. 585.

(*c*) *Re The Proprietors of the Basingstoke Canal*, 14 W. R. 956. As to a canal company being a "commercial or trading company," see *Warwick Canal Co., E. p. Croysdill*, 7 D. M. & G. 199.

(*d*) *Wey and Arun Junction Canal Co.*, 4 Eq. 197.

(*e*) *Bradford Navigation Co.*, 10 Eq. 331. An appeal was defeated by want of *locus standi* on the part of the appellants, 5 Ch. 600.

it be shewn that there is no other process by which its difficulties can be overcome (*f*).

Abortive companies.

A company which is to be formed on certain terms and under certain conditions, but which has in fact never been formed, cannot be wound up as an "unregistered company," because preliminary expenses have been incurred; and, *quære*, whether provisional directors can, by acting under the name of the company, be so associated as to form a body capable of being wound up (*g*).

Partnership.

But whether an association or partnership has been formed or not is a question of fact.

Thus, where—in reply to a circular issued by M. and D. setting forth a project for acquiring and re-modelling a theatre at the cost of £12,000 with the intention of selling it to a company, to be formed for the purpose, for £40,000, which would enable a return to be made of £300 for every £100 subscribed,—persons exceeding seven in number subscribed to the project, they were held to be partners, and a winding-up order was made (*h*).

In such a case, if more than seven members admit the existence and insolvency of the association, there is ground for an order, although other alleged members deny its existence. The question whether the latter are members or not must be decided in subsequent proceedings (*i*).

An order has been made to wind up an unregistered association consisting of four firms containing in all eight members (*k*).

Industrial and provident societies.

Previous to the Industrial and Provident Societies Act, 1876 (*l*), industrial and provident societies were governed by the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), and by sect. 17 of that Act the jurisdiction to wind them up was in the County Court. The Court of Chancery had no jurisdiction to wind up such a company as an unregistered company uuder this Act where omission had been made in registering it under the Industrial and Provident Societies Act.

Therefore, where an industrial society had been registered under the Industrial and Provident Societies Act, 1852 (15 & 16 Vict. c. 31), but not under the Act of 1862 (25 & 26 Vict. c. 87), the Court refused to make a winding-up order under this Act, and recommended that the company should be registered under the Act of 1862, and wound up in the County Court (*m*).

Re Sheffield and Hallamshire, &c., Co-operative Society (*n*) was a similar case, in which, on the matter being mentioned to the Lord Chancellor, he concurred in opinion with the judge below, and the society was accordingly registered under the 25 & 26 Vict. c. 87, and wound up in the County Court.

In *Re Chatham Co-operative Industrial Society* (*o*), an industrial society, registered under the Act of 1852, but not under that of 1862, having obtained a winding-up order under this Act, and having subsequently been registered under the Industrial and Provident Societies Act, 1862, the winding-up order was upon motion discharged as irregular.

(*f*) *Exmouth Docks Co.*, 17 Eq. 181; *Free Fishermen of Faversham*, 36 Ch. Div. 329; *South London Fishmarket Co.*, 39 Ch. Div. 324; *cf. Herne Bay Co.*, 10 Ch. D. 42, 47.

(*g*) *Imperial Anglo-German Bank*, 25 L. T. 895; 26 L. T. 229; W. N. 1872, 340.

(*h*) *Royal Victoria Palace Theatre Syndicate*, 29 L. T. 668; 30 L. T. 3; W. N. 1873, 224; 1874, 8.

(*i*) *South of France Pottery Syndicate*, 36 L. T. 651.

(*k*) *Adansonia Fibre Co.*, see 9 Ch. 635, 637, n.

(*l*) 39 & 40 Vict. c. 45.

(*m*) *Rotherhithe, &c., Industrial Society*, 32 Beav. 57.

(*n*) See 34 L. J. (Ch.) 593; 11 Jur. (N.S.) 553.

(*o*) 33 L. J. (Ch.) 737; 4 N. R. 481; 12 W. R. 1053; 10 Jur. (N.S.) 983.

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By sect. 17 of the Act of 1876 societies registered or deemed to be registered under that Act may be dissolved by an order to wind up, or by a resolution for winding-up made as directed by this Act, and the provisions of this Act are to apply, except that the Court having jurisdiction is to be the County Court.

Benefit building societies.

Under the Building Societies Act, 1874 (*p*), a winding-up petition can be presented only by a member authorized by three-fourths of the members present at a meeting, or by a judgment creditor for not less than £50 (*q*); and the Court having jurisdiction is the County Court (*r*).

Previous to that Act, it was held that a benefit building society, not registered under the Industrial and Provident Societies Acts, 1852 and 1862, was subject to the provisions of this Act with respect to winding-up; and (*per* Turner, L.J.) such a society was not within the provisions of the Industrial and Provident Societies Acts. The last-mentioned Acts seem to apply only to societies formed for carrying on or exercising any trade or labour (*s*).

Where a petition to wind up a benefit building society was presented by a holder of fully paid-up investment shares, who had given notice of withdrawal, and had served a notice requiring immediate payment, which was not complied with, the Court, being of opinion that the society was solvent, although its assets were not capable of immediate realization, held that this was an answer to a member, though it would have been none to an outside creditor; and being of opinion that the object of the petitioner was to obtain an unfair priority over other persons in a like position, dismissed the petition, which was supported by no person beside the petitioner (*t*). A withdrawal member is not equivalent to a creditor (*u*).

Loan society.

A loan society was held to be within the Winding-up Act, 1849 (*x*).

Mutual societies.

Mutual-insurance societies formed since the commencement of the Act require to be registered, and if unregistered, are illegal. Such societies therefore, if unregistered, cannot properly be the subject of a winding-up order at all (*y*). Another difficulty in the way of a winding-up order is that in such societies it may be that no one is liable to contribute anything, and if so, and if the society is unregistered, it may be that a winding-up order cannot be made (*z*). Orders were, however, made in *Shields Marine Insurance Association* (a), *London Marine Insurance Association* (*b*), in both of which cases the society had been formed before November, 1862, and in *Albert Average Association* (*c*).

But a mutual life insurance society formed before the Act and not required to be registered under the Act may be wound up, and there is jurisdiction under the Life Assurance Companies Act, 1870, to make an order, although there may be no liability in any one to contribute to the payment of debts. For sect. 2 of the Life Assurance Companies Act, 1870, contains a definition of "company" which includes it (*d*).

(*p*) 37 & 38 Vict. c. 42, s. 32.

(*q*) See this section commented on, *supra*, p. 230.

(*r*) 37 & 38 Vict. c. 42, s. 4.

(*s*) *Midland Counties Benefit Building Society*, 4 D. J. & Sm. 468; 12 W. R. 661; 13 W. R. 399; 33 L. J. (Ch.) 520, 739; and see *St. George's Benefit Building Society*, 4 Drew. 154; *Doncaster Permanent Building Society*, 3 Eq. 158; *Queen's Benefit Building Society*, 6 Ch. 815; *Professional, &c., Benefit Building Society*, 6 Ch. 856.

(*t*) *Planet Benefit Building Society*, 14 Eq. 441.

(*u*) *Walker* v. *General Mutual Building Society*, 36 Ch. Div. 777.

(*x*) *E. p. James Smith*, 1 Sim. (N.S.) 165.

(*y*) *Padstow Association*, 20 Ch. Div. 137; *Hargrove and Co.*, 10 Ch. 542; and see *ante*, p. 4.

(*z*) *Merchant's and Tradesman's Society*, 9 Eq. 694; *Great Britain Mutual Society*, 16 Ch. Div. 246, 251.

(a) *Lee and Moor's Case*, 5 Eq. 368.

(*b*) 8 Eq. 176, 185.

(*c*) 5 Ch. 597; 13 Eq. 529.

(*d*) *Great Britain Mutual Society*, 16 Ch. Div. 246.

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Trustee savings banks.

By sect. 3 of the Trustee Savings Bank Act, 1887 (50 & 51 Vict. c. 47), a trustee savings bank certified under the Trustee Savings Bank Act, 1863 (26 & 27 Vict. c. 87), may be wound up as an unregistered association upon the petition of any person competent under the Companies Acts to petition, or of the commissioners for the reduction of the national debt, or of a commissioner appointed under the Trustee Savings Bank Act, 1887.

Clubs.

The meaning of the word "association" has been discussed, *ante*, p. 3. It was also discussed in the *St. James' Club Case* (*e*), where it was held that a club was not an "association" within the then Winding-up Acts.

Literary society.

Having regard to sub-sect. (1), which speaks of the "place of business" of the unregistered company, it must be a trading company to fall within the section. Accordingly an order has been refused in the case of a literary and scientific institution not established for the purpose of gain (*f*).

"More than seven members."

If at the date of the petition the members are less than seven in number there is no jurisdiction under the Act to wind up an unregistered company. An action must be brought (*g*).

"Unregistered."

By an unregistered company is meant one which is unregistered at the date of the commencement of the winding-up. Registration subsequent to the presentation of a winding-up petition is a nullity (*h*).

Liability of contributory.

All the provisions of the Act with respect to winding-up are to apply. By sect. 75, therefore, the liability of a contributory of a company, not registered under the Act, but wound up under it, is of the nature of a specialty debt (*i*).

Service of petition.

Service of a winding-up petition can be effected on an unregistered company under Rule 3 of the General Order, 11th of November, 1862, *infra* (*k*).

Who to be deemed a contributory in the event of company being wound up.

200. In the event of an unregistered company being wound up every person shall be deemed to be a contributory (α) who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges, and expenses of winding-up the company, and every such contributory shall be liable to contribute to the assets of the company in the course of the winding-up all sums due from him in respect of any such liability as aforesaid; but in the event of the death, bankruptcy, or insolvency of any contributory, or marriage of any female contributory, the provisions hereinbefore contained with respect to the personal representatives, heirs, and devisees of a deceased contributory (β), and to the assignees of a bankrupt or insolvent contributory (γ), and to the husband of married contributories (δ), shall apply.

(α) ss. 38, 74, 105, 196 (5).
(β) s. 76.
(γ) s. 77.
(δ) s. 78.

(*e*) 2 D. M. & G. 383.
(*f*) *Bristol Athenæum*, 43 Ch. D. 236.
(*g*) *Bolton Benefit Loan Society, Coop* v. *Booth*, 12 Ch. D. 679; *South London Fishmarket Co.*, 39 Ch. Div. 324.
(*h*) *Hercules Insurance Co.*, 11 Eq. 321.
(*i*) *In re Muggeridge, Muggeridge* v. *Sharp*, 10 Eq. 443.
(*k*) *City of London and Colonial Financial Association*, 15 W. R. 1095; 36 L. J. (Ch.) 832.

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A mere debtor to the company is not a contributory.

"Liable . . . to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves"—these words intend a legal or equitable liability to contribute in the character of a partner: they cannot be held to include a mere debtor to the company. Thus the mortgagee of a ship, which was insured in a mutual insurance society, and who, as such mortgagee, had, in accordance with the rules of the society, given a guarantee for the payment of all contributions and averages in respect of the ship, was held not to be a contributory (*l*).

And so a shareholder who transferred his shares when calls were in arrear, and who might therefore be a debtor to the company for the calls, was held not to be on this account a contributory in the winding-up; for he was not liable at law or in equity to contribute to any debt of the company, but was merely a debtor to the company. And although the money coming from him might be used for settling the debts of the company or adjusting liabilities between the shareholders, this did not constitute him a contributory (*m*).

So in the case of an unregistered company which is a corporation (as a building society under the Building Societies Act, 1874) the member is not either at law or in equity liable to contribute to pay the debts, except so far as the statute makes him a contributory to the common fund out of which the debts are to be paid. The corporation, not the member, is debtor (*n*).

And so a debtor to the company, or a *cestui que trust* of shares in the company, or an officer of the company who has misappropriated its assets, may each be compelled to pay moneys which will be part of the assets of the company, but they are not contributories, and cannot be made liable as such (*o*).

So a person who by virtue of sect. 11 of the Savings Bank Act, 1863 (26 & 27 Vict. c. 87), was liable for neglect or omission as in that section mentioned, was not a contributory by virtue of this section, although liable under sect. 165 (*p*).

Misrepresentation by promoters.

But the liability of one of the partners to make good such a misrepresentation as that in *Rawlins* v. *Wickham* (*q*) is a liability for which he may be made answerable as a contributory.

Thus where two promoters issued a circular containing a statement that the entire cost of the operations for which the company was to be formed would be £12,000 "and of this sum £5000 only remains for subscription," they were held to be contributories to the amount of £7000, or of so much of that sum as they failed to shew had been subscribed by other persons (*r*).

Nominee *bonâ fide*.

"Liable at law, or in equity, to pay or contribute . . ."—these words do not include persons who on purchasing shares have, for *bonâ fide* reasons, had them transferred to, and registered in the name of, a nominee (*s*).

Nominee not *bonâ fide*.

But where C. took shares in a company, and for the purpose of giving the company a fictitious importance, caused the shares to be transferred into the names of nominees, an order was made, having regard to the absence of *bonâ fide* trusteeship on the part of the nominees, to put C.'s name on the list of contributories without prejudice to any application to add the names of any other person or persons in respect of the shares (*t*).

(*l*) *Lee and Moor's Case*, 5 Eq. 368.
(*m*) *E. p. Littledale*, 9 Ch. 257.
(*n*) *Sheffield Building Soc.*, 22 Q. B. D. 470.
(*o*) *British Nation Association*, 8 Ch. Div. 679, 708.
(*p*) *Cardiff Savings Bank*, W. N. 1890, 74.
(*q*) 3 De G. & J. 304.
(*r*) *Moore and De La Torre's Case*, 18 Eq. 661.
(*s*) *King's Case*, 6 Ch. 196; see note to s. 30, *supra*.
(*t*) *Cox's Case*, 4 D. J. & S. 53; 33 L. J. (Ch.) 145; 12 W. R. 92; 3 N. R. 97; and see note to s. 30, *supra*.

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Joint tenants of shares.

If two persons are joint tenants of shares in a company whose deed of settlement contains a covenant by each shareholder for himself, his heirs, executors, and administrators to satisfy the obligations attaching to the shares, and one of them dies, his executors will in the winding-up be put on the list with the surviving owner, but only in respect of liabilities incurred up to the death of their testator (*u*).

But, in the absence of anything to the contrary in the articles, the covenant into which members are by sect. 16 to be taken to have entered, will be a joint and not a joint and several covenant. Upon the death of one joint tenant, therefore, his liability as a present member will cease (*x*).

Mutual insurance society.

Where S. had agreed in writing to become a member of a marine mutual insurance society, and had contributed to the losses of other members, and made a claim in respect of injury sustained by his own ship, but no stamped policy had ever been executed; it was held that in the absence of a duly stamped agreement for insurance there was not, under 35 Geo. 3, c. 63, evidence of a binding mutual contract for insurance, and that S. was not a contributory (*y*).

But where B. & Co. by letter authorized the managers of such a society to insure a ship with the society, and undertook to abide by the rules, and a duly stamped policy, containing, however, no reference to the rules, was issued to them; it was held that the letter, though unstamped, was admissible in evidence, that the letter and policy together constituted a binding agreement, and that B. & Co. were, therefore, contributories (*z*).

In a society of this kind the winding-up order does not displace or alter the terms of the contract between the parties (a).

Proof on an unstamped policy.

Where no stamped policy had been issued, but, the ship insured having been lost, the validity of the claim in respect of the policy had been admitted by the company, as was shewn by the fact of their having raised the money, and by entries in their books, before a winding-up order was made; it was held that although the policy itself, being unstamped, could not be put in evidence, yet that there had been a sufficient admission of liability by the company, and proof in respect of the amount insured was allowed in the winding-up (*b*).

Costs of winding-up.

The principle upon which the liability in respect of the costs of the winding-up is to be distributed is conceived to be, that the costs must be borne in proportion to the interest of the members in the assets or their liability to the debts of the association (*c*).

Thus in the case of a mutual insurance association where there were no shares, it was held that the costs must be borne by payers and receivers *pro ratâ* according to the amounts to be paid or received by them respectively, the Court treating the association as an agency established by both receivers and payers, and the winding-up as a proceeding for taking the accounts for the benefit of both parties (a).

In an insurance company whose policies provide that the funds of the company shall alone be liable, and that no shareholder shall be liable to claims in respect of policies beyond the amount of his shares, the costs of the winding-up must be borne by the shareholders and not paid out of the funds of the company (*d*).

(*u*) *Kirby's Executors' Case* (Alb. Arb.), Reil. 67; 15 Sol. J. 922.
(*x*) *Hill's Case*, 20 Eq. 585; see *ante*, p. 206.
(*y*) *Smith's Case*, 4 Ch. 611.
(*z*) *Blyth & Co.'s Case*, 13 Eq. 529.
(a) *London Marine Insurance Association*, 8 Eq. 176.
(*b*) *Martin's Claim*, 14 Eq. 148.
(*c*) *Preece and Evans' Case*, 2 D. M. & G. 374; *London Marine Insurance Association*, 8 Eq. 176.
(*d*) *Professional Life Assurance Co.*, 3 Eq. 668; 3 Ch. 167; *Lethbridge* v. *Adams*, 13 Eq. 547; and see *supra*, p. 297.

Sect. 201.

For the contract of the policy-holders is, that the funds of the company remaining undisposed of at the time of enforcing the agreement, that is, at the date of the winding-up, and inapplicable to prior claims, shall be liable to them. Any costs of realisation, such as costs of sale, must of course be deducted, and the net sale moneys only are the applicable assets; but costs of enforcing payment of calls and such like, that is, all general costs of winding-up, must be borne by the shareholders (*e*).

And where the liquidator compromises with a contributory for a lump sum, the limited assets available for the policy-holders have a first claim to have the amount due to the limited assets satisfied out of the sum received, and the unlimited assets available for general creditors or for costs can take only what is left (*f*).

Past members.

It will be observed that this section contains nothing similar to the provisions of sect. 38, exonerating past members who have ceased to be members for more than a year from liability in respect of debts contracted before they left the company.

Stannaries Act, 1869.

By the Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 25:

Limitation of Liability of past Shareholders.] On a company being wound up in the Court of the Vice-Warden or any other Court, a former shareholder, notwithstanding the provisions contained in the Companies Act, 1862, part 8, s. 200, shall not be liable to contribute to the assets of the company if he has ceased to be a shareholder for a period of two years or upwards before the mine has ceased to be worked or before the date of the winding-up order.

Where transfer was made in Oct. 1876, the mine ceased to be worked in July, 1877, and the winding-up order was made in March, 1879, on a petition presented in Jan. 1879 the transferor was held not to be liable as a past member (*g*). The words "before the mine has ceased to be worked" might be left out altogether: if a man has ceased to be a shareholder two years before the winding-up order he is discharged (*g*).

Power of Court to restrain further proceedings.

201. The Court may, at any time after the presentation of a petition for winding-up an unregistered company, and before making an order for winding-up the company, upon the application of any creditor of the company, restrain further proceedings in any action, suit, or proceeding against any contributory of the company, or against the company as hereinbefore provided (*a*), upon such terms as the Court thinks fit.

(*a*) s. 85; *et cf.* ss. 197, 204.

See the notes to sect. 85, *supra*, where will be found some observations on the frame of this section, which provides only for application by a creditor, and not for application by company or contributory.

Effect of order for winding-up company.

202. Where an order has been made for winding-up an unregistered company, in addition to the provisions hereinbefore contained (*a*) in the case of companies formed under this Act, it is hereby further provided that no suit, action, or other legal

(*e*) *Agriculturist Cattle Insurance Co., E. p. Official Manager*, 10 Ch. 1.

(*f*) See *International Life Assurance Society*, 2 Ch. Div. 476; *Re same Co.*, 36 L. T. 914; *Accidental Death Insurance Co.*, 7 Ch. D. 568; noticed *ante*, p. 298.

(*g*) *Chynoweth's Case*, 15 Ch. Div. 13, 21.

proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the Court, and subject to such terms as the Court may impose. Sect. 203.

(*a*) s. 87; *et cf.* ss. 198, 204.

See the notes to sect. 87, and *Gray* v. *Raper* (*h*).

This section only applies to actions brought against contributories as such to enforce payment of a debt of the company (*i*).

Provision in case of unregistered company.

203. If any unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may by the order made for winding-up such company, or by any subsequent order, direct that all such property, real and personal, including all interest, claims, and rights into and out of property, real and personal, and including things in action as may belong to or be vested in the company, or to or in any person or persons on trust for or on behalf of the company or any part of such property, is to vest in the official liquidator or official liquidators by his or their official name or names, and thereupon the same or such part thereof as may be specified in the order shall vest accordingly, and the official liquidator or official liquidators may, in his or their official name or names, or in such name or names and after giving such indemnity as the Court directs, bring or defend any actions, suits, or other legal proceedings relating to any property vested in him or them, or any actions, suits, or other legal proceedings necessary to be brought or defended for the purposes of effectually winding-up the company and recovering the property thereof.

The effect of a vesting order is that the property vests in the official liquidator, not in his personal but in his official character. He does not become personally liable in respect of obligations attaching to the property (*k*).

But where an order was made vesting the property in six liquidators, a conveyance by two of them operated (notwithstanding ss. 95 and 92, and an order under s. 92 that acts might be done by any two of the liquidators) to pass only two-sixths of the legal estate (*l*).

A vesting order can be obtained on an *ex parte* motion (*m*). But the trustee in whom the property is vested may be served (*n*).

Provisions in this part of Act cumulative.

204. The provisions made by this part of the Act with respect to unregistered companies shall be deemed to be made in addition to and not in restriction of any provisions hereinbefore con-

(*h*) L. R. 1 C. P. 694; *Graham* v. *Edge*, 20 Q. B. D. 538, 683.

(*i*) *South of France Pottery Syndicate*, 37 L. T. 260; 25 W. R. 370.

(*k*) *Graham* v. *Edge*, 20 Q. B. D. 538, 683; *Ebsworth and Tidy's Contract*, 42 Ch. Div. 23, 44.

(*l*) *Ebsworth and Tidy's Contract*, 42 Ch. Div. 23.

(*m*) *Albert Life Assurance Co.*, 18 W. R. 91.

(*n*) *Britannia Building Soc.*, W. N. 1890, 170.

Sect. 205. tained (*a*) with respect to winding-up companies by the Court, and the Court or official liquidator may, in addition to anything contained in this part of the Act, exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding-up companies formed under this Act; but an unregistered company shall not, except in the event of its being wound up (*β*), be deemed to be a company under this Act, and then only to the extent provided by this part of this Act.

(*a*) ss. 74–128, and 153–173.

(*β*) Including the time when a petition is pending, *Rudow* v. *Great Britain Mutual Society*, 17 Ch. Div. 600.

The Court will give to this section its due effect, and will refuse to hold any of the foregoing provisions inapplicable to the case of unregistered companies, on the ground that this section includes them *per incuriam*.

Thus to an unregistered company, sect. 95, sub-sect. 5, is applicable; and the official liquidator will be allowed to prove against a bankrupt contributory, notwithstanding the general rule that joint creditors cannot prove against the separate estate of a partner in competition with separate creditors (*o*).

The section renders applicable to unregistered companies the whole, except as expressly excepted, of Part IV. of the Act (*p*).

PART IX.

Repeal of Acts and Temporary Provisions.

Repeal of Acts.

205. After the commencement of this Act there shall be repealed the several Acts specified in the first part of the third schedule hereto, with this qualification, that so much of the said Acts as is set forth in the second part of the said third schedule shall be hereby re-enacted and continue in force as if unrepealed.

Saving clause as to repeal.

206. No repeal hereby enacted shall affect,

(1.) Anything duly done under any Acts hereby repealed:

(2.) The incorporation of any company registered under any Act hereby repealed:

(3.) Any right or privilege acquired or liability incurred under any Act hereby repealed:

(4.) *Any penalty, forfeiture, or other punishment incurred in respect of any offence against any Act hereby repealed:* (*a*)

(5.) Table B. in the Schedule annexed to the Joint Stock Companies Act, 1856, or any part thereof, so far as the same

(*o*) *E. p. Ball*, 10 Ch. 48; *cf. Re Muggeridge, Muggeridge* v. *Sharp*, 10 Eq. 443.

(*p*) *Rudow* v. *Great Britain Mutual Society*, 17 Ch. Div. 600.

applies to any company existing at the time of the commencement of this Act.

(a) Struck out by Statute Law Revision Act, 1875.

(3.)

The power of making contracts in writing, signed by their agents, conferred by sect. 41 of the Joint Stock Companies Act, 1856, is a "right or privilege incurred under" that Act within this section, and is, therefore, unaffected by the repeal of that Act (q).

Saving of existing proceedings in winding-up.

207. *Where previously to the commencement of this Act an order has been made for winding-up a company under any Acts or Act hereby repealed, or a resolution has been passed for winding-up a company voluntarily, such company shall be wound up in the same manner and with the same incidents as if this Act were not passed, and for the purposes of such winding-up such repealed Acts or Act shall be deemed to remain in full force.*

This section is repealed by Statute Law Revision Act, 1875.

The following are cases under this section:

Re Public Life Assurance Society (r).
Re Economic Omnibus Co. (s).
Re West Silver Bank Mining Co. (t).
Re Fire Annihilator Co. (u).

Saving of conveyance deeds.

208. Where previously to the commencement of this Act any conveyance, mortgage, or other deed has been made in pursuance of any Act hereby repealed, such deed shall be of the same force as if this Act had not passed, and for the purposes of such deed such repealed Act shall be deemed to remain in full force.

Compulsory registration of certain companies.

209. Every insurance company completely registered under the Act passed in the eighth year of the reign of her present Majesty, chapter one hundred and ten, intituled "An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies," shall on or before the second day of November, one thousand eight hundred and sixty-two, and every other company required by any Act hereby repealed to register under the said Joint Stock Companies Acts, or one of such Acts, and which has not so registered, shall, on or before the expiration of the thirty-first day from the commencement of this Act, register itself as a company under this Act, in manner and subject to the regulations hereinbefore contained (a), with this exception, that no company completely registered under the said Act of the eighth year of the reign of her present Majesty shall be required to deliver to the registrar a copy of its deed of settlement; and for the purpose of enabling such insurance companies as are mentioned in this

(q) *Prince* v. *Prince*, 1 Eq. 490.
(r) 7 L. T. 302.
(s) 7 L. T. 399.
(t) 32 Beav. 226.
(u) 32 Beav. 561; 2 N. R. 99; 11 W. R. 652; 9 Jur. (N.S.) 633.

Sect. 210.

section to register under this Act, this Act shall be deemed to come into operation immediately on the passing thereof (β); nevertheless the registration of such companies shall not have any effect until the time of the commencement of this Act. No fees shall be charged in respect of the registration of any company required to register by this section.

(α) See Part VII., *supra*, p. 418. (β) s. 2.

A trade partnership of more than twenty-five persons, formed before the passing of the 7 & 8 Vict. c. 110, and formally registered under the 58th section of that Act, but not otherwise registered, was not required by any of the Acts of 1844, 1856, and 1857, to register before the passing of this Act. Such a company is, therefore, not included in this section, and not subject to the penal consequences imposed by the 210th section: and, although incapable of suing in a corporate capacity, an action may be maintained by some of the partners on behalf of themselves and all the others (*x*).

A company registering compulsorily under this section is in the same position as if the registration had been voluntary. By sect. 196, therefore, all the provisions of the Act, including those (such as sect. 38) which are expressed to apply only to companies formed under the Act, are applicable to a company which is compulsorily registered (*y*).

Penalty on company not registering. 21 Vict. c. 14, s. 28.

210. If any company required by the last section to register under this Act makes default in complying with the provisions thereof, then from and after the day upon which such company is required to register under this Act, until the day on which such company is registered under this Act (which it is empowered to do at any time), the following consequences shall ensue; (that is to say,)

(1.) The company shall be incapable of suing either at law or in equity, but shall not be incapable of being made a defendant to a suit either at law or in equity:

(2.) No dividend shall be payable to any shareholder in such company:

(3.) Each director or manager of the company shall for each day during which the company so being in default carries on business incur a penalty not exceeding five pounds, and such penalty may be recovered by any person, whether a shareholder or not in the company, and be applied by him to his own use:

Nevertheless, such default shall not render the company so being in default illegal, nor subject it to any penalty or disability, other than as specified in this section; and registration under this Act shall cancel any penalty or forfeiture, and put an end to any disability which any company may have incurred under any Act

(*x*) *Womersley* v. *Merritt*, 4 Eq. 695. (*y*) *Ramsay's Case*, 3 Ch. Div. 388.

hereby repealed by reason of its not having registered under the said Joint Stock Companies Acts, 1856, 1857, or one of them. Sect. 211.

An insurance company which has neglected to register under sect. 209 is, by this section, incapable of presenting a petition for a winding-up order; and it will not be permitted to evade the section by joining a shareholder as petitioner (z).

Temporary power for companies to change registered office.

211. *Upon the application of the directors of any company registered under the Joint Stock Companies Acts as hereinbefore defined* (a), *or any of them, made within one year after the date of the commencement of this Act, sanctioned by a resolution passed at an extraordinary general meeting, but subject to the restrictions hereinafter mentioned, the Board of Trade shall have authority by their certificate in writing to change the registered office of any such company from any one part of the United Kingdom of Great Britain and Ireland to any other part thereof, and the Registrar of Joint Stock Companies with whom the memorandum of registration of such company has been registered shall, upon receipt of such certificate, note in writing upon the margin or at the foot of the said memorandum the name of the place to which such registered office is to be transferred, and the day upon which such transfer is pursuant to such certificate to take place, and shall attach the certificate to the memorandum; and the said registrar shall thereupon transmit to the Registrar of Joint Stock Companies for that part of the United Kingdom to which the registered office is to be so transferred copies of the said certificate and of the said memorandum of registration so noted certified by him; and the said registrar for the said last-mentioned part of the United Kingdom shall, upon receipt of such copies of certificate and memorandum, retain and register the same in like manner, and on payment of the like fees to him as provided in the case of the registration of an original memorandum of registration, and thereupon the place of the registered office shall, from the said last-mentioned registration and the said day mentioned in the said certificate, be the place mentioned as such on the said certificate: provided, however, that such change shall in nowise alter or affect anything theretofore done by the said company, or any of their rights or liabilities in respect thereof.*

(a) s. 175.

This section is repealed by Statute Law Revision Act, 1875.

Restrictions on issue of certificate.

212. *The Board of Trade shall not issue their certificate in pursuance of the foregoing section until they are satisfied that an*

(z) *Waterloo Life, &c., Assurance Co.*, 31 Beav. 586; 32 L. J. (Ch.) 370.

Sect. 212. *advertisement of the intention of the company to apply to the Board of Trade for a certificate, with a declaration that all parties objecting thereto are forthwith to apply to the Board of Trade, has been published once at the least in each of four successive weeks in the newspapers following, that is to say, in some newspaper circulating in the district where the registered office of the company is situate, and also if the company is registered in England in the* London Gazette, *if in Ireland in the* Dublin Gazette, *if in Scotland in the* Edinburgh Gazette, *nor until the said Board are satisfied that the objections, if any, that may be urged against the issue of such certificate are groundless.*

This section is repealed by Statute Law Revision Act, 1875.

Table A.
Art. 1.

FIRST SCHEDULE.

TABLE A.

Regulations for Management of a Company limited by Shares.

These regulations are by sects. 14, 15, to be deemed, so far as applicable, to be the regulations of every company limited by shares and formed under the Act, unless excluded or except as modified by articles of association. They are not applicable to companies formed and registered under the Joint Stock Companies Acts (s. 176); nor are they applicable to companies existing before, but registered under, this Act, unless adopted by special resolution (s. 196). They may, by special resolution, be altered by any company to which they are applicable (s. 50), and general power of altering them is by sect. 71 given to the Board of Trade.

Shares (α).

(1.) If several persons are registered as joint holders (β) of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share. Joint holders' receipts.

(α) *Supra*, s. 22; *infra*, art. (46). (β) *Supra*, pp. 206, 437.

As to the right of survivorship between joint holders of shares, see *Garrick* v. *Taylor* (a), *Hill's Case* (b).

(2.) Every member shall, on payment of one shilling, or such less sum as the company in general meeting may prescribe, be entitled to a certificate (α), under the common seal of the company, specifying the share or shares held by him, and the amount paid up thereon. Share certificate.

(α) s. 31.

(3.) If such certificate is worn out or lost, it may be renewed, on payment of one shilling, or such less sum as the company in general meeting may prescribe.

Calls on Shares (α).

(4.) The directors may from time to time make such calls upon the members (β) in respect of all moneys unpaid on their shares as they think fit, provided that twenty-one days' notice (γ) at least is given of each call, and each member shall be liable to pay Calls.

(a) 29 Beav. 79; 4 D. F. & J. 159. (b) 20 Eq. 585.

Table A. Art. 4.

the amount of calls so made to the persons and at the times and places appointed by the directors.

(α) 32 & 33 Vict. c. 19, ss. 10–13, as to companies in the Stannaries.
(β) s. 23.
(γ) Arts. (35) (97) *infra*.

Authority to make calls.

The Act (differing in this respect from the Companies Clauses Consolidation Act (*c*)) contains no provision as to the authority by which calls in a going company are to be made, but leaves this to be determined by the articles, or by Table A. when applicable. By sect. 16 calls made under the articles in a going company, and by sect. 75 calls made in the winding-up (*d*), are specialty debts, in which the heirs of the contributory are bound. Sect. 70 gives a short form of declaration in an action by the company against a member.

The liquidator in a voluntary winding-up may enforce payment of a call previously made by the directors (*e*).

Under the Stannaries Act, 1869 (*f*), calls may be made at any meeting of the company with special notice.

Quorum.

A call made by directors not duly appointed (*g*), or at a time when the number of directors has fallen below the minimum prescribed by the articles (*h*), or by such a number of persons as does not constitute a quorum (*i*), is invalid.

Where, however, the articles contain an article similar to Table A. art. (56), and there has been a board of the minimum number, but by casual vacancies it has fallen below the minimum, a quorum of the continuing directors may act (*k*). *Secus*, if the continuing directors are less than a quorum (*l*).

Under articles which included Table A. arts. (52), (53), and contained an article, "3. The number of directors of the company shall be not less than three nor more than ten unless otherwise determined by the company in general meeting, and two directors shall form a quorum," it was held that art. 3 did not apply to the subscribers of the memorandum, and that two of the subscribers could not allot shares and appoint directors (*m*).

In *Thames Haven Dock Co.* v. *Rose* (*n*) the statute governing the company provided that its concerns should "be carried on under the management of twelve directors to be chosen, &c.," and named nine persons as the first directors; it further provided that the directors for the time being should meet, and that they should not be competent to determine on any business unless at least five directors should be present. As matter of construction the Court came to the conclusion that the provision as to twelve directors was directory only, and held that when the number of directors had dropped to seven a call made by five of the seven was good (*o*).

(*c*) 8 & 9 Vict. c. 16, s. 22, enacts that it shall be lawful for the company to make calls; and under this section the power is, by virtue of sect. 90, in the directors; *Ambergate Railway Co.* v. *Mitchell*, 4 Ex. 540.

(*d*) *Buck* v. *Robson*, 10 Eq. 629.

(*e*) *Stone* v. *City and County Bank*, 3 C. P. Div. 282, 299, 309.

(*f*) 32 & 33 Vict. c. 19, s. 10.

(*g*) *Garden Gully Co.* v. *McLister*, 1 App. Cas. 59. See *ante*, p. 192.

(*h*) *Alma Spinning Co., Bottomley's Case*, 16 Ch. D. 681. Contrast *York Tramways Co.* v. *Willows*, 8 Q. B. Div. 685.

(*i*) *Howbeach Coal Co.* v. *Teague*, 5 H. & N. 151; doubted in *York Tramways Co.* v. *Willows*, 8 Q. B. Div. 685; but see *London and Southern Counties Land Co.*, 31 Ch. D. 223; *cf. Kirk* v. *Bell*, 16 Q. B. 290; see, however, *Scadding* v. *Lorant*, 3 H. L. C. 418; cited *infra*, Art. (56), *ad fin.*

(*k*) *Scottish Petroleum Co.*, 23 Ch. Div. 413, 431, 435.

(*l*) *Newhaven Local Board* v. *Newhaven School Board*, W. N. 1885, 130, 157.

(*m*) *London and Southern Land Co.*, 31 Ch. Div. 223.

(*n*) 4 Man. & Gr. 552.

(*o*) See as to this case, *New Sombrero Co.* v. *Erlanger*, 5 Ch. D. 73, 100; *Alma Spinning Co., Bottomley's Case*, 16 Ch. D. 681, 687; and see *Southampton Dock Co.* v. *Richards*, 1 Man. & Gr. 448; 2 Railw. Cas. 215.

A call made at a meeting at which the necessary quorum of directors was not present, and confirmed when a quorum was present, was good (*p*).

See further the note to Art. (66) as to what is a quorum.

Calls for prospective expenses.

The power given by this article is for the directors to make calls "as they think fit," under which it is conceived that there can be no objection to calls for prospective expenses. The Stannaries Act, 1869 (*q*), provides that calls may be made for estimated expenses to be incurred within three months from the date of the call.

Call before capital fully subscribed.

There is nothing in the Act to forbid business being commenced or calls being made before the capital has been fully subscribed, and it is therefore no answer to an action for a call that a small or even an insignificant amount of the shares have been taken up (*r*).

It is conceived that *Fox* v. *Clifton* (*s*), and *Pitchford* v. *Davis* (*t*), and cases of that class, are not authorities to the contrary, for in those cases under the old law the company never properly existed, its completion by a full subscription being held an essential element in the contract of each subscriber. Under this Act, however, the company comes into existence at once upon registration, and is a corporate body, having, as one of the incidents of its existence, the right to make calls upon its members for the amount of their shares (*u*). Nothing but necessity would justify the introduction of a qualification of this right not found in the words of the Act, and there is no necessity, for intending shareholders can protect themselves by refusing to become members of a company whose articles do not contain regulations precluding the directors from carrying on the business before the capital is fully or sufficiently subscribed (*x*).

The Court has therefore refused to interfere to prevent a company from commencing business on the ground that the whole capital has not been subscribed (*y*), and has refused to relieve an allottee of shares on the like ground (*z*).

But if the articles provide for not commencing business until the capital is subscribed, effect will be given to such provision; and, therefore, where the articles provided that, in case all the shares should not be allotted, the registered members should, *if the directors should by resolution so declare*, be associated for the objects of the company, and that the regulations of the company should be binding on such members as if all the shares had been allotted, and that the business of the company might be commenced from that time, it was held that a call made before all the shares were allotted, and before a resolution was passed, could not be recovered; and that, although the effect of the articles was affirmative only and not negative (a).

Interference of Court.

The Court will not in general take upon itself to investigate the propriety or necessity of a call. This is such an interference in the internal management of a going concern as the Court will decline to undertake (*b*).

But if it be shewn that the call is illegal, as made for a purpose not within the objects of the company, it is conceived that the Court would interfere at

(*p*) *Phosphate of Lime Co., Austin's Case*, 24 L. T. 932.

(*q*) 32 & 33 Vict. c. 19, s. 11.

(*r*) *Ornamental Pyrographic Co.* v. *Brown*, 2 H. & C. 63; 32 L. J. (Ex.) 190. The dicta to the contrary in *Howbeach Coal Co.* v. *Teague*, 5 H. & N. 151, must be abandoned.

(*s*) 6 Bing. 776.

(*t*) 5 M. & W. 2.

(*u*) See, however, some dicta in *North Stafford Steel Co.* v. *Ward*, L. R. 3 Ex. 172.

(*x*) See note (*r*), *ante*.

(*y*) *McDougall* v. *Jersey Imperial Hotel Co.*, 2 H. & M. 528; 12 W. R. 1142.

(*z*) *Lyon's Case*, 35 Beav. 646; *Scottish Petroleum Co.*, 23 Ch. Div. 413, 422; see further, *supra*, p. 22.

(a) *North Stafford Steel Co.* v. *Ward*, L. R. 3 Ex. 172. And see *Pierce* v. *Jersey Waterworks Co.*, L. R. 5 Ex. 209.

(*b*) *Bailey* v. *Birkenhead Railway Co.*, 12 Beav. 433.

Table A. Art. 4.

the instance of a minority of shareholders, or even of a single shareholder, if it be shewn that the majority are in favour of the call, on the principle of those cases which have determined that one of several shareholders or partners is entitled to protection against the *illegal* acts of a majority (*c*).

In *Preston* v. *Grand Collier Dock Co.* (*d*), a demurrer to a bill filed by a shareholder to compel certain other shareholders to pay calls which the directors refused to enforce against them on the ground that they held the shares only in trust for the company, was overruled.

Power to make calls is fiduciary.

A director is a trustee for the general body of shareholders of his power of making calls, and must not use it for his own benefit, without regard to their interests (*e*). But he is in no sense a trustee for the creditors notwithstanding what was said in *Gaslight Improvement Co.* v. *Terrell* (*f*) by Romilly, M.R.: and if on the eve of liquidation he, being under a double liability, pay up his shares in such manner as in fact to diminish the creditors' fund, they cannot complain (*g*). He is moreover only a trustee for the shareholders in a qualified sense (*h*).

Where a shareholder in a company in compulsory liquidation agreed, for a pecuniary consideration, to endeavour to get the liquidators to postpone making a call, such agreement was illegal, as contrary to the policy of the Winding-up Acts, and an action for the consideration could not be sustained (*i*).

Notice.

If, in an action for a call, it be shewn that the person sued has had notice of that call, the fact that other shareholders have not received notice (*k*), or that the form of notice sent out would not as to some of the shareholders have been a valid notice (*l*), affords no defence.

Where, a company being about to change its name under sect. 13, the directors made a call in the old name, and before the change of name was complete gave notice of the call in the new name, and subsequently brought an action in the old name to recover the call from a shareholder who knew of the proposed change of name, the notice was held sufficient, as it in fact gave the defendant notice that the call had been made (*l*).

Where the articles required that, upon non-payment of a call, the notice of call should be repeated within a certain time, a mere notice that the company would come under liabilities, and would be in want of money at that time, was not sufficient (*m*).

By Art. 95 the notice may be served by post.

Irregularities.

If a call be made by the proper authority for a proper purpose, it is not every trifling irregularity that will vitiate the call.

Thus where the deed of settlement required that the call should be advertised, *quære*, whether the omission of this formality was open as a ground of objection to the call by a shareholder who was present at the meeting at which the call was made, the shareholders having in effect and substance had notice by circular (*n*).

(*c*) *Natusch* v. *Irving*, 2 Coop. C. C. 358; Gow on Partnership, 3rd ed. 398; *Const* v. *Harris*, T. & R. 496, are leading cases on this subject. See *Kernaghan* v. *Williams*, 6 Eq. 228; *Pickering* v. *Stephenson*, 14 Eq. 322; and numerous cases cited in Lindley on Partnership, 5th ed. p. 313, *et seq.*

(*d*) 11 Sim. 327.

(*e*) *Gilbert's Case*, 5 Ch. 559.

(*f*) 10 Eq. 168, 175.

(*g*) See *Poole's Case*, 9 Ch. Div. 322; *cf. South London Fishmarket Co.*, 39 Ch. Div. 324.

(*h*) *Forest of Dean Coal Co.*, 10 Ch. D. 450.

(*i*) *Elliott* v. *Richardson*, L. R. 5 C. P. 744.

(*k*) *Newry and Enniskillen Railway Co.* v. *Edmunds*, 2 Ex. 118.

(*l*) *Shackleford, Ford, & Co.* v. *Dangerfield*, L. R. 3 C. P. 407.

(*m*) *Chubwa Tea Co.* v. *Barry*, 15 L. T. 449.

(*n*) *British Sugar Refining Co.*, 3 K. & J.

Table A. Art. 4.

A call is not invalid because made prospectively, as, *e.g.*, by a resolution passed on the 13th of March that a call be made on the 30th of March, payable on the 1st of May (*o*).

Prospective call.

The prospectus of a company will sometimes state that it is not intended to make calls beyond a certain amount, but such a statement cannot of course deprive the company of its power to make calls, or relieve the shareholder of his obligation to pay them.

Intention not to make calls.

A statement that "no further calls are contemplated," has been held to afford no defence by way of equitable plea to an action for calls (*p*).

So an agreement that a person shall not, as a shareholder, be liable to pay calls, but shall only be a shareholder for the purpose of participating in profits, is *ultra vires* and void (*q*).

Agreement that calls shall not be payable in cash.

In several cases it has come under consideration whether an agreement with a shareholder that his calls shall not be payable in cash, but only by set-off against goods supplied by him, can be supported. It is conceived that, for the reasons assigned by the Lords Justices in *Pellatt's Case* (*r*), such an agreement is *ultra vires* and invalid, so far at least as it may be sought to extend it to relieve the shareholder from payment in cash of a call in respect of which he cannot, at the time the call is payable, shew payment by set-off of a sum at that time due to him from the company for goods supplied before that date (*s*).

For the liability of a shareholder to pay calls is a liability defined by the Act, which makes this liability a specialty debt, and gives the company the usual remedies of a specialty creditor. To hold that the directors have power to relieve a shareholder from payment of calls in the manner referred to would be to allow them to deprive the company of these advantages, and to place it in a position in which its only remedy against the shareholder would be by action for breach of contract.

It is at any rate perfectly clear that as respects calls made in the winding-up such an agreement is wholly inoperative to relieve the shareholder from the obligation of payment. A company cannot contract with one of its shareholders that the law as laid down in *Grissell's Case* (*t*), where that law is applicable, shall not apply to him (*u*).

But in going companies it is conceived that the question whether, under such an agreement, a call has or has not been duly paid by a set-off in respect of goods supplied must be determined with reference to the same considerations as have been held applicable to questions arising under the 25th section of the Companies Act, 1867 (*x*).

And, even in a company in liquidation, it is quite another question whether, after payment of his calls, a shareholder may not under such an agreement have a remedy over against the company, as distinguished from the creditors of the company.

Thus in *Elkington's Case* (*y*), although Messrs. Elkington were made

408; and see *Sheffield Railway Co.* v. *Woodcock*, 7 M. & W. 574; *Miles* v. *Bough*, 3 Q. B. 845; *Southampton Dock Co.* v. *Richards*, 2 Railw. Cas. 215; 1 Man. & Gr. 448, *et supra*, note (*l*).

(*o*) *Sheffield Railway Co.* v. *Woodcock*, 7 M. & W. 574.

(*p*) *Accidental Insurance Corporation* v. *Davis*, 15 L. T. 182.

(*q*) *Bunn's Case*, 2 D. F. & J. 275, 295, 299; and see *E. p. Clark*, 7 Eq. 550.

(*r*) 2 Ch. 527, 533, 535; and see *E. p. Clark*, 7 Eq. 550.

(*s*) See, however, *Black & Co.'s Case*, 8 Ch. 254, 265.

(*t*) 1 Ch. 528; see note, *supra*, p. 286.

(*u*) *Black & Co.'s Case*, 8 Ch. 254; as to whether a contract filed under the Comp. Act, 1867, s. 25, makes any difference, see note to that section.

(*x*) See the note to that section, where the cases are fully considered; see also *supra*, p. 47.

(*y*) 2 Ch. 511, 521, 527.

Table A. Art. 4.

contributories, yet it was expressly said that this did not decide anything adversely to their having a right to claim against the company to be indemnified against calls. And in *Black & Co.'s Case* (*z*), Lord Justice Mellish expressed an opinion that such an agreement is not *ultra vires*, but is only subject to the construction put upon it by the statute: the result of which is that as between the shareholder and the creditors no such set-off can be allowed, but after the creditors have been paid in full the shareholder may as against his fellow-shareholders be entitled to be indemnified in respect of the calls which he has been compelled to pay.

It is unnecessary further to recapitulate here the cases, which have been elsewhere (a) considered, dealing with the question of payment in money's worth.

In *Ex parte Clark* (*b*) there was an agreement on the part of the company with its agent to place to his debit the amount then remaining due, and all other sums that might become due on account of calls on his shares, and to take security for their amount. *Quære*, whether such an agreement could be lawfully made by a company with one of its shareholders.

Payment of call whether made (*c*).

Where a director of a company affected to have paid a portion of a call by a debenture of the company not yet payable, which the directors redeemed at a discount, it was held that this could not be treated as a payment of the call, for it was a set-off of money not actually due (*d*).

Where the directors, having power to receive payment of calls in advance, paid into the bank the amount remaining uncalled on their shares, and on the same day appropriated the money in payment of their fees, it was held that there had been no *bonâ fide* payment of calls in advance, and that the directors remained liable on their shares (*e*).

In *Rance's Case* (*f*), where a bonus had been improperly declared and credited to a director against arrears of calls due from him, it was said (*g*) that the transaction might perhaps have been properly declared wholly void and the contributory, as in the case last cited, left liable to the unpaid calls. But owing to the form of the application, the same result was arrived at by directing repayment under sect. 165.

But, even where a company is in difficulties, there may be payments properly made to a director which, even having regard to his fiduciary position, he is not disabled from receiving, and if any such are applied in payment by way of set-off of moneys payable on shares, this will be an effectual payment.

Thus where a company (whose articles allowed directors to participate in the profits of contracts with the company), wishing to rid themselves of an onerous contract with the director, agreed with him to cancel the contract and pay him compensation, and in compliance with a condition in the agreement he applied the compensation in paying up his shares in full, this was held a good payment, although the company was wound up on a petition presented less than two months afterwards (*h*).

Allotment moneys. Who is liable to pay calls:—

The payment required on an allotment of shares is not a call (*i*).

This article, by providing that calls are to be made upon the members,

(*z*) 8 Ch. 254.

(a) *Supra*, p. 47; *infra*, Comp. Act, 1867, s. 25.

(*b*) *Re London and Colonial Co.*, 7 Eq. 550.

(*c*) As to payments on shares, see further, *supra*, p. 47; and *infra*, Comp. Act, 1867, s. 25.

(*d*) *Habershon's Case*, 5 Eq. 286.

(*e*) *Sykes' Case*, 13 Eq. 255. Contrast *Poole's Case*, 9 Ch. Div. 322.

(*f*) 6 Ch. 104.

(*g*) 6 Ch. 115.

(*h*) *Adamson's Case*, 18 Eq. 670.

(*i*) *Croskey* v. *Bank of Wales*, 4 Giff. 314; 9 Jur. (N.S.) 595.

obviates any such question as has arisen under other Acts as to whether mere subscribers or scrip-holders are liable to calls. The question of who are members is discussed under sect. 23.

Where a company brought an action to enforce a call against a transferee of shares, upon bill filed charging that the transfer was fraudulent and void, and that the transferee was not a member, an injunction was granted to stay the action (*k*).

after transfer of shares.

If a transfer of shares has been made and registered after a call has been made, but before it has become payable, it is conceived, although it is by no means clear, that the transferor and not the transferee is the person liable in an action for the call. A call is owing from the day on which it is made, although it be "payable" on a subsequent day (*l*). But it will be observed that Art. (6) provides that upon non-payment of the call the *holder for the time being* of the share shall pay interest, a provision which seems inconsistent with the liability for the principal sum being in the transferor (*m*). If Art. (10) is properly enforced the difficulty here referred to could not perhaps arise unless it should be held that a member is not "indebted" in respect of a call not yet payable, and cannot therefore be refused registration under that article (*n*). The writer is not aware of any authority on these points in cases arising under this Act (*o*).

In a company whose articles provided that no transfer should be made until all arrears of calls had been paid, it was held that a transferee by way of mortgage, who had been recognised by the company as a shareholder, could not be compelled to pay calls which were due at the time of the transfer, and that the shares could not in his hands be forfeited for their non-payment (*p*).

Upon an application in the European Arbitration to substitute the name of the transferee for that of the transferor in a case where registration had not been made before the winding-up owing to default on the part of the company, Lord Westbury made the order subject to the condition that payment of a call, made after the transfer ought to have been registered, should be made within three weeks of the order, for the call bound the transferor as long as his name was on the register, and his right was only to indemnity from the transferee (*q*).

As to shareholders whose shares have been forfeited for non-payment of calls, see Art. (21), and *supra*, p. 144.

As to calls against the estates of deceased shareholders, see the notes to sect. 76, and *infra*, Art (12). As to bankrupt shareholders, see sect. 75, and notes thereto.

Date of call.

(5.) A call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed.

This disposes of the doubt which was at one time felt, whether a call is to

(*k*) *Bloxam* v. *Metropolitan Cab Co.*, 4 N. R. 51.

(*l*) *China Steamship Co., Dawes' Case*, 38 L. J. (Ch.) 512; decided on a question of liability to a call by a member whose shares were forfeited before the call was payable.

(*m*) And see s. 70, and note thereto.

(*n*) But see note to Art. (10), *infra*.

(*o*) *North American Colonial Exhibition* v. *Bentley*, 15 Jur. 187; 19 L. J. (Q.B.) 427, is a case in which upon somewhat similar provisions the transferor was held liable; and see *Aylesbury Railway Co.* v. *Thompson*, 2 Railw. Cas. 668; but see *Aylesbury Railway Co.* v. *Mount*, 4 Man. & Gr. 651; 7 Man. & Gr. 898.

(*p*) *Watson* v. *Eales*, 23 Beav. 294.

(*q*) *Bentinck's Case* (Eur. Arb.), L. T. 99; 17 Sol. J. 807; *cf. Joshua Murgatroyd's Case* (Eur. Arb.), L. T. 115, 146; 18 Sol. J. 28.

Table A. Art. 6.

be taken as made at the date of the resolution, or at the date of the notice of call. The point may sometimes be of importance when a certain interval is to elapse between two calls, or possibly where questions of liability arise as between transferor and transferee (*r*) or in questions respecting forfeited shares (*s*).

If a call be made by a prospective resolution, *e.g.*, if a resolution be passed on the 13th of March that a call be made on the 30th of March payable on the 1st of May, *quære*, whether the resolution must be treated as of the 30th of March, and the liability to attach on that day (*t*).

In the absence of a definite provision as to the date at which a call is to be considered as made, the practice of the company will be regarded in ascertaining the date (*u*).

A resolution for a call must state not only the amount of the call, but also the time at which it is to be paid. If the date for payment be left in blank there is no valid call (*x*).

Interest on calls in arrear.

(6.) If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being (*a*) of such share shall be liable to pay interest for the same at the rate of five pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

(*a*) Note to Art. (4), *ad fin.*; and see Art. (8).

In *E. p. Lintott* (*y*), Malins, V.C., intimated an opinion that the provisions of the articles are not abrogated by the winding-up, and that under a stipulation contained in the articles providing for payment of interest on calls in arrear, the amount of the liability of the shareholders and their obligation to pay interest remains the same after a winding-up order.

But in *Re Welsh Flannel Co.* (*z*), on reconsidering the point, his Lordship held that provisions in the articles as to interest on calls apply only to directors' calls and not to calls made by the liquidators.

Where the articles, after providing for payment of interest, contained a forfeiture clause, providing that forfeiture should extinguish all rights incident to the share, but that the shareholder should remain liable to pay calls owing at the time of forfeiture, it was held that interest could not be recovered under the articles upon the arrears of calls due on shares forfeited for non-payment (a).

A forfeiture made consequent upon a notice which claims interest from the date of the call instead of from the day fixed for its payment, is invalid (*b*).

The time fixed for payment of a call should be fixed by a formal resolution of the directors, not by a mere verbal direction to the secretary (*b*).

The Stannaries Act, 1869 (*c*), provides that in companies falling under that Act discount at 5 per cent. may be allowed for prompt payment, and interest at 5 per cent. charged on arrears of calls.

(*r*) *Supra*, note to Art. (4), *ad fin.*
(*s*) *Dawes' Case*, 38 L. J. (Ch.) 512.
(*t*) *Sheffield Railway Co.* v. *Woodcock*, 7 M. & W. 574.
(*u*) *Addams* v. *Ferick*, 26 Beav. 384, 393.
(*x*) *Cawley and Co.*, 42 Ch. Div. 209.
(*y*) 4 Eq. 184.
(*z*) 20 Eq. 360; see *ante*, p. 199.
(*a*) *Stocken's Case*, 5 Eq. 6; 3 Ch. 412; and see note to Art. (21), *infra*; and as to calls in the winding-up, *supra*, p. 199.
(*b*) *Johnson* v. *Lyttle's Iron Agency*, 5 Ch. Div. 687; *Cawley and Co.*, 42 Ch. Div. 209.
(*c*) 32 & 33 Vict. c. 19, s. 12.

Table A. Art. 7.

(7.) The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon.

Power to receive calls in advance.

A power to receive payment of calls in advance is, like the power to make calls (*d*), a fiduciary power, which the directors are bound to exercise *bonâ fide* for the benefit of the company, and if they exercise it for their own interests only, the transaction is liable to be set aside as a fraud upon the power (*e*).

But the directors are not in any way trustees for the creditors, and the creditors cannot complain if this power has been exercised in such manner as in fact to diminish the fund available for payment of the company's debts (*f*).

In the winding up of the company if after payment of debts there are surplus assets for division amongst the shareholders, the amount paid in advance with interest to payment (and not merely to commencement of winding-up) will be repayable before the balance is divided equally among all (*g*).

Transfers of Shares (α).

(8.) The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register-book in respect thereof (β).

Transfers of shares:—

(α) s. 22, and notes thereto. (β) *Supra*, pp. 39, 133.

The Act does not, as does the Companies Clauses Act (*h*), require transfers to be made by deed, but enacts only (sect. 22) that shares shall be transferable "in manner provided by the regulations." This article provides that transfers shall be "executed" both by transferor and transferee, but it is conceived that this need not be by deed sealed and delivered (*i*).

by deed.

Where, as in companies subject to the Companies Clauses Act, transfers are required to be made by deed, a transfer in blank, *i.e.*, a transfer signed by the transferor leaving a blank for the name of the transferee, is void at law, and is in fact as a deed wholly inoperative (*k*). And in equity such an instrument cannot be of any greater validity as a deed, although as an agreement constituting in equity a transfer of the ownership, it will give a right to call for a legal transfer (*l*).

Transfers in blank:—

(*d*) *Gilbert's Case*, 5 Ch. 559.
(*e*) *Sykes' Case*, 13 Eq. 255.
(*f*) *Poole's Case*, 9 Ch. Div. 322; *cf. South London Fishmarket Co.*, 39 Ch. Div. 324.
(*g*) *Exchange Drapery Co.*, 38 Ch. D. 171.
(*h*) 8 & 9 Vict. c. 16, s. 14.
(*i*) See *E. p. Sargent*, 17 Eq. 273.
(*k*) *Hibblewhite* v. *McMorine*, 6 M. & W. 200; *Swan* v. *North British Australasian Co.*, 7 H. & N. 603; 2 H. & C. 175; *Société Générale* v. *Walker*, 14 Q. B. Div. 424; 11 App. Cas. 20.
(*l*) *Morris* v. *Cannan*, 4 D. F. & J. 581.

Table A. Art. 8.

But under the 23rd section of this Act agreement to become a member is the essential requisite for being deemed a member of the company, and, therefore, where this consent is shewn, the invalidity of the transfer as a deed is of no importance. For the question is not the validity of the instrument as a deed, but whether the transferor has agreed to transfer and the transferee to accept the shares purporting to be transferred (*m*).

Accordingly it has been held that where the articles of association do not require a deed, but permit transfers to be made by "instrument in writing," a transfer in blank carries to the person whose name is subsequently filled in as transferee, not only the equitable, but also the legal interest (*n*)—meaning, it is conceived, the legal right to call upon the company to register the transfer. For there is no legal title to the shares until registration (*o*); or at any rate until all necessary conditions have been fulfilled to give the transferee as between himself and the company a present absolute and unconditional right to have the transfer registered (*p*).

Where under the company's articles a transfer by instrument in writing, without seal, is sufficient, the addition of a seal does not render the instrument any the less effectual (*q*).

But if the articles require the transfer to be executed by both transferor and transferee, *semble*, a transfer executed by transferor alone does not pass the legal title (*q*). The transfer in this case bore an indorsement stating that the transferee's title would not be complete nor would the transfer be binding on the company until the transferee was registered, and that in order to procure registration the transferee must sign an acceptance of the shares; but apart from this, Hall, V.C., held that the legal title did not pass.

There is, however, no principle of law that a transferee cannot become a shareholder unless he has signed the transfer, and if he has been registered as a shareholder and has acted as a shareholder he may be liable (*r*).

by way of security.

The common way of giving security upon shares is by depositing with the mortgagee a transfer executed by the mortgagor, and the certificates of the shares. The transfer is commonly in blank as regards the name of the transferee and the date of execution. A good equitable security may thus be given upon the shares whether the constitution of the company do (*s*) or do not (*t*) require transfers to be by deed, and notice to the company is not necessary to perfect the mortgagee's title for the purpose of preserving priority against subsequent equitable titles (*s*). The 30th section of the Act precludes the company from receiving notice, so that the principle of *Dearle* v. *Hall* (*u*) as to notice in determining priorities does not apply (*s*).

Where the first equitable mortgagee holds the certificates containing (as is often the case) a note that no transfer will be registered until the certificate is delivered, the notice of a subsequent transferee who has not got the certificates is *à fortiori* inoperative to give him priority over the earlier transferee who has (*s*).

(*m*) *Langer's Case*, 37 L. J. (Ch.) 292; 18 L. T. 67.

(*n*) *E. p. Sargent*, 17 Eq. 273; *Davies' Case*, 33 L. T. 834, affirmed on appeal; see 38 L. T. 147.

(*o*) *Société Générale* v. *Walker*, 11 App. Cas. 20, 28; *Nanney* v. *Morgan*, 35 Ch. D. 598.

(*p*) *Nanney* v. *Morgan*, 37 Ch. Div. 346; *Roots* v. *Williamson*, 38 Ch. D. 485.

(*q*) *Ortigosa* v. *Brown, Janson, & Co.*, 38 L. T. 145, where Hall, V.C., said he had ascertained that the instrument in *E. p. Sargent*, 17 Eq. 273, was under seal.

(*r*) *Cuninghame* v. *Glasgow Bank*, 4 App. Cas. 607; *cf. Taurine Co.*, 25 Ch. Div. 118.

(*s*) *Société Générale* v. *Walker*, 11 App. Cas. 20; *Colonial Bank* v. *Whinney*, 11 App. Cas. 426. As to "certification of transfer," *i.e.* certificate given by the company to a purchaser that his vendor's certificates have been lodged, see *Bishop* v. *Balkis Co.*, 25 Q. B. D. 77; W. N. 1890, 160.

(*t*) *France* v. *Clark*, 22 Ch. D. 830; 26 Ch. Div. 257.

(*u*) 3 Russ. 1.

Table A. Art. 8.

And upon the question of "order and disposition" under sect. 44 (iii.) of the Bankruptcy Act, 1883, shares whose certificates bear such a note are not in the order or disposition of the registered holder so that he is reputed owner, when the certificates have been deposited with a mortgagee (*x*).

The holder of a blank transfer as security may be, and probably is, entitled to fill in his own name and register the transfer, holding then of course the legal title to the shares as security, and he is entitled, no doubt, to transfer his security and to fill in the name of the purchaser of the security and register the shares in such purchaser's name, he holding similarly the legal title as security. But he is not entitled to sell the shares themselves, and procure their registration in the name of the purchaser as owner as distinguished from mortgagee (*y*).

And if he do purport to sell the shares, but the documents which he hands to the purchaser to complete the sale include the transfer, still in blank, and the purchaser fills it up, he can only take such interest as his vendor had, and cannot rely on the doctrine of purchaser for value without notice. For the fact that the instrument is in blank affects him with notice (*z*).

But if the holder of the blank transfer, acting no doubt beyond his authority, fills up the blank transfer with the name of a transferee, and the transfer is registered, the transferor is estopped from objecting to the legal title thus acquired, and the *bonâ fide* transferee can hold the shares provided he be purchaser for value without notice (a); but not if, as the House of Lords held, he was put upon inquiry as to the holder's authority (*b*).

Other irregularities.

Irregularities of various kinds in the instrument of transfer may be wholly unimportant.

Thus, where a transfer was executed by P. to company C. of shares in company B., and the intention of both parties was that P. should transfer and company C. accept all the shares which P. held; and at the time when P. executed the transfer, and handed it to his agent, it contained no description of the shares; and before it left his agent's hands it was filled up with the number of the shares, being all P.'s shares, and with the description of them as shares in company B., but the denoting numbers of the shares were not inserted; and the seal of the C. company was then affixed to it, and subsequently the denoting numbers and the date of transfer were filled in; this was held to be a good transfer (*c*).

So, the fact of a transfer to a company not having been accepted by the company under its seal has been held to be immaterial (*d*).

Again, where L. executed to W. a transfer of shares, and the transfer was registered as of the 23rd of August, and it appeared that L. was not at that time the registered holder of any shares, but held transfers to himself of a corresponding number of shares, which last-mentioned transfers appeared from the books to have been sent in to the company's office on the 5th of September, but were registered as on the 30th of August, it was held that the errors and irregularities in the registration did not affect the validity of the transfer to W. (*e*).

(*x*) *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

(*y*) *France* v. *Clark*, 22 Ch. D. 830; 26 Ch. Div. 257.

(*z*) *France* v. *Clark*, 22 Ch. D. 830; 26 Ch. Div. 257. And see *Williams* v. *Colonial Bank*, 36 Ch. D. 659; 38 Ch. Div. 388; *Colonial Bank* v. *Cady*, 15 App. Cas. 267.

(a) *Easton* v. *London Joint Stock Bank*, 34 Ch. Div. 95.

(*b*) S. C. *sub nom. Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333. See also the cases collected, *ante*, p. 363, note (*q*).

(*c*) *E. p. Contract Corporation*, 3 Ch. 105.

(*d*) *Royal Bank of India's Case*, 7 Eq. 91; 4 Ch. 252.

(*e*) *Weikersheim's Case*, 8 Ch. 831, 837, 839.

Table A. Art. 8.

Moreover, although the articles or deed of settlement of a company may require certain formalities in respect of transfers, yet if the company have regularly adopted a course of dealing not in pursuance with those formalities, transfers executed and passed in accordance with such usage, although invalid at law, may not afterwards be capable of being impeached in equity (*f*).

And where a transfer through non-observance of formalities has been irregularly, though not invalidly, made, lapse of time, coupled with recognition of the transferee as a shareholder, may render the transfer incapable of being impeached (*g*).

Thus, where the articles require transfers to be executed by the transferees, a transfer which has not been so executed but has been received and acted upon cannot be impeached (*h*).

But the contrary is not necessarily the case, viz., that where the usage has been to require formalities in excess of the stipulations of the articles, a transfer not executed with such formalities will be invalid. Thus, where it had been the practice of the company to require transfer by deed, a transfer in blank was nevertheless held to convey the legal interest (*i*); although in an earlier case, in a company whose articles excluded Table A., and did not define any formalities for transfer, the directors were held justified in refusing to register a transfer not executed by the transferee (*k*).

But, since the validity of a transfer depends upon the agreement to transfer and to accept the shares purporting to be transferred, it follows that if the transfer be filled up with shares which the transferor did not agree to transfer (*l*), or with shares which the transferee did not agree to accept (*m*), or is a forgery (*n*), such transfer is a nullity.

Denoting numbers of shares.

But, where an agreement is shewn, an error in the distinguishing numbers of the shares is immaterial. For the numbers are simply directory for the purpose of enabling the title of particular persons to be traced. One share, being an incorporeal right to a certain portion of the profits of the company, is the same as another. If, therefore, a transferor has the number of shares which he professes to transfer, or a larger number, and by mistake the wrong distinguishing numbers are put in the transfer (*o*), or the numbers are not inserted till after execution (*p*), that will not prevent the number of shares purported to be transferred from passing to the transferee (*q*).

A person may be a shareholder who does not hold any numbered shares at all (*r*).

Shares in joint-stock banking companies.

By 30 Vict. c. 29, s. 1 (*v. infra*), contracts for the sale and purchase of shares, stock, or other interest in any joint-stock banking company are void, unless the numbers by which such shares, &c., are distinguished are set forth in the contract.

(*f*) *Shortridge* v. *Bosanquet*, 16 Beav. 84; *Bargate* v. *Shortridge*, 5 H. L. C. 297 (but see this case questioned by Lord Westbury in *Read's Case*, L. T. (Eur. Arb.) 10, 13); *Straffon's Executors' Case*, 1 D. M. & G. 576; *Frere's Case* (Alb. Arb.), 15 Sol. J. 674. But in respect of a due observance of formalities a director is more strictly treated; *E. p. Brown*, 19 Beav. 97; *E. p. Henderson*, ibid. 107; *v. supra*, p. 27.

(*g*) *Bush's Case*, 6 Ch. 246; affirmed *sub nom. Murray* v. *Bush*, L. R. 6 H. L. 37, where, however, the Lords were equally divided; *Hughes' Case*, 15 W. R. 476; 15 L. T. 526.

(*h*) *Taurine Co.*, 25 Ch. Div. 118.

(*i*) *E. p. Sargent*, 17 Eq. 273.

(*k*) *Marino's Case*, 2 Ch. 596.

(*l*) *Taylor* v. *Great Indian Peninsula Railway Co.*, 4 De G. & J. 559; and see *Johnston* v. *Renton*, 9 Eq. 181.

(*m*) *Blakely Ordnance Co., Bailey's Case*, W. N. 1869, 196.

(*n*) *Barton* v. *North Staffs. Railway Co.*, 38 Ch. D. 458.

(*o*) *Ind's Case*, 7 Ch. 485; *cf. Pinkett* v. *Wright*, 2 Hare, 120, where the shares were not numbered.

(*p*) *Bishop's Case*, 7 Ch. 296, n.; and see *E. p. Contract Corporation*, 3 Ch. 105.

(*q*) And see as to the number of shares, *East Gloucestershire Railway Co.* v. *Bartholomew*, L. R. 3 Ex. 15.

(*r*) *Portal* v. *Emmens*, 1 C. P. D. 201, 211; 1 C. P. Div. 664.

Table A. Art. 8.

Transfers by delivery :—

The Act contains nothing which *totidem verbis* forbids shares to be made transferable by delivery, but such shares are clearly contrary to the spirit of the Act (*s*), and this is rendered still more clear by the Companies Act, 1867 (*t*), which for the first time gives power to issue share warrants to bearer, transferable by delivery, and that only in the case of fully paid-up shares. Except as issued under the provisions of that Act, there can be little doubt, although it has never been absolutely decided, that shares transferable by delivery are illegal (*u*).

Companies whose articles have allowed the issue of such shares are, however, none the less liable to be wound up, at any rate if there be also shares not so transferable (*x*), and a winding-up order has even been made upon the petition of a scrip-holder (*y*).

As respects the persons liable in respect of such shares, this must in each case depend upon the effect of the provisions of the articles. If these are such as to constitute the original allottee of the scrip or warrant a member of the company, then, as between himself and the company, such allottee would probably be held liable as a contributory; and a transfer by delivery would merely create an equitable contract upon which, as between transferor and transferee, the former might claim an indemnity from the latter in respect of calls which the transferor had, as contributory, been called upon to pay (*z*). But, on the other hand, the effect of the articles may be such as to give the allottee of scrip merely a right to become, in certain events, a shareholder; and, if such events have not taken place, it may be that no person is liable in respect of shares which have not in fact ever been allotted (a).

It is submitted (*b*) that the creation of such shares would not be illegal in such sense as to deprive the transferor by delivery of his remedy over against his transferee; for the meaning of the articles may be merely this, that the company will accept the bearer of the scrip certificate as a shareholder, if the allottee comes in and duly executes a transfer; but until that is done the allottee remains a member, and is liable (*c*).

by non-members :—

Transfers may in certain cases be executed by persons who are not members of the company, but who have by devolution become entitled to shares (*d*).

in existing companies.

Sect. 178 reserves to a company registered under the Joint Stock Companies Acts (*e*) the power of transferring its shares in manner before in use.

Successive transfers of same shares.

The mere execution of a transfer does not pass the title to the shares. After a transfer has been executed to A. but not registered, a subsequent transfer to B. may be effectual, and if registered may pass the shares to B., although if A. was a purchaser for value he no doubt could restrain the registration of the transfer to B. (*f*).

(*s*) See ss. 22, 23, 25, 26.

(*t*) s. 27, *et seq.*

(*u*) See *General Co. for Promotion of Land Credit*, 5 Ch. 363, affirmed *sub nom. Princess of Reuss* v. *Bos*, L. R. 5 H. L. 176. In companies subject to the Companies Clauses Act, such shares are certainly illegal: *McEuen* v. *West London Wharves Co.*, 6 Ch. 655.

(*x*) *General Co. for Promotion of Land Credit*, 5 Ch. 363; L. R. 5 H. L. 176; and see *Grisewood's Case*, 4 De G. & J. 544.

(*y*) *Littlehampton Steamship Co.*, 34 Beav. 256; 2 D. J. & S. 521; *et v. supra*, pp. 198, 231.

(*z*) See the cases last cited, 5 Ch. p. 379; L. R. 5 H. L. 201; *Gregg's Case*, 15 W. R. 82; *McEuen* v. *West London Wharves Co.*, 6 Ch. 655, 662.

(a) *Ormerod's Case*, 5 Eq. 110; *Eustace* v. *Dublin Trunk Railway Co.*, 6 Eq. 182; *E. p. Collum*, 9 Eq. 236.

(*b*) See, however, 5 Ch. 377.

(*c*) *McEuen* v. *West London Wharves Co.*, 6 Ch. 655, 662; *cf. Morton's Case*, 16 Eq. 104; *ante*, p. 69.

(*d*) s. 24, Arts. (13)—(16).

(*e*) s. 175.

(*f*) *Nanney* v. *Morgan*, 37 Ch. Div. 346, 354.

Table A. Art. 9.

Stamps on transfers.

Transfers must be stamped with an *ad valorem* stamp according to the table in the Stamp Act, 1870, 33 & 34 Vict. c. 97 (*g*), and in the case of sub-purchases the duty is to be paid upon the consideration for the sale by the original purchaser to the sub-purchaser (*h*).

A joint transfer by several shareholders of shares to which they are separately entitled, may be stamped with an *ad valorem* stamp on the total amount of the consideration (*i*).

A contract for the sale and purchase of shares was held under the statute 55 Geo. 3, c. 184, to require an agreement stamp, shares not being "goods, wares, or merchandise," within the exception of the Sch. pt. 1, "Agreement" (*k*). But by the Stamp Act, 1870 (*l*), a contract note requires only a penny stamp.

Where a consideration consists of shares, the *ad valorem* duty is to be paid on the value of the shares (*m*), calculated at the average price on the day of the date of the instrument (*n*).

Dividend as between transferor and transferee.

A sale of shares made without any special condition as to dividend carries to the purchaser any dividend which is so to say *in gremio* the share at the date of the sale, although payable in respect of a period anterior to that date. Thus, where sale was made on the 1st of August and on the 28th of August a dividend was declared for the period ending the 30th of June, this dividend belonged to the purchaser (*o*).

See further, as to transfers, the notes to sect. 22, *supra*.

Form of transfer.

(9.) Shares in the company shall be transferred in the following form:—

I *A. B.* of in consideration of the sum of pounds paid to me by *C. D.* of do hereby transfer to the said *C. D.* the share [*or* shares] numbered standing in my name in the books of the company, to hold unto the said *C. D.*, his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof; and I the said *C. D.* do hereby agree to take the said share [*or* shares] subject to the same conditions. As witness our hands the day of

A question upon which there is at present little authority is how far the transferee steps into the shoes of his transferor so as to be bound by all acts (*e.g.* of acquiescence) of his transferor. The transferee gets upon registration a legal title and the question is not one of equities. The point was raised and not decided in *Ashbury* v. *Watson* (*p*).

Transfer by indebted member.

(10.) The company may decline to register any transfer of shares made by a member who is indebted to them.

To escape a difficulty which will be found discussed under sect. 70 and Art. (4), there should be added to this article a clause providing that, for the purposes of this article, a member shall be deemed indebted in respect of a

(*g*) See the Sch., sub-tit. "Conveyance."
(*h*) Stamp Act, 1870, s. 74 (3).
(*i*) *Wills* v. *Bridge*, 4 Ex. 193.
(*k*) *Knight* v. *Barber*, 16 M. & W. 66; see Stamp Act, 1870, Sch. "Agreement (3)."
(*l*) s. 69, and Sch. "Contract-note."
(*m*) Stamp Act, 1870, s. 71.
(*n*) Ibid. s. 12.
(*o*) *Black* v. *Homersham*, 4 Exc. D. 24.
(*p*) 30 Ch. Div. 376.

call made but not yet payable: to meet the decision in *Bentham Mills Co.* (*q*), mentioned presently, there should be added provisions to render the article applicable to persons claiming by transmission: and to give the company a right to enforce their lien against the shares themselves there should be added provisions giving an actual lien on the shares and a right to sell them. **Table A. Art. 10.**

Except as curtailed by any provision in the articles, the shareholder's right is to transfer his shares when and to whom he pleases (*r*). The Act does not contain any section corresponding to sect. 16 of the Companies Clauses Act (8 & 9 Vict. c. 16), disentitling a shareholder to transfer shares on which calls are in arrear. In the absence, therefore, of such an article as this, a transfer could not be refused on the ground of calls unpaid. But under this article the company is more amply protected than under the Companies Clauses Act, for under this provision a shareholder indebted to the company on any account whatever, whether for calls or otherwise, will be disentitled to transfer any of his shares (*s*).

The Stannaries Act, 1869 (*t*), provides that a company subject to that Act shall not be bound to recognise a transfer of a share until all calls made have been paid, but limits it to the particular share in respect of which the holder is in default.

Company's lien under Table A.

This article and Art. (75) give the company a passive lien as regards the shares themselves, and as regards the dividends an active lien to retain and apply them towards satisfaction of the shareholder's debt.

Meaning of "indebted."

"Indebted" means "indebted on any account" and not "indebted in respect of the share proposed to be transferred" (*u*); it also means "indebted whether solely or jointly and severally with others" (*x*). The lien extends to any amount in respect of which the shareholder is indebted to the company and not merely to debts in respect of calls, still less of calls on the particular share on which the lien is asserted (*u*), and extends to debts in which the shareholder is jointly and severally indebted with others, and not merely to debts in which he is solely indebted (*x*).

It is conceived that a member is "indebted" in respect of a call as soon as the resolution is passed, and before it becomes payable (*y*). This is a question which has arisen under former Acts, but upon clauses whose wording has been in each case different from the present. The Companies Clauses Act (8 & 9 Vict. c. 16, s. 16) disentitles a shareholder from transferring until he have paid "all calls for the time being due," while the repealed statute 7 & 8 Vict. c. 110, s. 54, had the words "full amount due and payable," upon which last words it was held that a transfer made when a call was due but not yet payable was valid (*z*).

The "indebtedness" must be determined by the state of things existing at the time that the deed of transfer is presented for registration. Upon payment of the amount of such indebtedness the member is entitled to registration, although subsequently to the presentation of the transfer another call may have been made (a).

If a bill be taken for a debt, the original debt, in the absence of special circumstances, remains, but the remedy is suspended till the instrument

(*q*) 11 Ch. Div. 900.
(*r*) *v. supra*, p. 26.
(*s*) *E. p. Stringer*, 9 Q. B. Div. 436. Contrast under the Companies Clauses Act: *Hubbersty* v. *Manchester Railway Co.*, L. R. 2 Q. B. 59, 471.
(*t*) 32 & 33 Vict. c. 19, s. 14.
(*u*) *E. p. Stringer*, 9 Q. B. Div. 436.
(*x*) *Bentham Mills Co.*, 11 Ch. D. 900.
(*y*) *Supra*, Art. (5); *Dawes' Case*, 38 L. J. (Ch.) 512.
(*z*) *Orpen's Case*, 9 Jur. (N.S.) 615; and see *E. p. Hatton*, 8 Jur. (N.S.) 380; 31 L. J. (Ch.) 340; and the cases cited *supra*, p. 451, note (*o*); see also Art. 47, n.
(a) *Cawley & Co.*, 42 Ch. Div. 209; *Reg.* v. *Inns of Court Hotel Co.*, 11 W. R. 806; 2 N. R. 397; 8 L. T. 551.

Table A. Art. 10.

has attained maturity. The obligation therefore on a bill not yet due is an indebtedness which will justify a company in refusing to register a transfer (*b*).

Thus a banking company having under its articles a lien upon the shares of any shareholder "for all moneys due to the company from him" held bills of a shareholder for a debt due to the bank. It was held that the amount of the bills was, before they arrived at maturity, "moneys due to the company" for which it had a lien on the shares, though the remedy for recovering the amount was postponed, and that therefore the lien of the bank had priority over a charge created on the shares by the shareholder before the bills arrived at maturity (*b*).

But upon articles which provided that the company should have a lien for money "due," and that the company might decline to register a transfer by a member who was "indebted," Jessel, M.R., held that "due" by virtue of the context meant "due and payable," and that "indebted" meant "indebted in money due," and that the company could not refuse to register a transfer on the ground that they were indorsees and holders of a current acceptance of the transferor (*c*).

Article is not imperative.

The power given by the article is permissive only, and, if the company do not refuse registration, the transfer will of course not be invalid. This has been held even under the Companies Clauses Act, s. 16, which is much more stringent, and provides that a shareholder in arrear "shall not be entitled" to transfer (*d*). For such a provision is for the protection of the company, and is capable of being waived by the company.

But if a transfer be passed by mistake, and the mistake be corrected within a reasonable time, this may invalidate the transfer (*e*).

Transmission.

A person entitled by transmission (*e.g.*, a trustee in bankruptcy) may under Art. (13) be registered at his option as a member, and to such a registration Art. (10) does not apply. Transmission and transfer are distinct. Thus if A. being indebted to the company become bankrupt, his trustee B. may elect to be registered, and the company cannot refuse (*f*). The result may be that B., as a member not indebted to the company, will be able to sell the shares, and the company's lien will be defeated altogether. This is a result against which provision should be made by proper regulations in the articles.

A. mortgaged his shares to B. and executed transfers of which B. on the 30th Oct. gave notice to the company, and which he on the 7th Nov. sent in for registration. On the 12th Nov. A. filed a liquidation petition, and on the 29th Nov. a trustee was appointed. A. was indebted to the company. The trustee moved for rectification by substituting his name for the name of A. on the register. B. consented to the motion, but did not waive his security. Bacon, V.C., made the order (*g*), the result of which might have been that the company's lien would have been defeated, and A.'s trustee and B. might have divided the shares. The Court of Appeal reversed this (*h*), holding (1) that if B. had opposed the motion the order could not have been made, for as between A.'s trustee and B. the shares (to the extent of the mortgage) belonged to B.; and (2) that B.'s consent made no difference, for that an article similar to Table A., Art. (14), relates only to such title as the trustee has under the Bankruptcy Act, and does not enable a prior transferee and such trustee to combine their titles so as to defeat the company's lien (*i*).

(*b*) *London, Birmingham, &c., Bank*, 34 Beav. 332; 13 W. R. 446; 12 L. T. 45.
(*c*) *Stockton Iron Co.*, 2 Ch. D. 101.
(*d*) *Hoylake Railway Co., E. p. Littledale*, 9 Ch. 257.
(*e*) *Anderson's Case*, 8 Eq. 509.
(*f*) *Bentham Mills Co.*, 11 Ch. Div. 900.
(*g*) *Cannock and Rugeley Colliery Co., E. p. Harrison*, 26 Ch. D. 522.
(*h*) 26 Ch. Div. 363.
(*i*) Contrast *Artistic Colour Co., E. p. Fourdrinier*, 21 Ch. Div. 510. And *cf. New*

Table A. Art. 11.

Trust shares.

If the articles provide that the company shall have a lien and charge on the shares of a shareholder for all moneys owing from him to the company, the charge may be enforced against shares of which he is the registered holder, notwithstanding that he is only trustee for others (*k*). In the case referred to the debt was a trade debt of a firm of which one of two trustees was a member, and was incurred long after the investment; the shares were registered in the names of trustees of a marriage settlement of whom the debtor was one, and were held by them upon the usual trusts of a marriage settlement. The equitable right of the company in respect of the charge was held to be paramount over the equity of the *cestuis que trust* under the settlement, because the investment of the trust funds was made upon a security on which there attached at the date of the investment the right of lien given by the articles.

On the other hand the company has no lien on the shares for the debt of the *cestui que trust* (*l*).

Lien enforceable by sale.

Where the articles expressly provide for a lien it is not a mere passive right of retainer, but amounts to an equitable charge on the shares (*m*).

Closing transfer books.

(11.) The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year (*a*).

(*a*) s. 49.

Transmission of Shares.

Shares devolving by death.

(12.) The executors or administrators of a deceased member shall be the only persons recognised by the company as having any title to his share.

A member of a joint stock company is not in the legal sense of the word a partner with his co-members, and his death does not therefore, as in an ordinary partnership, operate as a dissolution of his connection with the company. Until something is done to transfer the interest, the dead shareholder—that is, his estate—remains a member, and his representatives are, on the one hand, entitled to receive dividends, and on the other are, in their representative capacity, liable for calls. As between the deceased shareholder and the company (*n*), the estate of the deceased shareholder is liable to the same extent as the shareholder himself would have been liable if living. Out of his estate must be paid, of course, calls made in his lifetime, and also calls made after his death, so long as the shares are left in his name, and as respects the latter the liability is not confined to obligations incurred before his death (*o*).

City Club Co., 34 Ch. Div. 646; *Willmott* v. *London Celluloid Co.*, 31 Ch. D. 425; 34 Ch. Div. 147.

(*k*) *New London and Brazilian Bank* v. *Brocklebank*, 21 Ch. Div. 302. But *quære* this case if the company had notice of the trust: *Bradford Co.* v. *Briggs*, 12 App. Cas. 29, overruling, it is conceived, *Miles* v. *New Zealand Co.*, 32 Ch. Div. 266.

(*l*) *Mexican Mining Co., Re Perkins*, 24 Q. B. Div. 612.

(*m*) *Re Lewis*, 6 Ch. 818.

(*n*) As between the parties beneficially interested in the shareholder's estate specific legatees of shares must pay calls made after, while the residuary estate must pay calls made before, the testator's death: *Addams* v. *Ferick*, 26 Beav. 384, 393; and see *Armstrong* v. *Burnet*, 20 Beav. 424.

(*o*) *Baird's Case*, 5 Ch. 725; *Blakeley's Case*, 13 Beav. 133; 3 Mac. & G. 726; *Ex p. Gouthwaite*, 3 Mac. & G. 187; *Heward* v. *Wheatley*, 3 D. M. & G. 628; *Houldsworth* v. *Evans*, L. R. 3 H. L. 263, 283. As to joint tenants of shares, see *Kirby's Executors' Case* (Alb. Arb.), 15 Sol. J. 922; *Hill's Case*, 20 Eq. 585, cited *supra*, p. 206.

Table A. Art. 13.

To escape the disadvantage under which the company is thus placed in having for holders of its shares merely representative members, whose liability is limited by the amount of the assets of their testator, provisions have been commonly introduced into deeds of settlement putting upon executors a pressure either to transfer their testator's shares, or to become in their own persons proprietors in respect of them, by attaching the penalty of forfeiture to a neglect to do either one or the other within a limited time.

But until the executors either personally accept or validly dispose of (*p*) the shares, or until the forfeiture is declared, the estate of the deceased shareholder remains liable (*q*), and upon a deficiency of the personal estate, the real estate may in the hands of devisees be rendered liable in equity to the payment of calls (*r*).

In respect of their testator's estate executors may be placed on the list of contributories (*s*), and if they make default in payment of calls the personal and real estates may be administered (*t*). As respects the real estate, the heirs and devisees need not be placed on the list unless the Court thinks fit (*u*).

If the executors personally accept the shares, then as between themselves and the company at any rate they become the persons liable (*x*), but under this Act they can execute a transfer without incurring any such liability (*y*); and the effect of this and the three following articles appears to be that in the first instance the executors or administrators take the place of the deceased member, both as respects profits and as respects liability (so far as the estate is sufficient), and so continue until they either, under Art. (13), elect to be registered, from which time they will become personally liable, or execute a transfer under Arts. (14)—(16), which may be either to a purchaser or to a legatee, or person otherwise beneficially entitled.

Before shares can be transferred into the name of an executor so as to render him personally liable, there must be shewn a distinct and intelligent request by him that the shares should be dealt with in that way. The executor bears a representative character, and if he simply sends the probate in to be noted, as that his title may be recorded and recognised, this may be done without making him personally liable (*z*).

Persons entitled by death, bankruptcy, or marriage.

(13.) Any person becoming entitled to a share in consequence of the death (*α*), bankruptcy (*β*), or insolvency of any member, or in consequence of the marriage of any female member (*γ*), may be registered as a member upon such evidence being produced as may from time to time be required by the company.

(*α*) s. 76. (*β*) s. 75, 77. (*γ*) s. 78.

(14.) Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or

(*p*) *Lancey's Case* (Eur. Arb.), Reil. 12; L. T. 15; 17 Sol. J. 8; *Buchan's Case*, 4 App. Cas. 549; assent to a bequest of the shares is not sufficient unless the company have accepted the legatee as shareholder: *Keene's Executors' Case*, 3 D. M. & G. 272.

(*q*) *Howard* v. *Wheatley*, 3 D. M. & G. 628.

(*r*) *Turquand* v. *Kirby*, 4 Eq. 123; *Hamer's Devisees' Case*, 2 D. M. & G. 366.

(*s*) s. 76, and note thereto.

(*t*) s. 105.

(*u*) s. 99.

(*x*) *v. supra*, p. 77.

(*y*) s. 24. But under the Comp. Clauses Act they cannot: *Barton* v. *L. & N. W. Railway Co.*, 24 Q. B. Div. 77.

(*z*) *Buchan's Case*, 4 App. Cas. 549, 588, 589, 594.

in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person to be named by him registered as a transferee of such share.

(15.) The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.

Executors.

One of two executors cannot make a valid transfer of shares in a company subject to the provisions of the Comp. Clauses Act, 1845, which are registered in the names of both (a).

Bankruptcy.

The Bankruptcy Act, 1869, s. 22 (Bankruptcy Act, 1883, s. 50 (3)), vests in the trustee in bankruptcy full power of transferring the bankrupt's shares. Upon the bankruptcy of a member the trustee may either sell and transfer the shares under that section and these articles, or if the shares are onerous may disclaim them (*b*). The effect of such disclaimer will, under the Bankruptcy Act, 1869, be that the shares will be deemed to be forfeited from that date. Calls made before the bankruptcy, the liability to future calls where the winding-up is in point of date prior to the bankruptcy, and *quære* under the Bankruptcy Act, 1869, s. 31 (Bankruptcy Act, 1883, s. 37), the liability to future calls whether this be or not the case, are proveable under the bankruptcy (*c*). If this be so it would appear to follow that the bankrupt's order of discharge is a bar to any claim against him for calls (*d*) whether the trustee disclaims the shares or not (*e*).

Evidence of title.

(16.) The instrument of transfer shall be presented to the company, accompanied with such evidence as the directors may require to prove the title of the transferor, and thereupon the company shall register the transferee as a member.

Under this article a company is entitled, before registering a transfer of the shares or any of the shares included in a certificate, to demand that the certificate shall be left at the office for the inspection of the board, and is not bound to be satisfied with the bare production of it to a clerk (*f*).

Forfeiture of Shares (*α*).

Forfeiture of shares.

(17.) If any member fails to pay any call on the day appointed for payment thereof, the directors may at any time thereafter during such time as the call remains unpaid, serve a notice (*β*) on him, requiring him to pay such call, together with interest (*γ*) and any expenses that may have accrued by reason of such non-payment.

(*α*) Stannaries Act, 1869 (32 & 33 Vict. c. 19), ss. 16–20, as to companies in the Stannaries.

(*β*) Arts. (95)–(97).

(*γ*) *Supra*, Art. (6).

(a) *Barton* v. *North Staffs. Railway Co.*, 38 Ch. D. 458; *Barton* v. *L. & N. W. Railway Co.*, 24 Q. B. Div. 77.

(*b*) Bankruptcy Act, 1869, s. 23; Bankruptcy Act, 1883, s. 55.

(*c*) *Supra*, s. 75, and see note thereto.

(*d*) See *Brown's Case* (Eur. Arb.), Reil. 32; L. T. 21; 17 Sol. J. 310; and *supra*, p. 202, as to liability to costs of winding-up.

(*e*) See further, *supra*, p. 199, *et seq.*

(*f*) *East Wheal Martha Mining Co.*, 33 Beav. 119; 2 N. R. 543.

Table A. Art. 18.

(18.) The notice shall name a further day on or before which such call, and all interest and expenses that have accrued by reason of such nonpayment, are to be paid. It shall also name the place where payment is to be made (the place so named being either the registered office of the company or some other place at which calls of the company are usually made payable). The notice shall also state that in the event of nonpayment at or before the time and at the place appointed the shares in respect of which such call was made will be liable to be forfeited.

(19.) If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof has been made, be forfeited, by a resolution of the directors to that effect.

Powers of forfeiture, whether valid;

Provisions in the articles conferring upon the directors under particular circumstances the power of forfeiting shares are usual, and, if duly and *bonâ fide* called into operation, perfectly legal. And although provisions for the cancellation of shares are not so usual, the same will hold good with respect to such provisions if they are contained in the articles (*g*).

So also a power given to the directors by the articles to accept from any shareholder the surrender and forfeiture of his shares is a good power (*h*). The question of the validity of powers of surrender is discussed under Comp. Act, 1867, s. 9.

But, *semble*, such a power will be construed strictly, and its effect may be merely, when a forfeiture has been incurred, to allow it to be carried into effect where a member is willing, without going through all the formalities; not to give validity to forfeitures collusively arranged between the directors and a shareholder (*i*).

In cost-book mining companies in the Stannaries, however, shareholders may relinquish their shares by giving notice in writing to the purser (*k*). The custom is that the shareholder may relinquish on payment of what is due from him to the company (*l*), but it is competent to prove in a particular company a right to relinquish without discharging arrears (*m*). Under the Stannaries Act, 1887, s. 22, a relinquishment has no effect if delivered within six weeks immediately preceding the day on which a resolution to wind up the company is legally passed, or on which a winding-up order is made.

invalid, except as authorized by the articles:—

A shareholder can only cease to be a shareholder in manner authorized by the Act, and by the regulations of the company; and, if the articles do not authorize the forfeiture of shares, neither the directors, nor the company in general meeting, can make a valid declaration of forfeiture (*n*).

The directors can only bind the shareholders by acts coming within the scope of the authority delegated to them by the regulations of the company, and except as authorized by the regulations, and strictly for the purposes

(*g*) *Marshall* v. *Glamorgan Iron and Coal Co.*, 7 Eq. 129, 136; and see *Wright's Case*, 12 Eq. 336, n.

(*h*) *Snell's Case*, 5 Ch. 22.

(*i*) *Hall's Case*, 5 Ch. 707.

(*k*) 32 & 33 Vict. c. 19, ss. 21–23.

(*l*) *Prosper United Mining Co., E. p. Palmer*, 7 Ch. 286; *Frank Mills Mining Co.*, 23 Ch. Div. 52; see *ante*, p. 352.

(*m*) *Bodmin United Mines*, 23 Beav. 370.

(*n*) *Barton's Case*, 4 Drew. 535; 4 De G. & J. 46; *Clarke* v. *Hart*, 6 H. L. C. 633; *Fletcher's Case*, 37 L. J. (Ch.) 49; 16 W. R. 75; 17 L. T. 136.

contemplated by the regulations, the releasing of shareholders from their liability is not within their power (*o*). **Table A. Art. 19.**

Where a power of forfeiture exists, it is to be treated as *strictissimi juris* (*p*). A very little inaccuracy in complying with the conditions precedent to a forfeiture, is as against the company as fatal as the greatest (*q*). For if the company rely upon the forfeiture as valid, they must shew that all conditions precedent have been complied with; except that if the shareholder lie by for more than six years he may be precluded from asserting a claim (*r*). But if it is the shareholder who relies upon it as against the company, who seek to say that it is invalid, this is another matter (*s*).

Where the articles do not contain a power of forfeiture or surrender, it is competent to the company by special resolution to vary its articles so as to acquire such power, provided the resolution be passed honestly and *bonâ fide*, with a view to the benefit of the company, and not with a view to enabling shareholders to escape liability, nor with any other fraudulent or improper intent (*t*). or by the articles as altered by special resolution.

And, therefore, where there were in a company two classes of shares, viz. X. shares of £10 each fully paid up, and A. shares of £10 each with £2 10*s*. paid, and special resolutions were duly passed that both the X. and the A. shares should be cancelled, and in lieu of each X. share should be issued two new £10 shares with £5 each paid, and in lieu of every two A. shares, one new £10 share with £5 paid, it was held that a holder of A. shares who had accepted in lieu of them new shares, and subsequently transferred his new shares, could not in the winding-up be made a contributory in respect of his A. shares, for that they had been validly surrendered (*t*).

A company cannot, by resolutions of this kind, compel dissentient shareholders to convert their shares, but if the resolution be adopted and acted on, then it does not lie in the mouth of either the company or the assenting shareholder to say that the transaction is invalid (*u*).

So where, in a company of very irregular constitution, and whose shares were transferable by delivery of the certificates, resolutions were passed at a general meeting providing that the capital should be increased, and that within a limited time the shareholders should bring in their certificates to be registered, or that in default their shares should be forfeited (there being in the deed of settlement a power of altering the existing regulations), the shares of members who did not send in their certificates were, in the winding-up of the company two years afterwards, held to have been effectually forfeited. For the resolutions were within the scheme and constitution of the company, and the company could not subsequently seek to put on the list of contributories members whom they had agreed to drop, and who had consented to be dropped, out of the concern (*x*).

There is a common form article very generally used, which authorizes the forfeiture of the shares of a member who sues the company or the directors; it is invalid (*y*). Forfeiture for suing the company:—

Rules in restraint of trade are, under the Trade Union Act, 1871, not for breach of rules in restraint of trade.

(*o*) *Stanhope's Case*, 1 Ch. 161, 169; and the cases in the *Agriculturists' Cattle Insurance Co., passim*, v. *infra*; *Manisty's Case* (Eur. Arb.), L. T. 87.

(*p*) *Clarke* v. *Hart*, 6 H. L. C. 633.

(*q*) *Johnson* v. *Lyttle's Iron Agency*, 5 Ch. Div. 687; *Garden Gully Co.* v. *McLister*, 1 App. Cas. 39, 55.

(*r*) *Rule* v. *Jewell*, 18 Ch. D. 660.

(*s*) See *infra*, p. 475.

(*t*) *Teasdale's Case*, 9 Ch. 54; but it should be observed that the effect of the resolutions was to increase the available capital of the company.

(*u*) *Campbell's Case*, 9 Ch. 1; *Teasdale's Case*, Ibid. 54.

(*x*) *Kelk's Case*, *Pahlen's Case*, 9 Eq. 107.

(*y*) *Hope* v. *International Financial Soc.*, 4 Ch. Div. 327

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illegal. A forfeiture or expulsion for breach of such rules is therefore valid (*z*).

Injunction against forfeiture.

A forfeiture which is invalid (a), or oppressive (*b*), may be restrained by injunction.

Stannaries Act.

Under the Stannaries Act, 1869, shares in mining companies subject to the jurisdiction of the Stannaries Court can be forfeited for non-payment of calls (*c*).

Forfeiture may be rendered valid by acquiescence.

Moreover, although an arrangement between a shareholder and directors, involving a forfeiture of shares, may have been *ultra vires* the directors, as being unauthorized by the articles, such an arrangement may nevertheless be made good if it be shewn that every individual shareholder had knowledge of and acquiesced in the transaction (*d*); and where the articles of association provided that "no agreement entered into by the directors . . . to which the assent of the company in general meeting shall be given, shall be afterwards impeached . . . by reason that the same is not within . . . the business and objects of the company," but contained no power to cancel shares, a contract entered into by the directors with a shareholder, and assented to by the company in general meeting, that the directors would forthwith cancel his shares, was valid:—for by the terms of the articles it was unimpeachable, and was to be taken as acquiesced in by every member of the company (*e*).

Agriculturists' Cattle Insurance Co.

The leading cases on the subject of forfeiture of shares are those in the *Agriculturists' Cattle Insurance Co.* (*f*), and for their convenient and intelligible collocation some short account of the history of the company will be necessary. The company, which was formed in the year 1845, was in 1848 in considerable difficulty, and there being a considerable division of opinion among the shareholders as to whether it would be the more prudent course to carry on or to wind up the business, a special general meeting was called on the 2nd of November, 1848. At that meeting it was proposed that a call to a certain amount should be made, and that those shareholders who were desirous of leaving the company should pay a part of that call, and for non-payment of the rest their shares should be declared forfeited. To allow of the consideration of this proposal by the shareholders, the meeting was adjourned to the 13th of November, to be held at the New Inn, Chippenham, and notice sent to every shareholder. At the adjourned meeting an agreement (in all the cases referred to as the "Chippenham compromise") was concluded to the effect of the above proposal. Circulars had been sent to all the shareholders, stating those terms, and telling them that they might retire if they accepted those terms on or before the 13th of November, the day of the adjourned meeting. Several of the shareholders availed themselves

(*z*) *Strick* v. *Swansea Tin Plate Co.*, 36 Ch. D. 558.

(a) *Johnson* v. *Lyttle's Iron Agency*, 5 Ch. Div. 687.

(*b*) *Goulton* v. *London Architectural Co.*, W. N. 1877, 141.

(*c*) 32 & 33 Vict. c. 19, ss. 16–20; see *Bodmin United Mines Co.*, 23 Beav. 370.

(*d*) *Brotherhood's Case*, 31 L. J. (Ch.) 861; 31 Beav. 365; 8 Jur. (N.S.) 926; *Evans* v. *Smallcombe*, 3 Eq. 769; L. R. 3 H. L. 249; and see, *passim*, the cases in the *Agriculturists' Cattle Insurance Co.*, cited and collected *infra*; *cf.* also *Imperial Bank of China, &c.*, v. *Bank of Hindustan, &c.*, 6 Eq. 91: and see as to what is sufficient to shew knowledge and acquiescence, *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P. 43; *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 224; 7 H. L. 653; *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366.

(*e*) *Marshall* v. *Glamorgan Iron and Coal Co.*, 7 Eq. 129; *cf.* the clause in *Featherstonhaugh* v. *Lee Moor Co.*, 1 Eq. 318.

(*f*) Whether the authority of these cases, decided under 7 & 8 Vict. c. 110, is on the question of acquiescence and ratification equally applicable to cases falling under the Comp. Act, 1862, see *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 224, 266, 289; S. C. 7 H. L. 653.

of the "Chippenham compromise," made the payments accordingly, and were never afterwards treated as shareholders. Among these was a Mr. Brotherhood. Others, among whom was a Mr. Spackman, did not assent to the Chippenham compromise. Mr. Spackman presented a petition to the Court of Chancery to wind up the company, which was dismissed by Knight Bruce, V.C., and, on appeal, the Vice-Chancellor's order was affirmed by Cottenham, L.C. (*g*). Subsequently, negotiations were entered into between Mr. Spackman and six other shareholders and the directors, and at the end of 1849 those seven persons were allowed to retire from the company on paying a sum of money less than that which they would have had to pay under the Chippenham compromise. Lord Belhaven was an alleged shareholder, who had never executed the deed of settlement, and repudiated his liability altogether. In his case a compromise was effected in 1855, under which his shares were forfeited. Mr. Stanhope was another shareholder who elected to continue a shareholder at the time of the Chippenham compromise. Subsequently, however, he wished to retire, and under an arrangement with the directors his shares were in August, 1849, forfeited for non-payment of calls. Mr. Smallcombe was a shareholder who elected to retire under the Chippenham compromise; but, instead of paying the sum due under that arrangement before the day fixed for its payment, he, after that day was passed, asked for an extension of time, and a bill accepted by him for the amount was taken by the directors. Mr. Stewart was a shareholder who did not accept the Chippenham compromise within the time limited, but after his death in 1849, his executors agreed with the directors to pay the sum payable under that arrangement, and the shares were thereupon forfeited. Mr. Houldsworth was a shareholder who did not attend the meeting of the 13th of November, but on the 12th of December application was made on his behalf to obtain a forfeiture under the Chippenham compromise, and ultimately an arrangement was made under which his shares were forfeited in April, 1849. Lastly, Mr. Dixon was a gentleman resident in Scotland, to whom application was made on behalf of the company to accept the office of local director there. He consented upon conditions which were not complied with, and, although an application for, and allotment of, shares was made in his name, he did not consider himself a shareholder, and for that reason did not attend the Chippenham meeting. Subsequently he insisted that, the conditions upon which he had consented to become a director not having been complied with, he was entitled to the cancellation of his shares, and in April, 1849, the directors cancelled them accordingly.

The deed of settlement of the company contained a power of forfeiture for non-payment of calls (*h*), and a power of compromise of actions and suits brought to enforce any claims of the company (*i*).

By means of the funds received from shareholders who retired under the Chippenham compromise, and other arrangements as above referred to, the company tided over its difficulties in 1848, but a winding-up order was ultimately made in 1861. Upon settling the list of contributories the validity of the forfeitures was disputed, and the cases to which reference is here made were cases in which the liabilities of shareholders who had, under the several circumstances above referred to, suffered many years before a forfeiture of their shares, were to be determined.

Summary of the cases.

The short result of the cases is as follows:—

(*g*) *E. p. Spackman*, 1 Mac. & G. 170; 1 Hall & Tw. 229; 18 L. J. (Ch.) 261.

(*h*) See clauses 125, 126, 182, of the deed of settlement, L. R. 3 H. L. 172-174.

(*i*) Clause 198, L. R. 3 H. L. 174; and see Lord Cranworth's observations on this clause, Ibid. p. 188, where clause 164 is also referred to.

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HELD NOT TO BE CONTRIBUTORIES:

1. *Brotherhood* (*k*). For the forfeiture of his shares was made under the Chippenham compromise, and, although *ultra vires*, was rendered valid by communication to and acquiescence by all the shareholders.

2. *Belhaven* (*l*). For there was a *bonâ fide* dispute whether he was a shareholder at all or not, and this was properly the subject of a compromise under the 198th clause of the deed of settlement.

3. *Smallcombe* (*m*). For the forfeiture of his shares was made under the Chippenham compromise: and although he did not at once pay the sum for which he was liable, but gave a bill for the amount which was paid at maturity, the meré enlargement of the time of payment could not affect the validity of the transaction.

4. *Dixon* (*n*). For (*per* Lord Westbury) he was a shareholder not under a complete but a conditional contract, and the question of his liability was therefore, as in *Lord Belhaven's Case*, properly the subject of compromise; (*per* Lord Cairns) although he was undoubtedly a shareholder, a *bonâ fide* compromise, including a forfeiture of his shares, could not after the lapse of time be disturbed. (But *quære* whether Lord Cairns' judgment is not in conflict with the decision of the majority of the House of Lords in *Spackman* v. *Evans* (*o*).)

HELD TO BE CONTRIBUTORIES:

1. *Spackman* (*p*). For the forfeiture of his shares was not by adverse sentence, but by collusive contract. It was a fraud on the power; *aliud simulatum, aliud actum.* Not being within the protection of the Chippenham compromise, and rendered valid by communication and acquiescence, it was *ab initio* invalid, and no lapse of time could render it valid. The forfeiture was not good as a compromise under the 198th clause, for that clause could only authorize compromises upon terms within the competency of the directors, a forfeiture was only within their competency by virtue of the power of forfeiture in the deed, and under that power the transaction was invalid *ut supra*, because it was a fraud on the power.

2. *Stanhope* (*q*). For the forfeiture was not under the Chippenham compromise, but under a subsequent arrangement. This case is governed by *Spackman's Case* (*r*).

3. *Stewart* (*s*). For the forfeiture, although made on the same terms as those of the Chippenham compromise, was arranged after the time limited for accepting those terms had expired.

4. *Houldsworth* (*t*). For, as in *Stewart's Case*, the arrangement was made after the time limited for accepting the Chippenham compromise had expired, which time was an essential part of the transaction.

The table on pp. 470, 471, is intended to shew at a glance the conflict of opinion among the many learned judges who assisted at the hearing of one or more of these cases, and the several decisions arrived at.

The general principles to be deduced from these and other decisions may now be conveniently detailed.

(*k*) 31 Beav. 365; 8 Jur. (N.S.) 926; 31 L. J. (Ch.) 861; 4 D. F. & J. 566.
(*l*) 12 L. T. 324, 595; 11 Jur. (N.S.) 572; 3 D. J. & S. 41.
(*m*) 3 Eq. 769; L. R. 3 H. L. 249.
(*n*) 5 Ch. 79; L. R. 5 H. L. 606.
(*o*) L. R. 3 H. L. 171.
(*p*) 10 Jur. (N.S.) 911; 34 L. J. (Ch.) 321; 11 Jur. (N.S.) 207; L. R. 3 H. L. 171.
(*q*) 14 W. R. 42; 1 Ch. 161.
(*r*) See L. R. 3 H. L. 210.
(*s*) 1 Ch. 511; there was no appeal to the House of Lords in this case; but it is practically affirmed by *Houldsworth* v. *Evans*, L. R. 3 H. L. 263.
(*t*) L. R. 3 H. L. 263.

Table A. Art. 19.

A power of forfeiture for non-payment of calls is a power intended to be exercised only when the circumstances of the shareholder render its exercise expedient for the interests of the company; it is not a power to be exercised for the benefit of the shareholder. The duty of the directors, when a call is made, is to compel every shareholder to pay to the company the amount due from him in respect of that call, and it is only when payment cannot be obtained that the power of forfeiture is to be resorted to (*u*).

Forfeiture must be for benefit of company:—

The power must be exercised *bonâ fide* for the good of the company, not to relieve a shareholder from liability (*x*).

Powers given to directors for one purpose cannot be used by them for another and a different purpose (*y*). And although the shareholder in whose favour the forfeiture is declared has no knowledge that the power is being used improperly, yet when he comes to claim the benefit of it, the transaction becomes a collusive one and invalid (*z*).

And therefore if, under any circumstances, a forfeiture is declared, not by way of adverse sentence against the shareholder, but by way of collusive contract with him—whether it be to enable him to avoid his liability, or be *bonâ fide*, with a view to putting an end to disputes between him and the directors, and as part of a *bonâ fide* compromise—such forfeiture is a fraud on the power and invalid. Any forfeiture in which there is *aliud simulatum, aliud actum*, is invalid (a).

and *bonâ fide*.

Thus the forfeiture of the shares of a member, who alleged that he was entitled to repudiate his shares on the ground of fraud, was invalid (*b*).

And where a director had subscribed the memorandum of association for 500 shares, but only 250 were allotted to him, an arrangement with his co-directors, under which a *quasi*-surrender or forfeiture was made by a deed of release and indemnity, was ineffectual (*c*).

Again, where a director took shares for the purpose of enabling the company to obtain registration, on the understanding that no calls should be made upon them, and they were subsequently forfeited to relieve him from liability, he was fixed as a contributory for those shares (*d*).

So where upon certain persons ceasing to be directors, their shares were declared to be forfeited for non-payment of calls, in order to put an end to their liability, the forfeiture though *bonâ fide* was invalid (*e*).

Forfeiture, if *ultra vires*, is not validated by lapse of time:—

And if a forfeiture be *ultra vires* no lapse of time alone can render it valid: *Quod ab initio non valet, in tractu temporis non convalescit* (*f*). "If a declaration of forfeiture proceeds upon and is the result of a collusive agreement,

(*u*) *Stanhope's Case*, 1 Ch. 161, 169; *Spackman* v. *Evans*, L. R. 3 H. L. 171, 186, 230; *Harris* v. *North Devon Railway Co.*, 20 Beav. 384; *Esparto Trading Co.*, 12 Ch. D. 191.

(*x*) *Richmond's Case, Painter's Case*, 4 K. & J. 305, 325.

(*y*) *Bennett's Case*, 5 D. M. & G. 284, 298.

(*z*) *Manisty's Case* (Eur. Arb.), L. T. 87; 17 Sol. J. 745.

(a) *Spackman's Case*, 34 L. J. (Ch.) 321; 11 Jur. (N.S.) 207; *Spackman* v. *Evans*, L. R. 3 H. L. 171, 189; *Stanhope's Case*, 1 Ch. 161, 169; *Stewart's Case*, 1 Ch. 511; *Houldsworth* v. *Evans*, L. R. 3 H. L. 263; see, however, Lord Cairns in *Dixon* v. *Evans*, L. R. 5 H. L. 606, 623, *et infra*, p. 474.

(*b*) *Gower's Case*, 6 Eq. 77.

(*c*) *Hall's Case*, 5 Ch. 707; this was not, however, properly a case of forfeiture.

(*d*) *London and County Assurance, E. p. Jones*, 27 L. J. (Ch.) 666.

(*e*) *Manisty's Case* (Eur. Arb.), L. T. 87; 17 Sol. J. 745.

(*f*) *Spackman* v. *Evans*, L. R. 3 H. L. 171; Lord Chelmsford, at p. 263, and references, *infra*; *Evans* v. *Smallcombe*, L. R. 3 H. L. 249; Lord Cairns, at p. 253; Lord Chelmsford, p. 260; *Stanhope's Case*, 1 Ch. 161; Lord Chelmsford, at p. 169; and see *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 224, 240; 7 H. L. 653; see, however, in *Houldsworth* v. *Evans*, L. R. 3 H. L. 263, Lord Cranworth, p. 276; and *contrà*, in *Spackman* v. *Evans*, Lord St. Leonards, L. R. 3 H. L. 208, 212, *et seq.*; Lord Romilly, p. 239; and *v.* the table, *post*, pp. 470, 471.

Agriculturists' Cattle Insurance Company.	Lord Romilly.	Lords Justices.	Lord Westbury.
Brotherhood's Case, 31 Beav. 365; 8 Jur. (N.S.) 926; 31 L. J.(Ch.) 861; 4 D. F.& J. 566. Affirmed in principle by the House of Lords in *Evans* v. *Smallcombe*, L. R. 3 H. L. 249.	M.R.] held B. not contributory. B. retired under Chippenham compromise, which was communicated to all the shareholders. By lapse of time and acquiescence the invalid forfeiture was rendered valid.	Knight Bruce and Turner, L.JJ.] affirmed order of the M.R.	.. .. ..
Spackman's Case. Spackman v. *Evans*, 10 Jur. (N.S.) 911; 11 Jur. (N.S.) 207; 34 L. J. (Ch.) 321; L. R. 3 H. L. 171.	M.R.] held S. not contributory. *Bonâ fide* compromise: no fraud: lapse of time was equitable bar to proceedings. H. of L., L. R. 3 H. L. 239.] In absence of fraud, *i.e.*, grave moral fraud, lapse of time bars all proceedings. S. could not be prejudiced by the absence of information to the shareholders.	.. .. ..	L.C.] held S. contributory. The forfeiture was not by adverse sentence, but by collusive contract: *aliud simulatum, aliud actum:* was not under Chippenham compromise, therefore not within the protection of *Brotherhood's Case* as rendered valid by acquiescence.
Lord Belhaven's Case, 12 L. T. 324, 595; 11 Jur. (N.S.) 572; 3 D. J. & S. 41.	M.R.] held B. contributory: feeling bound by Lord Westbury's decision in *Spackman's Case*.	Knight Bruce and Turner, L.JJ.] held B. not contributory. There was a *bonâ fide* dispute whether B. was a shareholder or not: this question was a proper subject for compromise.	
Stanhope's Case, 14 W. R. 42; 1 Ch. 161, L.C. Affirmed in principle by the House of Lords in *Spackman* v. *Evans*, L. R. 3 H. L. 171, 210.	M.R.] held S. not contributory. Thought *Spackman's Case* and *Belhaven's Case* irreconcilable; and therefore followed the latter, which he approved.	.. .. ..	.. .. ..
Stewart's Case, 1 Ch. 511, L.C. Affirmed in principle by the House of Lords in *Houldsworth* v. *Evans*, L. R. 3 H. L. 263.	M.R.] held S. not contributory, following *Brotherhood's Case*.	.. .. ..	.. .. ..
Smallcombe's Case. Evans v. *Smallcombe*, 3 Eq. 769; L. R. 3 H. L. 249.	M.R.] held S. not contributory, following *Brotherhood's Case*; the only difference being that S. paid what was due from him, not in cash, but by a bill. H. of L., see L. R. 3 H. L. 262] present at the first argument, held S. not contributory but did not vote.	.. .. ..	.. .. ..
Houldsworth v. *Evans*, L.R. 3 H. L. 263.	M.R.] held H. contributory. Order made without argument after decision of L.C. in *Stewart's Case*.	.. .. ..	.. .. ..
Dixon's Case. Dixon v. *Case*, 5 Ch. 79; L. R. 5 H. L. 606.	M.R.] held D. not contributory, following *Lord Belhaven's Case*.	Giffard, L.J.] held D. contributory: there was no controversy whether D. was a shareholder or not: the case was therefore governed by *Spackman* v. *Evans*, not by *Lord Belhaven's Case*.	H. of L.,'L. R. 5 H. L. 612] held D. not contributory. D. was not a shareholder under a complete, but only under a conditional contract. The cancelling the apparent contract was a proper subject of compromise.

[As to this Table, see *ante*, p. 408.]

Lord Cranworth.	Lord Chelmsford.	Lord Cairns.	Lord St. Leonards.	Lord Colonsay.
Note.—*In all the subsequent cases this case was assumed to have been, and all the learned Judges with one exception appear to have been of opinion that it was, rightly decided. Its principle was affirmed by the House of Lords in* Evans *v.* Smallcombe, *L. R.* 3 *H. L.* 249. *Lord Chelmsford, however* (v. 1 *Ch.* 513; *L. R.* 3 *H. L.* 259), *while allowing that the acquiescence with knowledge of every shareholder would have rendered the forfeiture valid, denied that there had been such acquiescence.*				
H. of L., L. R. 3 H. L. 178] held S. contributory. Not *bonâ fide* exercise of power of forfeiture: not good as compromise of action for calls: might have been, but was not, rendered valid by communication to and acquiescence by all the shareholders.	H. of L., L. R. 3 H. L. 224] held S. contributory. Arrangement invalid whether as forfeiture or compromise. Power of compromise is good only within the competency of the directors. Mere lapse of time can never grow into acquiescence.	.. .. ..	H. of L., L. R. 3 H. L. 197] held S. not contributory. Arrangement was a continuation of the Chippenham compromise: after the lapse of time the question turns not on the legal validity of the forfeiture, but on its *bona fides*. Lapse of time was equitable bar to proceedings.	H. of L., L. R. 3 H. L. 245] held S. contributory.
L.C.] held S. contributory: adopted judgment of Lord Westbury in *Spackman's Case*.				
.. .. ..	L.C.] held S. contributory. Time was an essential part of the Chippenham compromise, and S. having come in after the time limited was not within *Brotherhood's Case*.			
H. of L., L. R. 3 H. L. 267] held S. not contributory: for he retired under the Chippenham compromise, *v. supra* in *Spackman's Case*.	H. of L., L. R. 3 H. L. 259] held S. contributory. The Chippenham compromise was not good, for it had not the acquiescence of every shareholder.	H. of L., L. R. 3 H. L. 252] held S. not contributory. The Chippenham compromise was by acquiescence valid, and S. was within it.	.. ..	H. of L., see L. R. 3 H. L. 252, 262] present at the first argument: held S. contributory but did not vote.
H. of L., L. R. 3 H. L. 276] held H. not contributory. The only variation from the Chippenham compromise was in point of date, and of this fact the shareholders had information, or means of information. In *Spackman's Case* there were no means of information of the variation in the money payment.	H. of L., L. R. 3 H. L. 281] held H. contributory: time being of the essence of the Chippenham compromise.	H. of L., L. R. 3 H. L. 265] held H. contributory. Time was of the essence of the Chippenham compromise, and H. was too late.		
.. .. ..	.. .. ..	H. of L., L. R. 5 H. L. 620] held D. not contributory. He was a shareholder, but the *bonâ fide* compromise could not after the lapse of time be disturbed. [N.B. This judgment seems to conflict with the decision of the majority of the House in *Spackman* v. *Evans*.	.. ..	H. of L., L. R. 5 H. L. 620] held D. not contributory: concurring with Lord Westbury.

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but is entered by the directors in the books of the company as if it were a *bonâ fide* adverse proceeding, the entry is a false statement involving a fraudulent concealment of the truth, for the suppression of the truth is a form of falsehood, and falsehood is fraud, and it is impossible under such circumstances of imposition on the other shareholders that the shareholder who sets up the forfeiture can make a case of acquiescence, or derive any benefit from lapse of time whilst the truth remains unknown" (*g*).

Moreover the shareholders are not bound to search the company's books in order to detect irregular proceedings on the part of the directors (*h*); or at any rate, even if passive acquiescence for a great length of time by shareholders who have received balance sheets shewing that a large number of shares have been cancelled, may preclude them from subsequently questioning the cancellations, they cannot be so precluded unless they were also aware that the acts of the directors were illegal and irregular (*i*).

unless acquiescence by every shareholder is shewn.

But if, upon a forfeiture which was *ultra vires* and invalid, the transaction was communicated to, and acquiesced in by every shareholder, or if the means of notice to all appear sufficient, so as to raise a clear presumption of knowledge and acquiescence, and the arrangement is left unimpeached for a great number of years; then that which was in its inception invalid, will by acquiescence be rendered unimpeachable (*k*).

As to what is a sufficient notice or means of notice to all the shareholders, it is by no means easy to lay down any general rule. It is not necessary or possible to prove the acquiescence of every individual shareholder, and it is probably enough to shew circumstances which are reasonably calculated to satisfy the Court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry (*l*). But it is not enough to shew merely that there was sufficient to rouse attention (*m*).

Where certain rights in respect of dividend having been defined by the memorandum of association, the company passed special resolutions altering those rights, and dividends upon the altered terms were paid for eleven years, it was held that the alteration was *ultra vires*, and that (assuming that every shareholder could have agreed to vary his rights) ratification was not proved because full knowledge was not shown (*n*).

By "acquiescence" is meant being content not to oppose (*o*).

In the absence of full information mere lapse of time cannot grow into acquiescence. Length of time may, in many cases, materially assist in estab-

(*g*) *Per* Westbury, L.C., in *Spackman's Case*, 34 L. J. (Ch.) 321, 330, cited by Lord St. Leonards in *Spackman* v. *Evans*, L. R. 3 H. L. 171, 212.

(*h*) *Stanhope's Case*, 1 Ch. 161, 169; *cf. Rawlins* v. *Wickham*, 1 Giff. 355; 3 De G. & J. 304.

(*i*) *Spackman* v. *Evans*, L. R. 3 H. L. 171; Lord Cranworth, at pp. 193, 194; Lord Chelmsford, p. 235; although *contrà*, Lord St. Leonards, p. 220.

(*k*) *Brotherhood's Case*, 31 Beav. 365; 8 Jur. (N.S.) 926; 31 L. J. (Ch.) 861; *Smallcombe* v. *Evans*, L. R. 3 H. L. 249. It will be observed that the dissent of Lord Chelmsford in *Smallcombe* v. *Evans* does not touch this proposition, for he denied the acquiescence; *Spackman* v. *Evans*, Lord Cranworth, L. R. 3 H. L. p. 190; *Houldsworth* v. *Evans*, Lord Cranworth, Ibid. p. 276; Lord St. Leonards and Lord Romilly held the lapse of time to validate the transaction in all the cases.

(*l*) *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P. 43; *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 224, 232.

(*m*) *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653, 681; *Blackburn Society* v. *Brooks*, 29 Ch. Div. 902, 910.

(*n*) *Ashbury* v. *Watson*, 28 Ch. D. 56; 30 Ch. Div. 376.

(*o*) *Per* Lord Cairns, L. R. 3 H. L. 256, 265; in *Smallcombe* v. *Evans*, affidavits filed (see 3 Eq. 770) by several shareholders to the effect that they had never acquiesced in the Chippenham arrangement did not rebut the presumption of acquiescence; see also Lord Cranworth in *Spackman* v. *Evans*, L. R. 3 H. L. 193.

lishing acquiescence; but it is not the time, but the acquiescence, which changes what would otherwise be a void act into a valid one (*p*).

Where it is sought to establish an invalid transaction as having been rendered valid by acquiescence, it must be shewn to come strictly within the terms of that arrangement which was communicated to and acquiesced in by the shareholders. Therefore, where it was an essential part of the proceeding that advantage should be taken of the arrangement before a certain date, forfeiture in the case of shareholders who came in after that date was invalid (*q*).

In *King's Case* (*r*) £100 shares having been subdivided and converted in a manner which was unauthorized and void each into five £20 shares, a forfeiture was declared for non-payment of calls on the £20 shares in a way which, if the conversion had been legal, would have been quite regular. The shareholder wrote, asking for a remission of the forfeiture, treating the shares as £20 shares and taking no objection to the regularity of the proceedings. His letter was not answered, and he never afterwards claimed to be a member. In the winding-up, which commenced seventeen months afterwards, the forfeiture was treated as valid.

Power to compromise does not authorize forfeiture:

A power of compromise, conferred upon the directors by the articles, cannot be employed, in the case of a *bonâ fide* shareholder, to enlarge the power of forfeiture of shares given by the articles. A power of compromise does not extend further than to compromise within the competency of the directors. It is, therefore, not competent to directors, under a power to compromise, to effect with a shareholder a compromise, one term of which is that his shares shall be forfeited, in a case where no valid forfeiture could be made under the power of forfeiture (*s*).

In *Dixon* v. *Evans* (*t*), however, Lord Cairns seems to have held that Dixon was a shareholder (*u*), but nevertheless that the compromise by which his shares were forfeited was good (*x*). In *Spackman* v. *Evans* the *bonâ fides* of the transaction was not allowed to support it.

except in compromise of dispute, whether shareholder or not.

But where there was a *bonâ fide* dispute whether B. was a shareholder or not, a compromise by which the directors released him and forfeited his shares was good. For there was sufficient doubt as to B.'s liability to be treated as a shareholder, for the dispute between himself and the directors on the question to be a proper subject of compromise (*y*).

Quære, whether in such a case, where the compromise was clearly for the benefit of the company, the directors would not have power, independent of authority given by the deed of settlement, to effect it (*z*).

In confirmation of which it has since been held that a company has, as an incident to its existence, and independent of express power under its articles, the same power of compromising claims against it as an individual has, and that consequently a cancellation of shares by way of *bonâ fide* compromise of a dispute whether the shares had been legally issued or not was valid (a).

It was held, however, in *Fletcher's Case* (*b*), that, independent of authority

(*p*) L. R. 3 H. L. 233, 260.

(*q*) *Houldsworth* v. *Evans*, L. R. 3 H. L. 263; *Stewart's Case*, 1 Ch. 511; and see *Stanhope's Case*, 1 Ch. 161, where the amount paid by the shareholder was also varied.

(*r*) *Re Financial Corporation*, 2 Ch. 714, 731.

(*s*) *Spackman* v. *Evans*, L. R. 3 H. L. 171, 189, 231, 232.

(*t*) L. R. 5 H. L. 606.

(*u*) Ibid. p. 621.

(*x*) Ibid. p. 623.

(*y*) *Lord Belhaven's Case*, 12 L. T. 324, 595; 11 Jur. (N.S.) 572; 3 D. J. & S. 41; *Dixon's Case*, 5 Ch. 79; *Dixon* v. *Evans*, L. R. 5 H. L. 606; and see *Wright's Case*, 12 Eq. 331; 7 Ch. 55.

(*z*) *Per* Lord Westbury, *Dixon* v. *Evans*, L. R. 5 H. L. 606, 618.

(a) *Bath's Case*, 8 Ch. Div. 334.

(*b*) 37 L. J. (Ch.) 49; 16 W. R. 75; 17

Table A. Art. 19.

given by the articles, the directors have no power to cancel an allotment of shares.

Where a compromise is *bonâ fide*, that is, is not an instrument to carry into effect any ulterior or collateral purpose, but only seeks to do that which is within the very terms of the compromise, and where the claims on each side are *bonâ fide* and truly made, the Court, if satisfied that it is not manifestly *ultra vires* the parties, ought to respect it (*c*).

Specific performance of agreement to forfeit.

Where directors, believing a shareholder to be of no means, have agreed with him to forfeit his shares upon terms, but afterwards, finding him to have means, have refused to carry out the forfeiture, the Court will not compel specific performance of the contract (*d*).

Forfeiture when complete.

If the articles provide that, upon non-payment of calls or upon default in doing any act, shares "shall become absolutely forfeited to the company," the effect is that a default operates as a forfeiture, not *ipso facto*, but only at the option of the directors (*e*).

So where the articles provided that, on default, any share "may be thereupon forfeited," and a shareholder, having received a notice that on non-payment by a certain day his shares "would be forfeited without further notice," paid the arrears on some, saying that he would submit to a forfeiture on the rest; it was held that the shares on which the arrears were not paid were not thereby absolutely forfeited, but that the company's right of option remained; and the company having declared their intention of retaining the shareholder, he was made a contributory in the winding-up in respect of the full number of shares (*f*).

But a prospective resolution for forfeiture is not invalid: and therefore where the directors passed a resolution that a notice should be sent to W. requiring immediate payment, and that, in default of payment within twenty-one days, the shares would be irremediably forfeited, non-payment operated as a forfeiture—for the directors had by the resolution declared their decision (*g*).

So, where the deed of settlement provided that if any call should not be paid within twenty-one days after it became due, the shareholder in default should cease to be a shareholder and his shares should be forfeited unless the directors within thirty days after the expiration of the twenty-one days decided to the contrary, it was held that in default of such decision within the time limited a forfeiture took place (*h*).

Formal notice of forfeiture not given.

And it is not in all cases necessary that the decision of the directors should be declared in a formal way; so that, where there had been no declaration of forfeiture sent to the shareholder, but the directors had in their balance-sheet treated the shares as forfeited, the application of the official manager in the winding-up to make the shareholder a contributory failed (*i*).

So, where no formal cancellation appeared to have been made, but the register of shareholders in 1868 contained a note to the effect that the shares had been cancelled, and the winding-up commenced in 1872, it was held that the company had acquiesced in the cancellation so long that it must be treated as valid (*k*).

L. T. 136; *Adams' Case*, 13 Eq. 474; *et v. ante*, p. 80.

(*c*) *Per* Lord Westbury, *Dixon* v. *Evans*, L. R. 5 H. L. 606, 618.

(*d*) *Harris* v. *North Devon Railway Co.*, 20 Beav. 384.

(*e*) *Moore* v. *Rawlins*, 6 C. B. (N.S.) 289, 310; and see 1 Eq. 314.

(*f*) *Bigg's Case*, 1 Eq. 309.

(*g*) *Wollaston's Case*, 4 De G. & J. 437; 28 L. J. (Ch.) 721; and see *Knight's Case*, 2 Ch. 321, 327.

(*h*) *Painter* v. *Ford*, W. N. 1866, 77.

(*i*) *Webster's Case*, 32 L. J. (Ch.) 135; 11 W. R. 226; 7 L. T. 618.

(*k*) *Hoylake Railway Co., Welsby and Andersson's Case*, W. N 1873, 200.

Table A. Art. 19.

Where, after allotment of shares in a banking company, provisional certificates only were issued, which upon certain acts done by the allottee were to be exchanged for shares, but in default the rights and privileges attaching to the certificates were to be forfeited, a shareholder who made default and did not exchange his certificates was under no obligation to take shares, and his interest was forfeited (*l*).

If the articles provide that, upon forfeiture, notice of the forfeiture shall be sent to the shareholder, it will not necessarily invalidate the forfeiture if it be shewn that such notice was not given. For the provision as to sending notice may be mandatory or directory only, and at any rate it will not lie in the mouths of the directors to say that the forfeiture is not valid and complete (*m*).

Kelk's Case (*n*) shews, further, that notice to the shareholder is not in all cases necessary.

Formalities not observed.

If the company act irregularly in respect of formalities which are intended for the protection of the shareholder, and upon proceedings thus irregularly conducted declare a forfeiture of shares, they cannot afterwards turn round and claim to hold the shareholder liable as a contributory (*o*).

Thus where there was an irregularity, first in respect of the *quorum* of directors by whom a call was made; and, secondly, in giving less than the requisite length of notice of the call, a forfeiture for non-payment of the call was nevertheless held valid (*p*).

So, if the articles provide that forfeiture is to be made by resolution of the directors, the Court will assume that such resolution was duly passed, if the forfeiture is found properly entered in the books of the company, although there be in the minutes no entry of the resolution (*q*).

If, upon a valid forfeiture or cancellation of shares, everything have been done on the part of the shareholder that is required to sever his connection with the company, he will not be prejudiced by the default of the company in not completing the cancellation and taking his name off the register before a winding-up order is made (*r*).

The fact that the name of a subscriber of the memorandum of association has not been actually entered on the register, and that therefore no specified shares have ever been allotted to him, does not prevent the application to him of a power of forfeiture and surrender (*s*).

But where a person has entered into an agreement to take shares, the directors have not, apart from the articles, any power to release him from his contract because he has not actually become the holder of specified shares (*t*).

And if the transaction be not an exercise of the power of forfeiture and surrender, but something else—as where by deed the subscriber was released from all liability in respect of some of the shares for which he had subscribed, and indemnified against all past liability in respect of them—this was ineffectual, for it was in fact not a forfeiture, but a dealing in shares by the company (*u*).

(*l*) *Re Asiatic Banking Corporation, E. p. Collum*, 9 Eq. 236.

(*m*) *Knight's Case*, 2 Ch. 321; *Wollaston's Case*, 4 De G. & J. 437; 28 L. J. (Ch.) 721, as to which see note in 1 Eq. 313.

(*n*) 9 Eq. 107, *v. supra*, p. 465; and see *Webster's Case*, 32 L. J. (Ch.) 135; 11 W. R. 226; 7 L. T. 618.

(*o*) Although the shareholder might be entitled to insist that the forfeiture was irregular, see *ante*, p. 465.

(*p*) *Phosphate of Lime Co., Austin's Case*, 24 L. T. 932.

(*q*) *Knight's Case*, 2 Ch. 321.

(*r*) *Marshall* v. *Glamorgan Iron and Coal Co.*, 7 Eq. 129; *Lyster's Case*, 4 Eq. 233.

(*s*) *Snell's Case*, 5 Ch. 22; and see *Thomas' Case*, 13 Eq. 437.

(*t*) *Adams' Case*, 13 Eq. 474; *Fletcher's Case*, 37 L. J. (Ch.) 49; 16 W. R. 75; 17 L. T. 136.

(*u*) *Hall's Case*, 5 Ch. 707.

Table A. Art. 19.

It will be a consideration, in determining the validity of an alleged forfeiture, whether the parties are bargaining at arm's length (*x*) or not (*y*).

A forfeiture made by two directors out of six, two being the number of directors who usually conducted the business of the company, was good (*z*).

When shareholder may set aside forfeiture.

A shareholder may bring an action on behalf of himself and all other shareholders to annul the forfeiture of his shares (a). If the company is in liquidation the question may be raised by summons (*b*), and if the shares cannot be restored to the shareholder he may in the winding-up be admitted as a creditor for damages (*c*).

Mere laches will not disentitle him to equitable relief against an invalid declaration of forfeiture (*d*): unless he have lain by for more than six years (*e*).

Where a shareholder sent a cheque in payment of calls due, subject to a protest which was held to be of no effect, this was a good tender of payment, and the forfeiture of his shares was invalid (*f*).

Where tender of payment was made at the company's office on the last day limited for payment, and the manager, handing the messenger a blank form of receipt to be filled up by the bankers, told him to pay it into the bank to the company's account, but the messenger arrived at the bank a few minutes after banking hours, and, therefore, did not pay the cheque in until the next day, the payment was in time (*g*).

Forfeiture not allowed to be questioned in bankruptcy.

Notice was on the 25th of November, 1867, sent to A. that in default of payment of arrears on the 2nd of December his shares would be forfeited. On the 29th of November A. was adjudicated bankrupt, and on the 3rd of December the directors forfeited his shares. It was held that the validity of the forfeiture could not be questioned in bankruptcy, but must be tried in an independent proceeding (*h*).

Notice.

Where there was a right of forfeiture on giving ten clear days' notice, a notice posted on the 27th and received on the 28th of February to forfeit "on Monday the 9th of March," the 9th being a Friday, was insufficient (*i*).

Winding-up.

Where a forfeiture of shares has been validly made before the commencement of a voluntary winding-up, the liquidators have no power under sect. 131 to cancel the forfeiture (*k*).

As to the liability, as a B. contributory, of a shareholder whose shares have been forfeited, see *supra*, p. 144.

Bankruptcy.

Under the Bankruptcy Act, 1869, s. 23 (*cf.* Bankruptcy Act, 1883, s. 55), shares disclaimed by the trustee in bankruptcy are to be deemed to be forfeited (*l*).

Rectification of the register (s. 35).

The cases above collected, and the rules stated, as to forfeiture of shares, turn, of course, on entirely different considerations from, and are in no way in conflict with, the cases collected under Companies Act, 1862, s. 35. The cases here collected are cases in which persons, who have under a binding contract become shareholders, have by virtue of powers given by the articles

(*x*) *Snell's Case*, 5 Ch. 22.
(*y*) *Hall's Case*, 5 Ch. 707.
(*z*) *Lyster's Case*, 4 Eq. 233; and see *Austin's Case*, 24 L. T. 932.
(a) *Sweny* v. *Smith*, 7 Eq. 324; but not to be relieved of his shares on the ground of misrepresentation; *Hallows* v. *Fernie*, 3 Ch. 467.
(*b*) *Alma Spinning Co., Bottomley's Case*, 16 Ch. D. 681.
(*c*) *New Chile Co.*, W. N. 1890, 174.
(*d*) *Garden Gully Co.* v. *McLister*, 1 App. Cas. 39.
(*e*) *Rule* v. *Jewell*, 18 Ch. D. 660.
(*f*) See note (a), *supra*.
(*g*) *Clarke's Case*, 27 L. T. 843; 21 W. R. 429; 42 L. J. (Ch.) 277.
(*h*) *E. p. Rippon, Re Andrew*, 4 Ch. 639.
(*i*) *Watson* v. *Eales*, 23 Beav. 294.
(*k*) *Dawes' Case*, 6 Eq. 232; *et v. supra*, p. 320.
(*l*) See note to Art. (15).

ceased to be shareholders; while the cases under sec. 35 are cases in which contracts voidable at the instance of the shareholder have been avoided. **Table A. Art. 20.**

(20.) Any share so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company in general meeting (*a*) thinks fit. Forfeited shares to be property of company.

(*a*) Arts. (29)—(43).

Forfeited shares may be issued again by the company at a discount [*quære*, not exceeding the amount paid by the previous holder] without the registration of a contract under Companies Act, 1867, s. 25 (*m*).

(21.) Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of forfeiture. Calls owing on forfeited shares.

Semble that, in the absence of a provision in the articles that calls owing at the time of forfeiture shall notwithstanding forfeiture be payable, proceedings at law to recover such calls will after forfeiture be incompetent, for such proceedings must stand on the footing that the person sued is a shareholder (*n*).

And where the articles reserve a right to the calls due at the time of forfeiture, so that such calls can be recovered, yet the shareholder cannot be put upon the list of contributories in respect of them (*o*).

Where there is under the articles a power to recover calls due at the time of forfeiture, a shareholder remains liable for a call made, but not payable before the date of the forfeiture; for a call is owing on the day it is made, although it be payable on a subsequent day (*p*).

As to the liability, as a B. contributory, of a member whose shares have been forfeited within a year before the commencement of the winding-up, see *supra*, p. 144.

In *Stocken's Case* (*q*) it was held upon the construction of the articles that a reservation of interest upon unpaid calls ceased to be applicable after forfeiture. Interest on such calls.

As to calls on shares disclaimed by a trustee in bankruptcy, and therefore, under the Bankruptcy Act, 1869, deemed to be forfeited (*r*), see note to Art. (15). Bankruptcy.

(22.) A statutory declaration in writing, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated, as against all persons entitled to such share, and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed Title to forfeited shares.

(*m*) *Ramwell's Case*, 29 W. R. 882.

(*n*) *Stocken's Case*, 5 Eq. 6; 3 Ch. 412, 415.

(*o*) *Needham's Case*, 4 Eq. 135; and see *supra*, p. 144.

(*p*) *Dawes' Case*, 38 L. J. (Ch.) 512.

(*q*) 5 Eq. 6; 3 Ch. 412. See further note to Art. (6), *supra*.

(*r*) Bankruptcy Act, 1869 s. 23; *cf.* Bankruptcy Act, 1883, s. 55.

Table A. Art. 23.

the holder of such share discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

The object of this article is, of course, to enable the company upon the re-issue of forfeited shares, which under Art. (20) become the property of the company, to give the purchaser a good title not capable of being impeached on the ground of any irregularity in the forfeiture.

Conversion of Shares into Stock.

Conversion into stock.

(23.) The directors may, with the sanction of the company previously given in general meeting (*a*), convert any paid-up shares into stock (*β*).

(*a*) Arts. (29)—(43). (*β*) ss. 12, 28, 29.

Transfer of stock.

(24.) When any shares have been converted into stock, the several holders of such stock may thenceforth transfer (*a*) their respective interests therein, or any part of such interests, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the company may be transferred, or as near thereto as circumstances admit.

(*a*) s. 22, Arts. (8)—(11); Comp. Act, 1867, s. 27, *et seq.*

Stockholder's dividends and votes.

(25.) The several holders of stock shall be entitled to participate in the dividends and profits of the company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages, for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages.

As to the differences and resemblances between shares and stock, see *Morrice* v. *Aylmer* (*s*).

Increase of Capital (*a*).

Issue of new shares.

(26.) The directors may, with the sanction of a special resolution (*β*) of the company previously given in general meeting (*γ*), increase its capital by the issue of new shares, such aggregate

(*s*) 10 Ch. 148; L. R. 7 H. L. 717.

increase to be of such amount, and to be divided into shares of such respective amounts, as the company in general meeting (γ) directs, or, if no direction is given, as the directors think expedient. **Table A. Art. 27.**

(α) ss. 12, 34. (β) s. 51. (γ) Arts. (29)—(43).

(27.) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice (α) specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. to be offered to members:—

(α) Arts. (95)—(97).

(28.) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital. to be considered as part of original capital.

General Meetings (α).

(29.) The first general meeting shall be held at such time, not being more than six months (β) after the registration of the company, and at such place, as the directors may determine. First general meeting.

(α) ss. 49, 52, 67. (β) Comp. Act, 1867, s. 39.

A general meeting of every company is to be held once at least in every year (sect. 49); and by the Companies Act, 1867, s. 39, the first general meeting must be held within four months after the registration of the memorandum of association.

One shareholder does not make a meeting (t). But a committee of a board of directors may consist of only one person (u).

(30.) Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting; and if no other time and place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors. Subsequent general meetings.

When the company is in voluntary liquidation, the liquidator is to

(t) *Sharp* v. *Dawes*, 2 Q. B. Div. 26; *Sanitary Carbon Co.*, W. N. 1877, 223. (u) *Taurine Co.*, 25 Ch. Div. 118.

Table A. Art. 31.

summon a general meeting at the end of the first and each succeeding year from the commencement of the winding-up (sect. 139). It is conceived that this will supersede the general meeting to be held under this article (*x*).

Extraordinary general meetings

(31.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

If no first ordinary meeting is held appointments (*e.g.*, of directors) until the first ordinary meeting continue in force (*y*).

(32.) The directors may, whenever they think fit, and they shall upon a requisition made in writing by not less than one fifth in number of the members of the company, convene an extraordinary general meeting.

A meeting convened by a Board not properly constituted (*e.g.*, by the exclusion of persons entitled to be present) may be so irregular that its resolutions will be ineffectual (*z*).

(33.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.

(34.) Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting.

The 52nd section contains provisions which are to obtain in the absence of any regulations as to the matters above provided for. If there are regulations, but they have become inoperative, sect. 52 is applicable (a).

Mandamus to call meeting.

Semble, the Chancery Division has jurisdiction to grant a mandamus to compel the summoning of a meeting pursuant to the provisions of the articles (*b*).

But upon the principle which is always strictly adhered to, that the Court will not interfere with the internal management of a company, the Court will not control the discretion of the directors or shareholders by directing a meeting to be summoned for the general purposes of the company, where the directors or the requisite number of shareholders do not think proper to summon one (*c*). If a meeting cannot be otherwise summoned at all, or if the object is a special one, such as to ascertain whether legal proceedings instituted by a shareholder or shareholders in the name or on behalf of the company have the approval of the company (*d*), the Court might call a meeting (*e*) or give an opportunity for a meeting to be called.

(*x*) See, however, s. 140.
(*y*) *South London Fishmarket Co.*, 39 Ch. Div. 324.
(*z*) *Harben* v. *Phillips*, 23 Ch. Div. 14, 34.
(*a*) *Brick and Stone Co.*, W. N. 1878, 140.
(*b*) *Paris Skating Rink Co.*, 6 Ch. D. 731.
(*c*) *Macdougall* v. *Gardiner*, 10 Ch. 606.
(*d*) *Atwool* v. *Merryweather*, 5 Eq. 464, n.; *Featherstone* v. *Cooke*, 16 Eq. 298; *Macdougall* v. *Gardiner*, 10 Ch. 606, 608; S. C. 1 Ch. Div. 13, 22; *Pender* v. *Lushington*, 6 Ch. D. 70, 79.
(*e*) *Quære*, whether except in a winding-up, the Court has any power to call a meeting: *Mason* v. *Harris*, 11 Ch. Div. 97, 109.

Table A. Art. 35.

And so the Court may control the directors as to the date at which a meeting shall be summoned if it be shewn that they are exercising their discretion improperly, *e.g.*, that they are calling the meeting earlier than usual in order to exclude from voting the transferees of shareholders who have recently executed transfers with a view to increasing their voting power (*f*).

Requisition.

If a requisition is made for a meeting and the objects stated in the requisition are such that in no manner and by no machinery can they be legally carried into effect, the directors will be justified in refusing to act upon it, and an injunction might be granted to restrain the requisitionists from themselves convening the meeting. But if the objects stated in the requisition be such that by any form of resolution or by any machinery sanctioned by the Act they can be carried into effect, it is the bounden duty of the directors to call the meeting. It must be a very strong case indeed which will justify the Court in restraining a meeting of shareholders (*g*).

Proceedings at General Meetings.

Notice of meetings.

(35.) Seven days' notice (*a*) at the least, specifying the place, the day, and the hour of meeting, and in case of special business (β) the general nature of such business, shall be given to the members in manner hereinafter mentioned (γ) or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

(*a*) s. 52. (β) Art. (36). (γ) Arts. (95)—(97).

Seven days.

The days must, it is conceived, be calculated from midnight to midnight (*h*). Neither the day of service nor the day of meeting will therefore form part of the seven days.

Notice of business to be transacted.

When an extraordinary meeting is called for the transaction of business, of which notice is necessary, the notice must give substantial information as to that which is proposed to be done, for otherwise resolutions passed upon insufficient notice may be altogether invalid (*i*).

And when a resolution passed at an extraordinary meeting is, for want of proper notice, invalid, a confirmation at the annual general meeting will not render it valid (*k*).

Notice of a meeting summoned "on special business" is not sufficient notice for an extraordinary meeting (*l*).

When the shareholders have in effect and substance had notice of a meeting, the want of observance of all formalities in respect of the manner of giving notice will not necessarily render the proceedings at the meeting invalid. At any rate, a member who was present at the meeting cannot question its regularity (*m*).

Special business.

(36.) All business shall be deemed special that is transacted at an extraordinary meeting (*a*), and all that is transacted at an

(*f*) *Cannon* v. *Trask*, 20 Eq. 669.
(*g*) *Isle of Wight Railway Co.* v. *Tahourdin*, 25 Ch. Div. 320; *Harben* v. *Phillips*, 23 Ch. Div. 14.
(*h*) *Cf. Lawford* v. *Davies*, 4 Prob. Div. 61.
(*i*) *Supra*, p. 184. *Garden Gully Co.* v. *McLister*, 1 App. Cas. 39.
(*k*) *Lawes' Case*, 1 D. M. & G. 421.
(*l*) *Wills* v. *Murray*, 4 Ex. 843.
(*m*) *British Sugar Refining Co.*, 3 K. & J. 408; and see *supra*, p. 448.

Table A. Art. 37.

ordinary meeting, with the exception of sanctioning a dividend and the consideration of the accounts, balance-sheets, and the ordinary report of the directors.

(*a*) Art. (31).

Quorum necessary.

(37.) No business shall be transacted at any general meeting, except the declaration of a dividend, unless a quorum of members (*a*) is present at the time when the meeting proceeds to business; and such quorum shall be ascertained as follows; that is to say, if the persons who have taken shares in the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed twenty.

(*a*) As to quorum of directors, *v.* Art. (66).

Any provisions contained in the statute as to the number of members required for the doing of any act, such as the provision of sect. 51 as to a special resolution, must be read with relation to the contract between the members contained in the articles, as to the qualification for voting, and the quorum necessary for the transaction of business. Resolutions therefore for voluntary liquidation are invalid unless passed and confirmed at meetings at each of which there is present the necessary quorum of members properly entitled to vote (*n*).

(38.) If within one hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved: in any other case it shall stand adjourned to the same day in the next week, at the same time and place; and if at such adjourned meeting a quorum is not present it shall be adjourned *sine die*.

A resolution passed at a meeting at which a proper number of persons is not present (*o*), or at a meeting improperly convened (*p*), is altogether invalid.

Chairman of meeting.

(39.) The chairman (if any) of the board of directors shall preside as chairman (*a*) at every general meeting of the company.

(*a*) s. 52.

(40.) If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be chairman (*a*).

(*a*) s. 52.

(*n*) *Cambrian Peat Co., E. p. Mott & Turner*, W. N. 1875, 6; 31 L. T. 773; 23 W. R. 405.

(*o*) *Howbeach Coal Co.* v. *Teague*, 5 H. & N. 151.

(*p*) *Harben* v. *Phillips*, 23 Ch. Div. 14, 34.

Table A. Art. 41.

(41.) The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

Adjournment.

It seems that it is unnecessary to send a distinct notice to every member for an adjourned meeting (*q*).

And where notice of an adjourned meeting was necessary, it was held that when business had been begun and not completed at the meeting from which the adjournment took place, the notice of the adjourned meeting need not state the purpose for which it was summoned (*r*).

Quære, whether a poll can be demanded on the question of adjournment, and whether the votes ought to be taken according to the number of shareholders or of the shares which they represent (*s*).

There is at common law a right of adjournment of a public meeting (*t*), and *semble* it lies in the chairman (*u*).

(42.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings (*a*) of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

Resolution, how carried.

(*a*) s. 67.

A resolution of the proper majority of the shareholders in general meeting is the proper mode of declaring the will of the corporation, but if all the shareholders, and not a majority only, expressly assent the absence of a resolution may be immaterial (*x*).

As to what is an act of the corporation binding the corporation, and what constitutes a meeting of the corporation, some authorities will be found collected in *Staple of England* v. *Bank of England* (*y*).

As to the authority of the chairman and the effect of his decisions, see note to sect. 51.

Where the power of demanding a poll was by the articles given to shareholders qualified to vote and holding so many shares, it was held that the power was exercisable only by shareholders present in person, for that the holder of proxies is not the holder of the shares included in the proxy (*z*).

A proxy authorizing a person to vote does not authorize him to demand a poll (a).

It has been said that if a poll is demanded the chairman cannot direct it to be taken then and there, but that an opportunity ought to be given for the members who are not present to vote at the poll (*b*).

There is, however, authority to the contrary in *Reg.* v. *D'Oyly* (*c*), and

(*q*) *Wills* v. *Murray*, 4 Ex. 843.
(*r*) *Scadding* v. *Lorant*, 3 H. L. C. 418.
(*s*) *Macdougall* v. *Gardiner*, 20 Eq. 383; 1 Ch. Div. 13.
(*t*) *Reg.* v. *D'Oyly*, 4 Perry & Davison, 52; *Reg.* v. *St. Pancras*, Ibid. 66; *Reg.* v. *Wimbledon Local Board*, 8 Q. B. Div. 459.
(*u*) *Reg.* v. *D'Oyly*, *l.c.*
(*x*) *Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675, n., 681, n.
(*y*) *Per* Wills, J., 21 Q. B. D. 165.
(*z*) *Reg.* v. *Government Stock Investment Co.*, 3 Q. B. D. 442.
(a) *Haven Gold Mining Co.*, 20 Ch. D. 151, 157.
(*b*) *Horbury Bridge Co.*, 11 Ch. Div. 109.
(*c*) 12 Ad. & E. 139; 4 Perry and Davison, 52.

Table A. Art. 43.

Kay, J., has held that under an article providing that the poll shall be taken "in such manner as the chairman shall direct," the poll may be taken then and there (*d*). *Secus*, if the articles require that the poll be taken subsequently (*e*).

By common law, votes at all meetings are taken by show of hands, and it is only when a poll is taken that regard is to be had to voting power according to number of shares. There is nothing in the Act or Table A. to exclude, but, on the contrary, there are indications confirmatory of the common-law rule. Unless therefore a poll is demanded, the voting will go by numerical majority (*f*).

It is not necessary that a motion put to the meeting should be seconded, and, *semble*, a question might be put by the chairman without its being either proposed or seconded (*f*).

It is an attribute at common law of all public meetings that any qualified person may demand a poll (*g*).

Poll.

(43.) If a poll is demanded by five or more members it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting, the chairman shall be entitled to a second or casting vote.

See note to Art. (42).

Votes of Members.

Votes:—

(44.) Every member shall have one vote for every share up to ten; he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares (*a*).

(*a*) s. 52.

A shareholder is entitled, if he be so minded, with a view to a particular meeting, to transfer his shares or some of them to nominees in such manner as to secure to himself the maximum of voting power, and unless the directors have under the articles some power to refuse registration available against him they cannot decline to register his transfers (*h*).

in respect of personal interest.

Although a director be disentitled under the articles to vote as a director in respect of any contract in which he is interested, yet he is entitled so to vote as a shareholder at a general meeting (*i*).

A shareholder is entitled to vote as he pleases, and to consult his own interests (*k*); and, in the absence of anything in the articles to the contrary,

(*d*) *Chillington Iron Co.*, 29 Ch. D. 159.
(*e*) *British Flax Co.*, W. N. 1889, 7.
(*f*) *Horbury Bridge Co.*, 11 Ch. Div. 109.
(*g*) *Reg.* v. *Wimbledon Local Board*, 8 Q. B. Div. 459; *Campbell* v. *Maund*, 5 Ad. and Ellis, 879, 880; *Reg.* v. *St. Pancras*, 4 Perry & Davison, 66; *Reg.* v. *D'Oyly*, Ibid. 52.
(*h*) *Stranton Iron Co.*, 16 Eq. 559; Table A. must have been excluded by the articles of this company, for otherwise Art. (47) would have interfered; *Cannon* v. *Trask*, 20 Eq. 669; *Pender* v. *Lushington*, 6 Ch. D. 70; *Moffatt* v. *Farquhar*, 7 Ch. D. 591.
(*i*) *East Pant Du Mining Co.* v. *Merryweather*, 2 H. & M. 254. *Cf. North West Transportation Co.* v. *Beatty*, 12 App. Cas. 589.
(*k*) Provided his vote be *bonâ fide*, and not contrary to public policy: *Elliott* v. *Richardson*, L. R. 5 C. P. 744.

Table A. Art. 44.

he is not debarred from voting upon a question in which he is personally interested (*l*); and his vote, if not impeachable for fraud, may in fact determine the matter in his own favour by turning the scale (*m*).

"Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders duly convened upon any question with which the company is legally competent to deal is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to or different from the general or particular interests of the company" (*m*).

Where the question under vote was whether or not the company should adopt a bill which had been filed to impeach the title of some of the shareholders, the holders of those shares were held entitled to vote, for to have decided otherwise would have been to prejudice the whole question at issue (*n*).

And where the question was whether the company should purchase a steamer belonging to one member, the resolution to do so was binding, although that member's own vote turned the scale (*o*).

The shareholder's vote is a right of property, and he is entitled if he pleases to exercise it in a manner entirely adverse to what others may think the interests of the company as a whole, and from motives or promptings of what he considers his own individual interest (*p*).

There may no doubt be a difference between the vote of the shareholder which belongs to him as a right of property attached to his share, and the vote of a creditor or other member of a class on whom is conferred by the legislature the power of controlling the rights of a minority of the class. In the latter case there may be good ground for saying that the voter is entrusted with his vote in his character of member of a class, and that he is bound to exercise it *bonâ fide* for the benefit of the class including himself, and not for that of himself as opposed to the class.

Thus it has been held that debenture-holders voting on a re-construction scheme under the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), ought to vote *bonâ fide* in the interests of the debenture-holders as a class (*q*), and there have been similar decisions in bankruptcy (*r*).

And even the shareholder's freedom of vote is limited by this, that he must use his power consistently with the constitution of the corporation whose affairs he is entitled to control. So that if a majority affirm a proposition which is *ultra vires*, the minority are not bound. It is this, it is conceived, which lies at the root of *Menier* v. *Hooper's Telegraph Company* (*s*), where a majority were seeking to divide assets among themselves to the exclusion of the rest.

Company cannot inquire into beneficial ownership.

As between the shareholder and the company, the person entitled to exercise the right of voting is the person legally entitled to the shares, the

(*l*) *Cf. London and Mercantile Discount Co.*, 1 Eq. 277.

(*m*) *North West Transportation Co.* v. *Beatty*, 12 App. Cas. 589, 593; *cf. Farrar* v. *Farrars, Limited*, 40 Ch. Div. 395.

(*n*) *East Pant Du Mining Co.* v. *Merryweather*, 2 H. & M. 254; and see *Mason* v. *Harris*, 11 Ch. Div. 97, 107.

(*o*) *North West Transportation Co.* v. *Beatty*, 12 App. Cas. 589.

(*p*) *Pender* v. *Lushington*, 6 Ch. D. 70.

(*q*) *Wedgwood Coal Co.*, 6 Ch. D. 627.

(*r*) *E.g. E. p. Page*, 2 Ch. Div. 323; *E. p. Walter*, Ibid. 326; *E. p. Terrell*, 4 Ch. Div. 293; *E. p. Williams*, 18 Ch. Div. 495; *E. p. Ball*, 20 Ch. Div. 670; *E. p. Russell*, 22 Ch. Div. 778; *E. p. Strawbridge*, 25 Ch. Div. 266.

(*s*) 9 Ch. 350; and see *North West Transportation Co.* v. *Beatty*, 12 App. Cas. 589.

Table A. Art. 44.

member whose name is on the register. The company have no right to inquire into the beneficial ownership, or to reject votes on the ground that a member is by the articles restricted to so many votes altogether, and that other registered shareholders who vote are really nominees of his, and that he is thus exceeding the limited number (*t*). A shareholder is, as we have seen, entitled to increase his voting power by transfers to nominees.

Right of minority to sue. Use of company's name:—

In cases where a minority are being overborne by the vote of a majority, or where some member or members are desirous of litigating some question connected with the company, and it is an open question whether they form a majority of the company or not, a question often arises as to the right to sue, and in case there be a right to sue, then as to the proper form of action. In such cases the following rules are to be found in the authorities:—

1. If an act, not *ultra vires* the corporation, and which therefore might be done with the approval of a majority, be done irregularly and without such approval, then the majority are the only persons who can complain (*u*), and the Court will not entertain the complaint except at the instance of the majority, and in a proceeding in which the corporation is plaintiff (*x*).

2. In any proceeding brought to recover property of the corporation, or otherwise to enforce rights of the corporation, the corporation is the only proper plaintiff (*y*).

Except that if (see rule 3, *infra*) an individual corporator sues the corporation to prevent it from doing something *ultra vires*, *e.g.*, to restrain it from carrying out an agreement with a third party, and joins that third party as a defendant, then as a necessary incident to the first part of the relief claimed, the Court will go on to direct the repayment of money, or restoration of property paid or disposed of under the agreement (*z*).

3. A single shareholder suing on behalf of himself and others, or suing alone and not on behalf (a), may make the company a defendant, and may restrain the company and directors from doing an act which is illegal (*b*), or *ultra vires* the corporation, and which a majority are consequently unable to affirm (*c*).

If, however, a majority are opposed to the illegal act, *quære* whether the company should not be made or at any rate joined as plaintiff.

4. If the act complained of be not *ultra vires*, but be a wrong done to the corporation, of which therefore the corporation alone upon the principles already stated can complain, yet if the alleged wrongdoers be themselves the majority, or turn the scale of the majority, then the minority may sue by one shareholder on behalf of himself and others (*d*).

5. The above are general rules strictly adhered to, but not inflexible, and any case in which the claims of justice require that an action in which the company is not plaintiff should be entertained, may be made an exception (*e*). But if the case is one in which the company ought to sue, then

(*t*) *Pender* v. *Lushington*, 6 Ch. D. 70.

(*u*) *Foss* v. *Harbottle*, 2 Hare, 461; *MacDougall* v. *Gardiner*, 1 Ch. Div. 13.

(*x*) *Mozley* v. *Alston*, 1 Ph. 790; *MacDougall* v. *Gardiner*, 1 Ch. Div. 13.

(*y*) *Gray* v. *Lewis*, 8 Ch. 1035, 1050; *Russell* v. *Wakefield Waterworks*, 20 Eq. 474, 479; *Duckett* v. *Gover*, 6 Ch. D. 82.

(*z*) *Russell* v. *Wakefield Waterworks Co.*, 20 Eq. 481, and cases there cited.

(a) *Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. C. 712; *Russell* v. *Wakefield Waterworks Co.*, 20 Eq. 481; *Hoole v. Great Western Railway Co.*, 3 Ch. 262.

(*b*) See *Natusch* v. *Irving*, *Gow* on Partnership, App. 398; *Const.* v. *Harris*, T. & R. 518, 519, for principle.

(*c*) *E.g. Holmes* v. *Newcastle Abattoirs Co.*, 1 Ch. D. 682; *Hope* v. *International Financial Society*, 4 Ch. Div. 327.

(*d*) *Atwool* v. *Merryweather*, 5 Eq. 464, n.; *Russell* v. *Wakefield Waterworks Co.*, 20 Eq. 482; *Menier* v. *Hooper's Telegraph Co.*, 9 Ch. 350; *Mason* v. *Harris*, 11 Ch. Div. 97.

(*e*) See *per* Jessel, M.R., 20 Eq. 482.

(subject to rule 6) the shareholder must exhaust all reasonable means of obtaining the institution of an action by the company before suing himself (*f*). But if the case be one of class (4), it is idle to say that a meeting ought to be called in which the alleged wrongdoers should not vote, for that would be trying the question of fraud as a preliminary step for ascertaining the frame of the action in which it is to be tried (*g*).

6. If the case be one in which the company ought to be plaintiff, the fact that the seal is in the possession of the adverse party will not necessarily preclude the intending plaintiffs from using the company's name. Neither will it be necessary to obtain the resolution of a general meeting in favour of the action before the writ is issued. In many cases the delay might amount to a complete denial of justice. In a case of urgency, the intending plaintiffs may use the company's name, but at their peril, and subject to their being able to shew that they have the support of the majority. In an action so constituted, the Court may give interlocutory relief, taking care that a meeting be called at the earliest possible date to determine whether the action really has the support of the majority or not (*h*). If it appears that the company's name has been used improperly, it will be struck out (*i*).

7. A single shareholder may sue the company to enforce any individnal right of his own, *e.g.*, his right to have his vote recorded (*k*), or his right as a director to restrain his co-directors from excluding him from the board (*l*).

in winding-up.

When the company is in liquidation, the only persons to whom the Court has any jurisdiction to give leave to use the company's name are the creditors and contributories. The principle on which leave to use the company's name is given is the same as that on which a *cestui que trust* could formerly file a bill against his trustee to be allowed to use his name to recover trust property. Where upon an application in the winding-up an order had been made directing payment of the applicant's costs out of the assets, a subsequent order allowing the applicant's solicitors (who were of course entitled to the costs) to use the name of the company to institute proceedings against directors for misfeasance was discharged on appeal as made without jurisdiction (*m*).

Poll.

As to the importance of demanding a poll where the numerical majority and the majority as determined under this article are not the same, see note to Art. (42).

Non-voting shares.

It is not uncommon to provide that certain shares, frequently preference shares, shall have no vote. Such provisions are legal, and the non-voting shares have no ground of complaint even as regards resolutions passed by the ordinary shareholders and affecting the preference shareholders, unless such resolutions are at variance with the rights of the preference shareholders (*n*).

(*f*) *Morris* v. *Morris*, W. N. 1877, 6. See also cases in note (*h*), *infra*.

(*g*) *Mason* v. *Harris*, 11 Ch. Div. 97.

(*h*) *Exeter and Crediton Railway Co.* v. *Buller*, 5 Railw. Cas. 211; 11 Jur. 527, 532; *East Pant Du Mining Co.* v. *Merryweather*, 2 H. & M. 254; *MacDougall* v. *Gardiner*, 1 Ch. Div. 13, 22; *Pender* v. *Lushington*, 6 Ch. D. 70; *Duckett* v. *Gover*, 25 W. R. 554; *Harben* v. *Phillips*, 23 Ch. Div. 14; *Imperial Hydropathic Co.* v. *Hampson*, 23 Ch. Div. 1.

(*i*) *Silber Light Co.* v. *Silber*, 12 Ch. D. 717; *Oystermouth Co.* v. *Morris*, W. N. 1876, 129, 192, where the bill was taken off the file (see also *Morris* v. *Morris*, W. N. 1877, 6), and the cases in the last note.

(*k*) *Pender* v. *Lushington*, 6 Ch. D. 70, 81; *cf. Cannon* v. *Trask*, 20 Eq. 669.

(*l*) *Pulbrook* v. *Richmond Co.*, 9 Ch. D. 610; *Harben* v. *Phillips*, 23 Ch. Div. 14.

(*m*) *Cape Breton Co.* v. *Fenn*, 17 Ch. Div. 198.

(*n*) *Barrow Steel Co.*, 39 Ch. D. 582, 603.

Table A. Art. 45.

(45.) If any member is a lunatic or idiot he may vote by his committee, *curator bonis*, or other legal curator.

Vote of lunatic :—

of joint holders :—

(46.) If one or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

of member in arrear :—

(47.) No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he

of transferee.

has acquired by transfer at any meeting held after the expiration of three months from the registration of the company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote (*a*).

(*a*) *Cf.* Comp. Act, 1867, s. 40, as to presenting a winding-up petition.

It is conceived that, for the purposes of this article at any rate, a call is not "due" until it is payable (*o*). Otherwise in the interval between the resolution for a call (Art. 5) and the day on which it is made payable, no shareholder would be entitled to vote, who had not paid the call before it was payable.

By this regulation as to transferees such a transaction as that in the *Stranton Iron Co.* (*p*) would be defeated.

A similar provision in the Companies Act, 1867, s. 40, disqualifies, except in certain events, a contributory, who has held shares for less than six months during the eighteen months preceding the winding-up, from presenting a winding-up petition.

Proxies.

(48.) Votes may be given either personally or by proxy.

(49.) The instrument appointing a proxy shall be in writing, under the hand of the appointer, or if such appointer is a corporation, under their common seal, and shall be attested by one or more witness or witnesses: no person shall be appointed a proxy who is not a member of the company.

(50.) The instrument appointing a proxy shall be deposited at the registered office of the company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote, but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.

(51.) An instrument appointing a proxy shall be in the following form :—

Company, limited.

I, of in the county of being a member of the company, limited, and entitled to vote [*or*

(*o*) *Cf.* note to Art. (10). (*p*) 16 Eq. 59, *supra*, p. 484.

votes], hereby appoint of as my proxy, to vote for me and on my behalf at the [ordinary *or* extraordinary, *as the case may be*] general meeting of the company to be held on the day of , and at any adjournment thereof [*or* at any meeting of the company that may be held in the year].

Table A. Art. 51.

As witness my hand, this day of

Signed by the said in the presence of

There is no common-law right on the part of a member of a corporation to vote by proxy. His right so to vote can arise only by contract, and this being so he must observe the terms of the contract. If therefore the articles require that a proxy shall be attested, an unattested proxy must be rejected (*q*).

Stamps and postage on proxies.

The company's funds ought not to be employed by the directors to get into their own hands the majority of the voting power, and an expenditure of the company's funds in sending out proxies containing the names of the directors will not be allowed. Moreover, a shareholder who votes by proxy does so for his own convenience, and the company's funds must not be expended in stamping or paying return postage on any proxies in any form. It may under some circumstances be justifiable to send out at the company's expense forms of proxy, not containing any names, or tending in any way to influence the votes of the recipients (*r*).

Corporation.

A corporation may give a proxy (*s*).

Penny stamp.

The appointment of a proxy to vote at any one meeting and any adjournment thereof, whether the number of persons named in the instrument be one or more, must bear a penny stamp (*t*).

Ten-shilling stamp.

If the appointment authorizes the proxy to vote at more than one meeting and any adjournment thereof, it must bear a ten-shilling stamp instead of a penny stamp (*u*). The words in brackets in the above form of proxy, viz., "or at any meeting of the company that may be held in the year ," are very often inserted in articles; but they are dangerous, as shareholders are apt to use them without remembering the heavy difference of stamp duty.

The Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 102, is as follows:—

Proxies and voting papers confined to one meeting.

"(1.) Every letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and every voting paper, hereby respectively charged with the duty of one penny, is to specify the day upon which the meeting at which it is intended to be used is to be held, and is to be available only at the meeting so specified, or any adjournment thereof.

Duty may be denoted by adhesive stamp.

(2.) The said duty of one penny may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is executed.

Penalty for executing not duly stamped, &c., £50:—

(3.) Every person who makes or executes, or votes or attempts to vote under or by means of any such letter or power of attorney or voting paper, not being duly stamped, shall forfeit the sum of fifty pounds.

and vote void:

(4.) Every vote given or tendered under the authority or by means of any such letter or power of attorney or voting paper, not being duly stamped, shall be absolutely null and void.

may not be stamped after execution.

(5.) And no such letter or power of attorney or voting paper shall on any pretence whatever be stamped after the execution thereof by any person."

Proxy in blank.

It is conceived that a proxy paper signed by A. with the name of the proxy

(*q*) *Harben* v. *Phillips*, 23 Ch. Div. 14, 22, 31, 35.

(*r*) *Studdert* v. *Grosvenor*, 33 Ch. D. 528.

(*s*) *Indian Zoedone Co.*, 26 Ch. Div. 70, 78.

(*t*) 34 Vict. c. 4, s. 4.

(*u*) 33 & 34 Vict. c. 97, schedule "Letter of Attorney."

Table A. Art. 52.

in blank, and handed by him to B., may be filled up by B., and when so filled up will be valid (*x*).

Liquidator's proxy in bankruptcy.

A proxy signed by the liquidator in his own name, not describing himself as an agent duly authorized by the company, is valid in bankruptcy as a proxy for the company in liquidation (*y*).

Directors.

First directors.

(52.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

There must be a majority of the subscribers to determine who are to be the first directors (*z*). The subscribers may determine by concurring in an appointment in writing; it is not necessary that they should meet to make the appointment (a).

(53.) Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors.

Qualification.

The Act of 1844 (*b*) required a director to be the holder of one share. But neither this Act, nor Table A., contains any similar provision. It is, however, the exception when the articles of a company do not prescribe a share qualification for its directors (*c*).

If the articles prescribe an absolute qualification for directors, and do not name the first directors, it is conceived that a subscriber of the memorandum, becoming by subscription under this or a similar article an *ad interim* director, agrees thereby to accept the necessary qualification, and it is in fact his duty to put his own name on the register for the right number of shares (*d*).

But if the provision in the articles be that no person shall be "eligible" as a director unless he holds a certain number of shares (*e*), or that the "future qualification" of a director shall be so many shares, directors named in the memorandum (*f*) or articles of association are not within the qualification clause (*g*).

Powers of first directors.

The subscribers to the memorandum are competent to act as first directors; and, *semble*, acts done by them unanimously are not vitiated by the fact of no meeting being held to sanction them (*h*).

But where, at a meeting at which three only of the seven subscribers were present, five of the subscribers were appointed directors, and a call was afterwards made at a meeting at which three only of the persons so chosen directors were present, the call was held to be invalid, and not capable of being enforced against a subscriber who had attended meetings as one of the directors; for the appointment of the directors was invalid, and the three persons who made the call were not a quorum of the subscribers in the capacity of first directors (*i*).

(*x*) *E. p. Lancaster*, 5 Ch. Div. 911.
(*y*) *E. p. Taylor*, W. N. 1877, 136.
(*z*) *London and Southern Counties Land Co.*, 31 Ch. D. 223.
(a) *Gt. Northern Salt Co.*, 44 Ch. D. 472.
(*b*) 7 & 8 Vict. c. 110, s. 28.
(c) See the cases collected, *supra*, p. 51, *et seq.*
(*d*) *Sidney's Case*, 13 Eq. 228.
(*e*) *Stock's Case*, 4 D. J. & S. 426; *Forbes' Case*, 8 Ch. 768.
(*f*) *Lord Claud Hamilton's Case*, 9 Ch. 548.
(*g*) See further, *supra*, p. 50, *et seq.*
(*h*) *Hallows* v. *Fernie*, 3 Eq. 520, 537; 3 Ch. 467, 472; *et v. infra*, Art. (66).
(*i*) *Howbeach Coal Co.* v. *Teague*, 5 H. & N. 151; doubted in *York Tramways Co.*

Table A. Art. 54.

The first directors have the powers of directors for all purposes: their powers are the same as those of the directors to be elected by the shareholders. They may appoint one of their number to the office of manager at a salary, subject, of course, to the consequence that the person so appointed vacates his office of director (*k*).

As to the retirement of the first directors at the first ordinary meeting, see Art. (58).

Remuneration.

(54.) The future remuneration of the directors, and their remuneration for services performed previously to the first general meeting, shall be determined by the company in general meeting.

Directors are in the position, not of servants, but of managers of the company. Apart, therefore, from contract or agreement, they cannot claim remuneration for their services according to their value (*l*).

In the absence of special provision for their payment any remuneration which is given them is in the nature of a gratuity (*m*). And if the articles require the directors to be members, it has been held that their unpaid fees are debts due to them in the character of members, and are to be postponed to outside creditors under Comp. Act, 1862, s. 38 (7) (*n*). But *quære* this decision. At any rate payment to a person for special skill and attention is none the less a provable debt because the person is a director, and under the articles a director must be a member (*o*).

A majority of shareholders cannot adversely to a minority vote a gratuity to their late officials when the business of the company is at an end (*m*), although if the business is a continuing business, so that a gratuity may be an incentive to more diligent service in the future, the company, or the directors on its behalf, may give extra remuneration for past service (*p*).

It is not competent to directors to vote to themselves remuneration at a rate exceeding that which the articles or constitution of the company provide (*q*).

But there is no general presumption that their fees are to be paid out of profits only. Where the articles provided "that the directors might yearly distribute among themselves, as remuneration for their services, such sum as should be equal to one-tenth part of the profits of the company for the last preceding year, provided always that there should be yearly distributed among such directors as such remuneration a sum which should not be less than £100 yearly for each director," and no profits were ever made by the company; an order of the Master of the Rolls, whereby the directors were ordered to refund moneys distributed among themselves out of the capital, to the amount of £100 a year to each director, was reversed by the Lords Justices (*r*).

As to the right of a director to make profit out of the company, see further, Art. (57), *infra*.

v. *Willows*, 8 Q. B. Div. 685; but see *London and Southern Counties Land Co.*, 31 Ch. D. 223; *cf. Garden Gully Co.* v. *McLister*, 1 App. Cas. 39, and see *ante*, p. 446.

(*k*) *Eales* v. *Cumberland Black Lead Mine Co.*, 6 H. & N. 481.

(*l*) *Dunston* v. *Imperial Gas Light Co.*, 3 B. & Ad. 125.

(*m*) *Hutton* v. *West Cork Railway Co.*, 23 Ch. Div. 654.

(*n*) *E. p. Cannon*, 30 Ch. D. 629.

(*o*) *Dale and Plant*, 43 Ch. D. 255.

(*p*) *Hampson* v. *Price's Candle Co.*, 24 W. R. 754; 34 L. T. 711.

(*q*) *Evans* v. *Coventry*, 25 L. J. (Ch.) 491, 501; 8 D. M. & G. 835, 844.

(*r*) *Re Lundy Granite Co., Harvey Lewis' Case*, 26 L. T. 673.

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Powers of Directors.

Management by directors.

(55.) The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company (*a*), and may exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made (*β*).

(*a*) Under words such as these an action will not lie at law against the company for non-payment of the preliminary expenses: *Melhado* v. *Porto Alegre Railway Co.*, L. R. 9 C. P. 503. But there may be a good equitable claim so far as the company has derived benefit: *Hereford Wagon Co.*, 2 Ch. Div. 621; *Empress Engineering Co.*, 16 Ch. Div. 125. But not if the work done before the formation of the company was done upon the retainer of some one who is liable to pay: *Rotherham Alum Co.*, 25 Ch. Div. 103. The effect of the common section in a special Act that the costs, etc., of obtaining the Act shall be paid by the company is to render the company liable to those who have done work for the intended company directly, but not to those who have been employed by others. If there is any one other than the company to whom the claimant can look for payment, the section does not apply to him: *Wyatt* v. *Metr. Board of Works*, 11 C. B. (N.S.) 744; *Skegness Tramways Co.*, *E. p. Hanly*, 41 Ch. Div. 215, 241.

(*β*) s. 67; *infra*, Art. (71).

If the articles contain provisions that the directors shall not have power to do certain defined acts, any resolution of the company empowering them to do such acts in future must be a special resolution altering the articles; but if the directors do such an act without authority, the company can by ordinary resolution adopt the act so that it shall become binding upon the company (*s*).

Directors are agents:—

The position of directors of a public company is that of agents of the company (*t*), they are managing partners (*u*). The company itself cannot act in its own person, for it has no person; it can act only through directors (*x*). Directors are described sometimes as agents, sometimes as trustees, sometimes as managing partners. But each of these expressions is used, not as exhaustive of their powers or responsibilities, but as indicating useful points of view from which they may for the moment and for the particular purpose be considered. It is not meant that they belong to the class, but that it is useful for the purpose of the moment to observe that they fall *pro tanto* within the principles which govern that class (*y*).

The company in general meeting have no doubt power to direct and control the board in the management of the affairs of the company (*z*).

may bind the company:—

And as regards the extent to which these agents may bind the company, the short result of the cases may be stated to be, that the company are not

(*s*) *Grant* v. *United Kingdom Switchback Co.*, 40 Ch. Div. 135.

(*t*) *Charitable Corporation* v. *Sutton*, 2 Atk. 400.

(*u*) *Forest of Dean Coal Co.*, 10 Ch. Div. 450, 451.

(*x*) *Ferguson* v. *Wilson*, 3 Ch. 77, 89.

(*y*) *Per* Bowen, L.J., *Imp. Hydropathic Co.* v. *Hampson*, 23 Ch. Div. 12.

(*z*) *Isle of Wight Railway Co.* v. *Tahourdin*, 25 Ch. Div. 320, 331.

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bound by any acts done by them for objects which the company has no power to entertain, and that these are the only acts which, if the directors do, are *ipso facto* void. But that not only do the acts of the directors bind the company when done within the scope of their authority, but also that where the acts of the directors, however irregular, belong to a class of acts which class is authorized by the deed of settlement, in these cases the company is absolutely bound when the acts are done with strangers who act *bonâ fide* with the company, and when these acts are done with the shareholders of the company, then that these acts are voidable only, and that the other shareholders must take active steps to set aside the transaction, and that where there is no dishonesty, time bars the remedy (a).

The directors' general authority extends to all acts reasonably necessary for management (*b*). If they think proper in a prosperous year to give the company's servants a gratuity out of profits, this is such an act as is within their general powers (*c*). For such a grant may be for the advancement of the interests of the company. And upon the same principle a pension to the family of a deceased servant of the company may be justifiable, for it may benefit the company to treat its servants with liberality (*d*). But if the undertaking of the company has been sold, so that its objects can no longer be prosecuted, a gratuity to the servants cannot be given, even by the company in general meeting, by a majority adversely to a minority (*e*).

So a majority in general meeting cannot vote the company's funds to an object wholly foreign to the company's business on the mere ground that it will indirectly increase its business; *e.g.*, a railway company cannot subscribe to a public institution on the ground that visitors to the institution will increase its traffic (*f*).

But not to acts *ultra vires*.

As regards acts which are *ultra vires* the company altogether, as being outside the objects which the company has power to entertain (*g*), it is conceived that the rule which was broadly laid down in *Pickering* v. *Stephenson* (*h*) with respect to the application of the funds of a company, is generally applicable. It was there said that the special powers given to the ultimate authority within the company—whether it be the directors, or a general council, or a majority at a general meeting—are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the purposes of the original bond of association (*i*).

If, however, one head of the decision in *London Financial Association* v. *Kelk* (*k*) is to be pressed home it would seem that if directors, *bonâ fide* believing an act which they do to be *intra vires* of the corporation, apply its funds to a purpose which is in fact *ultra vires*, a Court of Equity may hold their acts not to constitute such a breach of trust as to impose upon them liability (*l*). And further, that it is not impossible for the corporation to relinquish and disclaim any right of relief which it might have had in respect of the *ultra vires* disposition of its funds (*m*).

(a) *Per* Romilly, M.R., *Spackman* v. *Evans*, L. R. 3 H. L. 171, 244; but as regards the effect of lapse of time, his Lordship was in a minority in the opinion of the House.

(*b*) See, *e.g.*, *West of England Bank, E. p. Booker*, 14 Ch. Div. 317.

(*c*) *Hampson* v. *Price's Candle Co.*, 34 L. T. 711; 24 W. R. 754.

(*d*) *Henderson* v. *Bank of Australasia*, 40 Ch. D. 170.

(*e*) *Hutton* v. *West Cork Railway Co.*, 23 Ch. Div. 654.

(*f*) *Tomkinson* v. *South Eastern Railway Co.*, 35 Ch. Div. 675.

(*g*) As borrowing by a company not authorized to borrow: *Beattie* v. *Lord Ebury*, 7 Ch. 777, 792, n.

(*h*) 14 Eq. 322.

(*i*) See also note to s. 50, *supra*.

(*k*) 26 Ch. D. 107.

(*l*) Ibid. 146.

(*m*) Ibid. 151.

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Both these propositions, however, may be conceded as sound without violating a principle which it is conceived is inviolable, viz., that the corporation cannot bind itself in any way by an act *ultra vires* in the proper sense of those words, *i.e.* outside its objects altogether. Thus, if the corporation enters into an *ultra vires* contract, it is not a contract at all—but it does not follow of necessity that a director who has carried it out is liable to the corporation. The director's act creates, it may be assumed, a right of action in the corporation against him, but if the corporation in general meeting resolves not to sue him, or resolves that a release be given him, there is nothing *ultra vires* in the act of so resolving, and the resolution and the release, it is conceived, will be good. There is more difficulty in seeing how, if the corporation does sue, a Court of Equity can say that the director's misapplication of the funds is venial. But certainly in *London Financial Association* v. *Kelk* (*n*) any Court would have struggled not to render directors liable for hundreds of thousands of pounds for having misconstrued a very difficult memorandum of association.

Acquiescence.

And although some acts of directors which are *ultra vires* may be rendered valid by acquiescence, yet this can only be by the individual acquiescence of every shareholder (*o*). And as regards what constitutes such acquiescence, although Lord Cranworth, in *Houldsworth* v. *Evans* (*p*), held, that where shareholders know that their directors have been exceeding their legal powers, and take no steps in the matter, but allow their acts to remain unimpeached for years, they must be taken to have retrospectively sanctioned what was done, yet this opinion failed, in the absence of direct proof of knowledge, or the means of knowledge, by every individual shareholder, to prevail with the majority of their Lordships' House (*q*).

For, although a shareholder must be considered to be fully informed of the powers given to his directors by the deed of association or articles of association of his company, yet he is not bound to know, and practically he rarely does know, whether the directors are acting within or exceeding the scope of the authority entrusted to them (*r*). It is no part of his duty to look into the management of the business; he has a right to leave the management in the hands of those to whom he has entrusted it, and to assume that they are doing their duty (*s*).

Fraudulent acts of directors.

Moreover, the directors are not the agents of the body of shareholders to commit a fraud (*t*), and although, as regards the liability of the company in respect of misrepresentations made by the directors on its behalf, the cases are not all easy to reconcile, yet it is clear that a company is not bound by a fraudulent and illegal agreement entered into by its directors on its behalf (*u*), and is not liable in an action of deceit where the unauthorized and fraudulent act of the agent is committed for the agent's own private ends (*x*).

This is more fully discussed, *ante*, p. 104.

The company must, however, to some extent, take upon itself the conse-

(*n*) 26 Ch. D. 107.

(*o*) See the *Agriculturists' Cattle Insurance Co.'s Cases*, cited *supra*, pp. 466, *et seq.*

(*p*) L. R. 3 H. L. 263.

(*q*) See further, *supra*, pp. 466, 472, as to what is sufficient means of knowledge.

(*r*) *Downes* v. *Ship*, L. R. 3 H. L. 343, 359.

(*s*) *Stanhope's Case*, 1 Ch. 161, 170; *Houldsworth* v. *Evans*, L. R. 3 H. L. 263, 276; *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 224, 242, 294; 7 H. L. 653.

(*t*) *Dodgson's Case*, 3 De G. & Sm. 85, 90; *Bernard's Case*, 5 De G. & Sm. 283, 289; *Nicol's Case*, 3 De G. & J. 387, 422, *et seq.*; but see *per* Turner, L.J., Ibid. 437, and the argument, 403.

(*u*) *British and American Telegraph Co.* v. *Albion Bank*, L. R. 7 Ex. 119, 122.

(*x*) *British Mutual Co.* v. *Charnwood Forest Co.*, 18 Q. B. Div. 714.

quences of the misrepresentations of its agents whereby a contract has been induced between the company and a third party (*y*).

Thus a company is liable to an action for the false or fraudulent misrepresentations of its agent acting in the course of its business (*z*). For where a corporation takes advantage of the fraud of its agent it cannot afterwards repudiate the agency and say that the act which has been done by the agent is not an act for which it is liable (a). But if an officer, not being a director, answer inquiries which do not properly fall within the business of the company deputed to him, his representations cannot, in the absence of evidence, be imputed to the directors, and through them to the company (*b*).

So a company is not responsible for acts done by its managing director, when he is acting in his private capacity and not acting for the company or in pursuance of any authority given by the company (*c*).

Personal liability of directors:—

The directors of a company fill a double character. They are (i.) agents of the company, and (ii.) trustees for the shareholders of the powers committed to them. In the first character, that of agents, their personal liability in an action, upon a contract made by them, must be governed by the ordinary law of principal and agent. The directors cannot therefore be brought into Court, as personally liable, upon a proceeding which simply alleges that the company has violated a contract that they have entered into. In that state of things it is not the agent, but the principal that is the person liable. But a shareholder may sue directors personally, where he charges them as trustees, and seeks redress against them for a breach of duty to the company of which he is a member. For in that case the allegation of the shareholder in fact is that the company has done no wrong whatever, that it is the executive that has committed the wrong, and that the shareholder sues to protect the company against the unlawful acts of the directors (*d*).

as agents:—

Thus upon a bill filed to enforce specific performance of an alleged contract to allot shares, there was no equity against the directors to support a prayer that, all the shares having been allotted to other shareholders, the directors should indemnify the plaintiff out of their own shares or should be charged with damages. For the contract was one between the plaintiff and the company, the latter acting through the agency of their directors (*d*).

And where the company's business was to receive money from depositors and invest it, and the plaintiff deposited £1000 with the company upon terms that by way of security the company should transfer a certain mortgage to the plaintiff, and if the mortgage should become ineffective before the expiration of five years should replace it by another, and within the five years the mortgage was paid off but the company did not replace it by another, and ultimately the company went into liquidation, the plaintiff's action against the directors failed (*e*).

(*y*) *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L., Sc. 145, 157; *Henderson* v. *Lacon*, 5 Eq. 249, 261; see further, *supra*, p. 105.

(*z*) *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244; reversed, 9 Q. B. 301 (but see Ibid. p. 312), on the ground that the signature of the manager was not the signature of the company within the statute 9 Geo. 4, c. 14, s. 6.

(a) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301, 312.

(*b*) *Partridge* v. *Albert Life Assurance Co.* (Alb. Arb.), 16 Sol. J. 199; *Barnett, Hoares, & Co.* v. *South London Tramways*, 18 Q. B. Div. 815.

(*c*) *McGowan & Co.* v. *Dyer*, L. R. 8 Q. B. 141.

(*d*) *Ferguson* v. *Wilson*, 2 Ch. 77; *Wilson* v. *Lord Bury*, 5 Q. B. Div. 518. As to making some only of the directors defendants, see *supra*, p. 127.

(*e*) *Wilson* v. *Lord Bury*, 5 Q.B. Div. 518.

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A company, however, cannot be made liable upon covenants contained in a deed under seal executed by its managing director upon its behalf in which the company itself is not named. In such a case, although there be full knowledge on the part of all parties, the covenantee has elected to charge the director alone, and has no equity to proceed against the company who is the *cestui que trust* (*f*).

Where, however, the question is not one of deed under seal, the signature of a director or manager may be the signature of the company; but it has been held by the Exchequer Chamber, reversing the Queen's Bench, that the signature of the manager of a banking company, signing in his own name a letter containing a representation which is untrue, is not the signature of the company itself so as to be the signature of the "party to be charged" within the 9 Geo. 4, c. 14, s. 6. And the manager himself was there held to be personally liable for the representation he had made (*g*).

as trustees.

But the directors are trustees of the powers committed to them (*h*), as, for instance, of the power of approving transfers of shares (*i*); of the power of allotment of shares (*k*); of the power of employing the funds of the company (*l*); of the power of making calls (*m*); or receiving payment of calls in advance (*n*); of the power of forfeiting shares (*o*); and as trustees they may be rendered liable for their misuse (*p*).

Thus where upon the first allotment of shares certain promotion money was to be paid to the promoters, and the directors prematurely allotted shares and paid £5000 to the promoters, who immediately paid to four of the directors £500 apiece, repayment of the £500 was in the winding-up compelled from each of those directors (*q*).

So where, upon an issue of new capital at a time when the shares were at a considerable premium, directors made large profits by taking new shares off the hands of one person, to whom a large number were allotted, and then selling them, they were held liable to refund. For no agent may, in the matter of his agency, make a profit without his principal's knowledge and consent (*r*).

So where the directors made an unauthorized purchase of shares in their own company, they were, with the exception of one who denied all knowledge of the transaction, held liable to refund the money paid for the shares (*s*).

So also where the directors of a company assisted, *ultra vires*, in bringing out a new company, and for that purpose took on behalf of their company a large number of shares in the new company, they were held jointly and severally liable to make good to their company the sums paid in respect of the shares (*t*).

(*f*) *Pickering's Claim*, 6 Ch. 525.

(*g*) *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244; *sub nom. Swift* v. *Jewsbury*, L. R. 9 Q. B. 301.

(*h*) They are also entitled to the benefits of their character as trustees, so as to be entitled to indemnity from their *cestuis que trust* for expenses *bonâ fide* incurred: *German Mining Co., E. p. Chippendale*, 4 D. M. & G. 19, 52.

(*i*) *Bennett's Case*, 5 D. M. & G. 284, 297.

(*k*) *Madrid Bank* v. *Pelly*, 7 Eq. 442; *E. p. Williams*, 2 Eq. 216; *Parker* v. *McKenna*, 10 Ch. 96.

(*l*) *Land Credit Co. of Ireland* v. *Lord Fermoy*, 8 Eq. 7, 11; 5 Ch. 793; *Parker* v. *Lewis* (V.-C. M.), 28 L. T. 91, 98; on app. 8 Ch. 1035; *Gray* v. *Lewis*, 8 Eq. 526; 8 Ch. 1035; *Flitcroft's Case*, 21 Ch. Div. 519; *Oxford Building Society*, 35 Ch. D. 502.

(*m*) *Gilbert's Case*, 5 Ch. 559.

(*n*) *Sykes' Case*, 13 Eq. 255.

(*o*) *Harris* v. *North Devon Railway Co.*, 20 Beav. 384; and see note to Arts. (17)—(19), *supra*.

(*p*) *Charitable Corporation* v. *Sutton*, 2 Atk. 400.

(*q*) *Madrid Bank* v. *Pelly*, 7 Eq. 442.

(*r*) *Parker* v. *McKenna*, 10 Ch. 96.

(*s*) *Land Credit Co. of Ireland* v. *Lord Fermoy*, 8 Eq. 7; 5 Ch. 763.

(*t*) *Joint Stock Discount Co.* v. *Brown*, 8 Eq. 381.

Other cases, by which the liability of directors to make good funds of the company illegally appropriated to purposes foreign to those of the company is established, are *Gray* v. *Lewis* and *Parker* v. *Lewis* (*u*); *Re Imperial Land Company of Marseilles, Re National Bank* (*x*), where the directors had improperly paid to a bank a large sum as an inducement to them to open an account: *Re Reese River Silver Mining Co.* (*y*); *General Exchange Bank* v. *Horner* (*z*); *Imperial Mercantile Credit Association* v. *Chapman* (a); *London, Hamburg, and Continental Bank, Zulueta's Claim* (*b*).

But although it is clear that the Court may compel directors to refund to the company money misapplied by them, though in no way appropriated to their own use or for their own benefit (*c*), yet the position of directors in this respect is unquestionably very different from that of ordinary trustees. They may not inaptly be described as trustees of the powers entrusted to them as between themselves and the shareholders (*d*), but as between themselves and the shareholders even, it is only in a qualified sense that they can be called trustees. They are more properly described as managing partners (*e*), and while, as has been seen, they may be rendered liable for misuse of their powers, and may be charged not only with moneys belonging to the company improperly applied to their own use, but with moneys of the company misapplied but from which they personally have had no benefit, yet they cannot be charged as a trustee might, as, for instance, with want of due diligence in neglecting to sue, when by suing earlier a fund might have been recovered (*f*).

"The distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property, and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. The same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional, and casual circumstance. The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company of whom he is a director, and for whom he is acting. He cannot sue on such contracts, nor be sued on them unless he exceeds his authority. That seems to me to be the broad distinction between trustees and directors" (*g*).

Where, however, the question is one of breach of duty paid directors are certainly not entitled to a more favourable view in the eyes of the Court than ordinary unpaid trustees (*h*): and a director is liable for negligence in performing his duties (*i*). But there is no case, it is believed, in which directors have been held answerable for losses sustained by their mere innocent mistake, nor unless that mistake has been accompanied by some fraudulent or at least suspicious conduct or motive (*k*).

(*u*) 8 Eq. 526, and 28 L. T. 91; but see these cases on appeal, 8 Ch. 1035.

(*x*) 10 Eq. 298.

(*y*) W. N. 1867, 139.

(*z*) 9 Eq. 480; and see cases collected, *infra*, under Art. (57).

(a) 19 W. R. 379.

(*b*) 9 Eq. 270; 5 Ch. 444.

(*c*) *Pickering* v. *Stephenson*, 14 Eq. 322, 342.

(*d*) Directors are not trustees for the creditors at all: *Poole's Case*, 9 Ch. Div. 322.

(*e*) *Forest of Dean Coal Co.*, 10 Ch. D. 450; *London Financial Association* v. *Kelk*, 26 Ch. D. 107, 143; *Faure Electric Co.*, 40 Ch. D. 141, 151.

(*f*) *Forest of Dean Coal Co.*, 10 Ch. D. 450.

(*g*) James, L.J., *Smith* v. *Anderson*, 15 Ch. Div. 247, 275.

(*h*) *Joint Stock Discount Co.* v. *Brown*, 8 Eq. 381, 396; *Parker* v. *Lewis* (V.-C.M.), 28 L. T. 91, 98.

(*i*) *General Light Co., Marzetti's Case*, 28 W. R. 541; 42 L. T. 206.

(*k*) *London Financial Association* v. *Kelk*,

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And even where the facts are such as that the Court would grant an injunction to stop the expenditure of the company's funds in a particular manner in the future, it will not necessarily order repayment by the directors where the funds have been so expended in the past (*l*).

Crassa negligentia

But facts which may shew imprudence in the exercise of powers undoubtedly conferred upon directors will not subject them to personal responsibility, unless the imprudence be so great and so manifest as to amount to *crassa negligentia*. Directors, acting for the company as its agents, are bound to use the same amount of prudence which in the same circumstances they would exercise on their own behalf; but if they are authorized to do an act in itself imprudent, they are not to be held responsible for the consequences of doing it (*m*). The Court will not visit directors with the consequences of a mere error of judgment when they have acted *bonâ fide* and have intended to do what was right and best for the interests of the company (*n*).

"A director should not be held liable upon any very strict rules, such as those in my opinion too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable; directors are not to be made liable on those strict rules which have been applied to trustees" (*o*). The director must be "guilty of such negligence as would make him liable in an action. Mere imprudence is not such negligence. Want of judgment is not. It must be such negligence as would make a man liable in point of law" (*p*).

Fraud.

And if directors keep within the powers entrusted to them, the Court cannot interfere with the discretion exercised by them, however foolish their conduct may seem, unless it be alleged and shewn that their conduct has been prompted by fraudulent and improper motives, and not merely by a default of judgment (*q*). If they use their powers improperly they may be restrained (*r*).

Dividend improperly paid.

Thus where, upon a bill seeking to make directors liable for misrepresenting the value of the assets of a company, whereby fictitious and improper dividends were sanctioned and paid, a loan to a director who had since died insolvent was mentioned as one of the losses incurred, but no fraud was alleged in the matter of the loan, it was held that, on such a bill, the directors could not be made liable for the sum so advanced and lost, on the ground of its having been improperly advanced (*s*).

So, although a director may be made to repay a dividend declared and paid under a delusive and fraudulent balance-sheet, yet if the estimate upon which the dividend was declared was *bonâ fide* made, the balance-sheet will not be declared delusive and fraudulent merely because an estimated value was put upon assets of the company, being a company engaged in a hazardous trade, which were then in jeopardy and were subsequently lost, or because the company was actually obliged to borrow money in order to pay the dividend (*t*).

26 Ch. D. 107, 144; *Pickering* v. *Stephenson*, 14 Eq. 322; *Grimwade* v. *Mutual Society*, 52 L. T. 409.

(*l*) *Pickering* v. *Stephenson*, 14 Eq. 322; *Studdert* v. *Grosvenor*, 33 Ch. D. 528. But see *Faure Electric Co.*, 40 Ch. D. 141.

(*m*) *Overend & Gurney Co.* v. *Gibb*, L. R. 5 H. L. 480; S. C. 4 Ch. 701.

(*n*) *Re Brighton Brewery Co., Hunt's Case*, 37 L. J. (Ch.) 278, 280; 16 W. R. 472; *German Mining Co., E. p. Chippendale*, 4 D. M. & G. 19, 54; *Sheffield Building Soc.* v. *Aizlewood*, 44 Ch. D. 412.

(*o*) *Per* James, L.J., *Marzetti's Case*, 28 W. R. 542, 543.

(*p*) *Per* Brett, L.J., Ibid.

(*q*) *Turquand* v. *Marshall*, 4 Ch. 376, 386; and see *Overend & Gurney Co.* v. *Gibb*, L. R. 5 H. L. 480, 494; *Rance's Case*, judgment of Romilly, M.R., 6 Ch. 109, n.; *Faure Electric Co.*, 40 Ch. D. 141.

(*r*) *Cannon* v. *Trask*, 20 Eq. 669.

(*s*) *Turquand* v. *Marshall*, 6 Eq. 112; 4 Ch. 376.

(*t*) *Stringer's Case*, 4 Ch. 475.

But although the Court will not lightly interfere with a dividend *bonâ fide* declared after proper investigation, on the ground that the estimate on which it was founded turns out to be erroneous, yet if a proper investigation has not been made, the onus is on the directors to shew that the dividend was properly paid out of profits, and if they are unable to shew this, they will be ordered to refund (*u*).

For the assets of the company are entrusted to the directors to be applied for certain defined objects, and they are responsible as for a breach of trust if they apply them to other objects. An application of the company's capital to the payment of dividends is *ultra vires*, from which it results:—

(*a.*) That directors are jointly and severally liable for sums so misapplied.

(*b.*) That even if the shareholders knew the true facts, so that they personally have become bound by ratification, they cannot bind the company, and the company, whether a going concern or in liquidation, can compel the directors to replace the money (*x*): and this is so even if the corporation still consists of the same members (*y*), and the moneys to be recovered have in fact been divided rateably among those members; but subject no doubt to this, that if the corporation were suing for the purpose of paying over again to the members what the members had already received the Court would not allow it (*z*).

(*c.*) That the directors cannot set off moneys due from the company to them.

(*d.*) That the Statute of Limitations cannot be set up (a) (*d*).

Moreover, in order to charge directors for dividends paid out of capital it is not necessary to establish fraud (*b*), and this upon the ground that the directors are responsible for applying the capital of the company to its proper objects, and if they apply it otherwise they have failed to discharge themselves to that extent, and must be taken not to have spent the company's money. The following propositions Kay, J., says are established:—

1. Directors are *quasi* trustees (*c*) of the capital of the company.

2. Directors who improperly pay dividends out of capital are liable to repay such dividends personally upon the company being wound up.

3. This liability may be enforced by a creditor or by the liquidator under sect. 165 of the Act of 1862, or by the incorporated company before a winding-up.

4. The acquiescence of the shareholders does not affect the creditors in such a case.

5. Such act is a breach of trust, and the remedy is not barred by the Statute of Limitations (*d*).

The liability being one incurred by means of a breach of trust is not discharged by liquidation proceedings (*c*), and does not die with the person (*e*).

The directors were in the *Oxford Building Society* (*b*) held jointly and severally liable for the whole amount of the dividends declared at the time when they respectively were directors, with interest at 4 per cent. Dividends

(*u*) *Rance's Case*, 6 Ch. 104; *Evans* v. *Coventry*, 25 L. J. (Ch.) 491, 500; 8 D. M. & G. 835; *Oxford Building Society*, 35 Ch. D. 502; *Leeds Estate Co.* v. *Shepherd*, 36 Ch. D. 787; *et v. supra*, p. 404.

(*x*) *Secus* possibly where the matter is one which the members can ratify: *British Seamless Paper Box Co.*, 17 Ch. Div. 467.

(*y*) 21 Ch. Div. 535; and see *Alexandra Palace Co.*, 21 Ch. D. 149; 23 Ch. D. 297.

(*z*) 21 Ch. Div. 536.

(a) *Flitcroft's Case*, 21 Ch. Div. 519.

(*b*) *Oxford Building Society*, 35 Ch. D. 509; *Leeds Estate Co.* v. *Shepherd*, 36 Ch. D. 787.

(*c*) *Ramskill* v. *Edwards*, 31 Ch. D. 100.

(*d*) 35 Ch. D. 509, referring to *Evans* v. *Coventry*, 8 D. M. & G. 835; *Salisbury* v. *Metropolitan Railway Co.* 22 L. T. 839; *National Funds Co.* 10 Ch. D. 118; *Flitcroft's Case*, 21 Ch. D. 519. Subject now to the Trustee Act, 1888, 51 & 52 Vict. c. 59.

(*e*) *Leeds Estate Co.* v. *Shepherd*, 36 Ch. D. 787.

were under the articles payable only out of "realized profits," which was held to mean "profits tangible for the purpose of division."

Two other questions arose in the case, viz., (i.) as to remuneration received by the directors, and which was contingent upon dividend at a certain rate; and (ii.) commissions on sales which the directors had received. With the former they were charged, not jointly and severally, but each with the amount which he had received [why does not appear (*f*)] with interest at 4 per cent.; with the latter they were charged jointly and severally with interest at 5 per cent.

The form of order was followed in *Leeds Estate Co.* v. *Shepherd* (*g*).

But in *Denham & Co.* (*h*) a director who had neither knowledge nor any ground to suspect that the accounts had (as in fact they had) been fraudulently manipulated escaped, and was allowed even to retain the amount which he himself as a shareholder had received. He had actually moved the resolution for one of the dividends.

The shareholders, however, cannot as a body make the directors liable to repay the gross amount of dividends improperly declared and paid, for the injury is not one common to all the shareholders, but may affect each individual shareholder in a different manner. If any shareholder has been deceived and induced to remain longer in the concern, and has thereby incurred loss, this may be the subject of an action at law; or he may be entitled to proceed individually against the directors, just as a stranger who had been induced by their representation to enter into a contract; but in such a case each shareholder must proceed individually in respect of his own damage (*i*).

Directors cannot plead ignorance.

It is the duty of the directors, a duty which they have undertaken to perform in becoming directors, to be acquainted with the proceedings of the board of which they are members. A director cannot, therefore, *semble*, escape liability by professing ignorance of a state of affairs which he might have learned from the books of the company (*k*). But knowledge of all the entries in the books will not be imputed to him (*l*).

As to notice of matters referred to in minutes read at a meeting at which a director was present, see *Ashhurst* v. *Mason* (*m*).

So a director cannot justify himself for sanctioning an improper payment out of the funds of the company by asserting ignorance of the purpose to which it was to be applied. A plea of ignorance in such a case is a plea of guilty (*n*). But he is not responsible if the proceeds of a cheque, drawn with his sanction for a lawful purpose, are misappropriated (*o*).

And a director who, knowing the improper character of a proposed transaction, contents himself with protesting, and then does nothing more, stands by no means in a better position than his fellows (*p*).

Moreover, a director will not be heard to say that he signed a cheque as a merely ministerial act. The provisions by which a company guards against

(*f*) It is conceived that they were all jointly and severally liable for the total: *Carriage Co-operative Association*, 27 Ch. D. 322.

(*g*) 36 Ch. D. 787.

(*h*) 25 Ch. D. 752.

(*i*) *Turquand* v. *Marshall*, 6 Eq. 112, 131; 4 Ch. 376, 385; *cf.* *Hallows* v. *Fernie*, 3 Ch. 467.

(*k*) *Turquand* v. *Marshall*, 6 Eq. 112, 130; see, however, S. C. 4 Ch. 376, 383; where an inquiry "as to the time when the loss came to the knowledge of each director" is spoken of.

(*l*) *Hallmark's Case*, 9 Ch. Div. 329; *Denham & Co.*, 25 Ch. D. 752.

(*m*) 20 Eq. 225.

(*n*) *Land Credit Co. of Ireland* v. *Lord Fermoy*, 8 Eq. 7, 11; *General Light Co., Marzetti's Case*, W. N. 1880, 50; 28 W. R. 541; 42 L. T. 206.

(*o*) *Perry's Case*, 34 L. T. 716.

(*p*) *Joint Stock Discount Co.* v. *Brown*, 8 Eq. 381, 402; *Ramskill* v. *Edwards*, 31 Ch. D. 100.

Table A. Art. 55.

a misapplication of its funds by requiring that cheques shall be signed by certain persons, of course imply that each of those persons takes care to inform himself that the payment is a proper one, or if he does not so inform himself is prepared to take the risk of not doing so (*q*). The signing of a cheque may be an adoption of the whole transaction (*r*).

But a director cannot be held liable for being defrauded; and, therefore, where the directors, under a power in the deed, appointed an executive committee, and the committee reported to a meeting of the directors certain cheques as having been drawn for loans, and the directors approved them, a director who was present, but denied all knowledge of the improper transaction in respect of which the cheques were in fact drawn, was held not to be liable to replace the money (*s*). And where dividends were paid out of capital upon accounts which had been fraudulently manipulated a director who had no knowledge and no grounds for suspecting misconduct was not liable (*t*).

And a director cannot necessarily be fixed with liability in respect of acts of his co-directors of which he had no knowledge and in which he had taken no part (*u*). He is liable only for his own personal fraud, or for the fraud of his co-directors, or of any other agent of the company which he has either expressly authorized or connived at (*x*). But if he be brought into Court upon proceedings against his co-directors he will probably be left to pay his own costs (*y*).

Misrepresentation.

Another considerable head as regards the liability of directors is that which concerns their responsibility to persons who have been induced to become shareholders by misrepresentations put forth in the prospectus of a new company. The cases dealing with this point, however, have already been noticed (*z*), and it will be unnecessary again to advert to them under this head.

Where directors by a misrepresentation of fact induce dealings with their company, which do not bind the company, they are, as is always the case where an agent makes a misrepresentation in point of fact as to his power to bind his principal, liable personally to make good the representation they have made (a).

But if the misrepresentation be not of fact, but be only a mistaken representation of the law, this is not such a representation as the directors, as agents, are personally liable to make good (*b*).

Contribution among directors.

If one director is rendered liable to the company for misapplication of the company's funds (*e.g.*, for advancing upon unauthorized securities) he can maintain an action against his co-creditors for contribution (*c*), and the

(*q*) *Joint Stock Discount Co.* v. *Brown*, 8 Eq. p. 404.

(*r*) *Ramskill* v. *Edwards*, 31 Ch. D. 100.

(*s*) *Land Credit Co. of Ireland* v. *Lord Fermoy*, 5 Ch. 763.

(*t*) *Denham & Co.*, 25 Ch. D. 752.

(*u*) *Perry's Case*, 34 L. T. 716. See, however, *Charitable Corporation* v. *Sutton*, 2 Atk. 400; followed in *Att.-Gen.* v. *Wilson*, Cr. & Ph. 1, 28.

(*x*) *Weir* v. *Barnett*, 3 Ex. D. 32; *Weir* v. *Bell*, 3 Ex. Div. 238; *Cargill* v. *Bower*, 10 Ch. D. 502; and see *ante*, p. 127.

(*y*) *Joint Stock Discount Co.* v. *Brown*, 8 Eq. 381, 401, 406; *Gray* v. *Lewis*, 8 Eq. 526, 545; *General Exchange Bank* v. *Horner*, 9 Eq. 480; *Denham & Co.*, 25 Ch. D. 752.

(*z*) *v. supra*, p. 124.

(a) *Cherry* v. *Colonial Bank of Australasia*, L. R. 3 P. C. 24; *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Weeks* v. *Propert*, L. R. 8 C. P. 427; and see *Collen* v. *Wright*, 7 E. & B. 301; 26 L. J. (Q.B.) 147; 8 E. & B. 647; 27 L. J. (Q.B.) 215; *Chapleo* v. *Brunswick Building Society*, 5 C. P. D. 331; 6 Q. B. Div. 696; *Firbank* v. *Humphreys*, 18 Q. B. Div. 54; *West London Commercial Bank* v. *Kitson*, 12 Q. B. D. 157; 13 Q. B. Div. 360.

(*b*) *Beattie* v. *Lord Ebury*, 7 Ch. 777; L. R. 7 H. L. 102; *Rashdall* v. *Ford*, 2 Eq. 750.

(*c*) *Ramskill* v. *Edwards*, 31 Ch. D. 100.

Table A. Art. 55.

liability to contribute survives in the case of death (*d*), and is a "liability incurred by means of a breach of trust" so as not to be discharged by liquidation proceedings (*d*).

Knowledge of director.

A director will be taken to know that which in the performance of the trust which he has undertaken to perform for the benefit of the company it was his duty to know (*e*). Complete knowledge of the provisions of the deed of settlement or articles of association will be ascribed to him (*f*).

But he will not be taken to have notice of everything that may be discovered from entries in the company's books (*g*).

Thus, where the manager of the company had, in excess of his powers, purchased the company's shares and registered transfers of them to those two of the directors who were trustees for the purchase of shares on the company's account, they were held not to be affected with knowledge of the transaction (*h*).

Notice.

The knowledge of a director is not necessarily the knowledge of the company (*i*). A director is simply a person appointed to act as one of a board, with power to bind the company when acting as one of a board, but not otherwise. Because the same person is a common director of two companies, the one company has not therefore necessarily notice of everything that is within the knowledge of the common director, and which knowledge he has acquired as director of the other company, any more than it can be supposed to have knowledge of everything the director knows about his own private affairs (*k*).

So it has been held that a company is not affected with notice through the knowledge of its sole director, when the imputation of notice would have necessarily involved that the director had disclosed to the company his own fraud (*l*).

Casual notice brought home to the secretary, not as secretary, but as an individual, is not notice to the company (*m*).

Directors *de facto*.

A stranger dealing with a company has a right to assume, as against the company, that all matters of internal management have been duly complied with (*n*). And, therefore, where a person effected at the office of an insurance company a policy, which was signed by three persons who were acting directors *de facto*, although not directors *de jure*, and sealed with what purported to be the company's seal, it was held that the policy was binding on the company (*o*). And where the company's bankers received from the company's office a formal notice signed by the "secretary" that they were to pay cheques signed by "either two of the following three directors" they were entitled to pay on cheques so signed although no directors or secretary had really ever been appointed (*p*).

(*d*) *Ramskill* v. *Edwards*, 31 Ch. D. 100.

(*e*) *E. p. Brown*, 19 Beav. 97, 104; *Esparto Trading Co.*, 12 Ch. D. 191, 204.

(*f*) *Lane's Case*, 1 D. J. & S. 504, 506.

(*g*) *Hallmark's Case*, 9 Ch. Div. 329; *Denham & Co.*, 25 Ch. D. 752.

(*h*) *Cartmell's Case*, 9 Ch. 691.

(*i*) *Peruvian Railways Co.* v. *Thames, &c., Insurance Co.*, 2 Ch. 617; *Re Carew's Estate Act*, 31 Beav. 39; *Ebbw Vale Co.'s Claim*, 8 Eq. 14.

(*k*) *Re Marseilles Extension Railway Co., E. p. Crédit Foncier*, 7 Ch. 161, 168, 170; 25 L. T. 619, 858; and see, as to a common manager, *Hardy* v. *Metropolitan Land Co.*, 12 Eq. 386; 7 Ch. 427.

(*l*) *Re European Bank, E. p. Oriental Commercial Bank*, 5 Ch. 358; and see *Re Carew's Estate Act*, 31 Beav. 39.

(*m*) *Société Générale* v. *Tramways Union*, 14 Q. B. Div. 424, 438.

(*n*) *Royal British Bank* v. *Turquand*, 5 E. & B. 248; 6 E. & B. 327; *Totterdell* v. *Fareham Blue Brick Co.*, L. R. 1 C. P. 674; *Romford Canal Co.*, 24 Ch. D. 85.

(*o*) *Re County Life Assurance Co.*, 5 Ch. 288; but see *Wandsworth Gas Light Co.* v. *Wright*, 22 L. T. 404, where the third party was the solicitor to the company and had notice.

(*p*) *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869. *Secus* if there be constructive notice: *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366, 379.

But this principle does not apply to the case where an agent of the company has done something beyond any authority which was given to him, or which he was held out as having (*q*).

And, as against shareholders, acts done by directors who are not duly appointed are invalid; and therefore a shareholder was held not liable in an action for a call, which had been made by directors appointed at a meeting at which only three of the seven subscribers of the memorandum of association were present (*r*).

It has, however, been held by the House of Lords that a rate is not rendered invalid by the fact that it was made by vestrymen *de facto* but not *de jure* (*s*).

Bye-laws.

And although, after much difference of opinion, it must be taken to be settled, that persons dealing with a registered company are bound to acquaint themselves with the limits imposed by the deed of settlement or articles of association on the authority of the directors (*t*); yet strangers to the company dealing with directors cannot be affected by bye-laws, which may under the articles be from time to time made and varied by the directors, unless notice of such bye-laws is proved (*u*).

(56.) The continuing directors may act notwithstanding any vacancy in their body.

Where the articles name a minimum number of directors and also contain an article in this form, a quorum of a Board consisting of continuing directors of less than the minimum number may act (*x*). *Secus*, if the continuing directors are less than a quorum (*y*).

Disqualification of Directors.

Directors' disqualification:—

(57.) The office of director shall be vacated,—

If he holds any other office or place of profit under the company;

If he becomes bankrupt or insolvent;

If he is concerned in or participates in the profits of (*a*) any contract with the company.

But the above rules shall be subject to the following exceptions; that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is a director; nevertheless he shall not vote in respect of such contract or work; and if he does so vote his vote shall not be counted.

(*a*) See *Todd* v. *Robinson*, 14 Q. B. Div. 739.

by holding another office:—

In a company whose articles provided that a director who should accept or hold any other office (omitting the words "or place of profit") under the

(*q*) *Cartmell's Case*, 9 Ch. 691.

(*r*) *Howbeach Coal Co.* v. *Teague*, 5 H. & N. 151; doubted in *York Tramways Co.* v. *Willows*, 8 Q. B. Div. 685; but see *London and Southern Counties Land Co.*, 31 Bh. D. 223; *cf. Garden Gully Co.* v. *McLister*, 1 App. Cas. 39, and see *ante*, p. 192.

(*s*) *Scadding* v. *Lorant*, 3 H. L. C. 418.

(*t*) *Ernest* v. *Nicholls*, 6 H. L. C. 401, 419; *Fountaine* v. *Carmarthen Railway Co.*, 5 Eq. 316, 322.

(*u*) *Royal Bank of India's Case*, 4 Ch. 252.

(*x*) *Scottish Petroleum Co.*, 23 Ch. Div. 413.

(*y*) *Newhaven Local Board* v. *Newhaven School Board*, W. N. 1885, 130, 157.

Table A. Art. 57.

company should cease to be a director, the salaried secretary of the company was elected a director. After his election he ceased to receive his salary as secretary, but continued to perform the duties of that office. It was held that he was not thereby disqualified from acting as a director (*z*).

as to making profit in matters in which he acts for the company.

The Companies Clauses Act, 1845, provides (sect. 85) that no director shall be capable of being interested in any contract with the company during the time he shall be a director. The Companies Acts contain no corresponding clause, and Table A. confines itself to making such interest a disqualification.

Upon general rules of equity, however, the broad principle is firmly established that a person holding a fiduciary position as director with regard to a company cannot obtain for himself a benefit derived from the employment of the funds of the company in any matter in which he may happen to be engaged, unless, of course, the company knows and assents. No director can, in the absence of a stipulation to the contrary, be allowed to be a partaker in any benefit whatever from any contract which requires the sanction of a board of which he is a member. He stands in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company (a).

It makes no difference that the profit is one which the company itself could not have obtained. The question is not whether the company could have acquired it, but whether the director acquired it while acting for the company (*b*).

And the reason for this is, that the company have a right to the entire services of their paid directors, that they have a right to the advice of every director upon matters which are brought before the board for consideration; and that the general rule that no trustee can derive any benefit from dealing with the trust funds applies with still greater force to that state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance (*c*).

The cases in which these principles have been acted on are numerous (*d*), and to these may be added all those cases in which directors have been held liable to refund moneys improperly, and without the consent of their *cestuis que trust*, the shareholders, paid to them by promoters out of moneys payable in respect of the promotion of the company (*e*), or in respect of an amalgamation (*f*).

But it is perfectly competent to a company to stipulate that the right to these exclusive services on the part of their directors is a benefit of which they do not desire to avail themselves (*g*). It may be more advantageous to a company to have directors who can advance the interests of the

(*z*) *Iron Ship Coating Co.* v. *Blunt*, L. R. 3 C. P. 484.

(a) *Imperial Mercantile Credit Association* v. *Coleman*, 6 Ch. 558, 566 (Malins, V.C., 18 W. R. 570; 22 L. T. 357); L. R. 6 H. L. 189, 198, 204; *James* v. *Eve*, L. R. 6 H. L. 328, 349; *Great Luxembourg Railway Co.* v. *Magnay*, 25 Beav. 586.

(*b*) *Boston Co.* v. *Ansell*, 39 Ch. Div. 339.

(*c*) *Benson* v. *Heathorn*, 1 Y. & C. Ch. 326, 341.

(*d*) *E. p. James*, 8 Ves. 345; *Fawcett* v. *Whitehouse*, 1 Russ. & My. 132; *Hichens* v. *Congreve*, 4 Russ. 562; 1 Russ. & My. 150, n.; *Benson* v. *Heathorn*, 1 Y. & C. Ch. 326; *Beck* v. *Kantorwicz*, 3 K. & J. 230; *Aberdeen Railway Co.* v. *Blaikie*, 1 Macq. 461; *Bank of London* v. *Tyrrell*, 27 Beav. 273; 10 H. L. C. 26; collected in 6 Ch. 563, n.; *Great Luxembourg Railway Co.* v. *Magnay*, 25 Beav. 586.

(*e*) *Brighton Brewery Co., Hunt's Case*, 37 L. J. (Ch.) 278; 16 W. R. 472; *Re London and Provincial Starch Co.*, 20 L. T. 390; *Orgill's Case*, 21 L. T. 221 (doubted in *Hay's Case*, 10 Ch. 593, 600); *E. p. Williams*, 2 Eq. 216; *Madrid Bank* v. *Pelly*, 7 Eq. 442; *v. supra*, p. 405.

(*f*) *General Exchange Bank* v. *Horner*, 9 Eq. 480.

(*g*) As in *Adamson's Case*, 18 Eq. 670.

Table A. Art. 57.

company by their connection, and, by allowing them a commission, to make it worth their while to introduce business to the company, than to have the benefit of their advice in every proposed transaction.

And, therefore, where the articles provided that a director should vacate his office if he participated in the profits of any work done for the company without declaring his interest at a meeting of the directors, it was held by Lord Hatherley, L.C., that the articles contemplated that a director might have an interest in business brought by him to the company, and under the circumstances of that case his Lordship held that a director might retain a commission made by him on business so brought (*h*). This decision was on appeal reversed by the House of Lords (*i*), but upon the ground that the declaration of interest was not sufficiently explicit. A doubt was, however, thrown out whether a provision in the articles that a director shall vacate his office if he is interested in a contract with the company without declaring his interest, is of itself sufficient to countervail the rule of equity, and impliedly to sanction the retaining of his interest by a director if he declare it.

And so a clause in an agreement for the amalgamation of two companies, providing that part of the purchase-money should be paid to the directors of the selling company by way of bonus, was held not to invalidate the amalgamation (*k*).

The reason of the rule of equity does not apply to contracts entered into before incorporation between a person then intending to be a director of the projected company, and the owners of the business which the company is formed to work. Of course such agreements might be entered into in fraud, and if so the Court would reach them. But in the absence of fraud there is wanting in such a case the first requisite which calls the rule into action, viz., the sustenance by one person of the double character of both seller and buyer (*l*).

There is not in this Act any section corresponding to the 29th section of the 7 & 8 Vict. c. 110. By that section a director was precluded from voting or acting as a director on the subject of any contract proposed to be made by or on behalf of the company in which he was interested; and any contract (with certain exceptions) in which any director was interested was of no effect until confirmed by the shareholders at the next general or special meeting. 7 & 8 Vict. c. 110, s. 29.

Under this section it was held that there was no remedy against a company on any such contract unless the provisions of the statute with respect to confirmation had been strictly complied with (*m*).

But, except as allowed by the articles, no statutory enactment is required to invalidate as against the director a contract made by him with his company for profit to himself. And, therefore, where a director made advances to his company on the terms that no interest should be payable, but that he should be allowed a commission or bonus on goods sold, such commission was disallowed, and repayment only of his advances with interest at 5 per cent. was ordered (*n*).

A director cannot come into a Court of Equity for specific performance of

(*h*) *Imperial Mercantile Credit Association* v. *Coleman*, 6 Ch. 558.
(*i*) L. R. 6 H. L. 189.
(*k*) *Southall* v. *British Mutual, &c., Society*, 6 Ch. 614.
(*l*) *Albion Co.* v. *Martin*, 1 Ch. D. 580.
(*m*) *Ernest* v. *Nicholls*, 6 H. L. C. 401; *South Essex Gas Light Co., E. p. Stears*, Joh. 480.
(*n*) *Cardiff Preserved Coal Co., E. p. Hill*, 32 L. J. (Ch.) 154; 7 L. T. 656; and see *Central Darjeeling Tea Co.*, 15 L. T. 234; *Anglo-Californian Gold Mining Co., E. p. Williamson*, 17 L. T. 164.

Table A. Art. 58.

a contract with his company, out of which he is to make a profit, and his assignee stands in no better position (*o*).

Votes.

A prohibition in the articles against a director voting "as a director in respect of any matter in which he is personally interested," does not preclude him from voting as a shareholder at a general meeting in respect of any such matter (*p*).

Rotation of Directors.

Retirement of directors;

(58.) At the first ordinary meeting after the registration of the company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one third of the directors for the time being, or if their number is not a multiple of three, then the number nearest to one third, shall retire from office.

The object of this provision is evidently to give the shareholders within a reasonable time after the formation of the company the right to elect their own directors, and not necessarily to leave them under the management of the temporary officers appointed under Arts. (52), (53), in whose selection none but the subscribers of the memorandum will have had a voice.

It will be observed that the first directors are to retire at the first ordinary meeting, that under Art. (29) the first general meeting is to be held within six months after registration, and that by Art. (31) such meeting will be an ordinary meeting.

By Companies Act, 1867, s. 39, a general meeting must be held within four months after registration, and if this be an ordinary meeting the first directors will then retire. It has, however, been held that an extraordinary meeting will equally be a compliance with the terms of that section; and where, in a company governed by Table A., an extraordinary meeting was held within the four months, and special resolutions were then passed and afterwards confirmed (*q*) altering this article, and substituting words which postponed the first ordinary meeting for three years, it was held that this was valid (*r*).

It is evident that the shareholders were not thereby deprived of any right of election of their directors, for, by passing the resolutions, they in fact accepted the original directors for a period of three years.

(59.) The one third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the company shall, unless the directors agree among themselves, be determined by ballot: in every subsequent year the one third or other nearest number who have been longest in office shall retire.

re-eligible.

(60.) A retiring director shall be re-eligible.

Election of directors.

(61.) The company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

(*o*) *Flanagan* v. *Great Western Railway Co.*, 7 Eq. 116.

(*p*) *East Pant Du Mining Co.* v. *Merryweather*, 2 H. & M. 254; and see *supra*, Art. (44), n.

(*q*) *Supra*, s. 50.

(*r*) *Lord Claud Hamilton's Case*, 8 Ch. 548.

Table A. Art. 62.

The directors are to be chosen, as a matter of choice and selection, either by the shareholders, or, as regards a temporary interval, by the board of directors. Any agreement by which the directors, or some of them, are to be imposed upon the shareholders by another company altogether at arm's length, and even in a position of antagonism to them, must be illegal (*s*).

Poll.

At an election of directors the return of the poll must be taken to be good until it is brought into question before a proper tribunal in a proper manner: and therefore where—at a board meeting of two directors and two persons who claimed to be directors on the ground that the declaration of the poll, which was against them, was false,—a resolution was passed (three being a quorum) to direct legal proceedings to be taken to restrain one of the persons, who had been declared elected, from acting, a bill filed thereunder in the name of the company was ordered to be taken off the file (*t*).

(62.) If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

Number of directors.

(63.) The company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

Casual vacancies.

(64.) Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

A casual vacancy occurred in February: the ordinary general meeting in March elected to the places of the directors who retired by rotation, but did not fill up the casual vacancy: held that the board had power to fill it up subsequently (*u*).

Where the articles provide that the directors shall not be less than three; that the board may fill up casual vacancies: and that the continuing board may act notwithstanding any vacancy in their body, *quære*, when a casual vacancy occurs in a board of three can the remaining two fill it up? (*x*).

Removal of director.

(65.) The company, in general meeting, may, by a special resolution (*a*), remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead: the person so appointed shall hold

(*s*) *James* v. *Eve*, L. R. 6 H. L. 335.

(*t*) *Wandsworth Gas Light Co.* v. *Wright*, 22 L. T. 404.

(*u*) *Munster* v. *Cammell Co.*, 21 Ch. D. 183; *Isle of Wight Railway Co.* v. *Tahourdin*, 25 Ch. Div. 320.

(*x*) *York Tramways Co.* v. *Willows*, 8 Q. B. D. 690, 695.

Table A. Art. 66.

office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

(a) s. 51.

Whether there is or not in a corporation an inherent power to remove directors for whom no defined period of office has been fixed, there is no such inherent power where by the contract between the members their appointment has been made for a definite period (*y*). In companies governed by the Companies Clauses Act, 1845, there is, having regard to sect. 91 of that Act, power to remove (*z*). But there is no such power in the Companies Acts, and unless the articles of association contain a power of removal the articles must first be altered by inserting a power, and then the exercise of the power must follow (*y*).

Where the articles therefore (*y*) defined a period of office and the company passed and confirmed a special resolution, not altering the articles, but removing certain directors and appointing others, the removal was ineffectual, and the Court refused at the instance of the company to restrain the acting of the directors removed and the exclusion of those appointed in their place.

But if the majority of the shareholders are in fact opposed to certain persons being directors, the Court may refuse to interfere by interlocutory injunction in favour of the persons whom the majority disapprove, notwithstanding that they have not been effectually removed (a). "It is a very different thing to say that the Court will not interfere to force a director on a company and to say that a company cannot ask the Court to restrain a particular man from acting as a director, if the resolution by which they have attempted to remove him has been ineffectual" (*b*).

Where power is given by the articles to remove a director "for negligence, misconduct in office, or any other reasonable cause," this means such a cause as shall be deemed reasonable, not by a Court of justice, but by the shareholders assembled at a meeting duly convened. In the absence of proof of direct fraud, therefore, the Court has no jurisdiction, and will refuse to interfere or to determine whether the decision of the meeting has or not been unduly influenced by unfounded statements (*c*).

Quære whether a stipulation that a director shall not be removable will be enforced by the Court (*d*).

Proceedings of Directors.

Directors' meetings—quorum—votes.

(66.) The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business: questions arising at any meeting shall be decided by a majority of votes; in case of an equality of votes the chairman shall have a second or casting vote: a director may at any time summon a meeting of the directors.

Notice.

Every member of the board ought no doubt to have a sufficient notice of

(*y*) *Imp. Hydropathic Co.* v. *Hampson*, 23 Ch. Div. 1.

(*z*) *Isle of Wight Railway Co.* v. *Tahourden*, 25 Ch. Div. 320.

(a) *Harben* v. *Phillips*, 23 Ch. Div. 14.

(*b*) 23 Ch. Div. 41.

(*c*) *Inderwick* v. *Snell*, 2 Mac. & G. 216; and see *Hayman* v. *Governing Body of Rugby School*, 18 Eq. 28, and cases there cited.

(*d*) *Browne* v. *La Trinidad*, 37 Ch. Div. 1.

Table A. Art. 66.

each meeting, and a director cannot waive his right to notice (*e*). And if such notice has not been given, and a few of the directors purport to overrule the previous decision of all, without giving the rest an opportunity of attending, their act will be void (*f*). But if there has been an irregularity in giving notice, and the party complaining of it has not intervened at once, but has allowed action to be taken on the proceedings of the board as in fact convened, and the irregularity is one which could be cured at any moment, a Court of Equity will not interfere (*g*).

Quorum;

Where the articles do not prescribe the number of directors required to constitute a quorum, the number who usually act in conducting the business of the company will be a quorum (*h*).

And further, the directors having, under Art. (68), authority to delegate any of their powers to committees of their own body, delegated authority will be presumed where one or two directors act for the company in a matter properly within the scope of its ordinary business (*i*).

acting as a board.

And if the number of persons whose concurrence is necessary to give validity to an act did so concur with full knowledge, *semble*, that it is not necessary that those persons shall, at the time of giving their sanction, have been all assembled together in one place under one roof (*k*).

It was said in *Collie's Claim* (*l*), that the common law case of *D'Arcy* v. *The Tamar, &c., Railway Co.* (*m*) is not an authority, at any rate in equity, to shew that the quorum of directors must necessarily act together and at one place. For although it was there said that, to give validity to the bond, the authority for fixing the seal must have been given at a meeting when the directors were acting as a board, yet this was not necessary for the purpose of that decision; for it was proved that, three being the requisite number of directors, the seal was affixed when only two had given authority for it. But, *quære*, whether the authority of that case does not go further than this.

Minimum number of directors.

Where the articles or deed of settlement provide that there shall be a certain number of directors, this may be either imperative (*n*) or directory (*o*). In the former case, acts done by the directors, when their number is reduced below that prescribed, will be invalid (*p*) [unless the articles allow a quorum of continuing directors to act (*q*)] at any rate as respects a matter not within the scope of the ordinary business (*n*); in the latter, a matter of ordinary business, such as the making of a call, will nevertheless be good (*o*).

Disputes among directors.

If there are such dissensions among the governing body of a company as that its affairs cannot be properly carried on, the Court will so far deviate from the general rule of refusing to interfere in matters of internal management as to grant an injunction and receiver to protect the property of the company; but the interference of the Court will be continued only until a

(*e*) *Portuguese Copper Mines, Steele's Case*, 42 Ch. Div. 160.
(*f*) *Homer Mines, E. p. Smith*, 39 Ch. D. 546.
(*g*) *Browne* v. *La Trinidad*, 37 Ch. Div. 1.
(*h*) *Re Regent's Canal Iron Co.*, W. N. 1867, 79; *Lyster's Case*, 4 Eq. 233; *English and Irish Rolling Stock Co., Lyon's Case*, 35 Beav. 646; 14 L. T. 507; 14 W. R. 720.
(*i*) *Totterdell* v. *Fareham Blue Brick Co.*, L. R. 1 C. P. 674; *E. p. Contract Corporation*, 3 Ch. 105, 116.
(*k*) *Collie's Claim*, 12 Eq. 246, 258; *cf. Exmouth Docks Co.*, 17 Eq. 181.
(*l*) See 12 Eq. 259.
(*m*) L. R. 2 Ex. 158.
(*n*) *Kirk* v. *Bell*, 16 Q. B. 290; see *New Sombrero Co.* v. *Erlanger*, 5 Ch. Div. 73, 100, 112.
(*o*) *Thames Haven Dock Co.* v. *Rose*, 4 Man. & G. 552; see *supra*, note to Art. (4).
(*p*) *Alma Spinning Co., Bottomley's Case*, 16 Ch. D. 681.
(*q*) *Scottish Petroleum Co.*, 23 Ch. Div. 413, 431, 435.

Table A. Art. 67.

governing body is duly appointed, and as soon as this is done the Court will leave the company again to manage its own concerns (*r*).

If a director be excluded by his co-directors from the board, he has a personal right to compel them to admit him (*s*).

Order of business.

The directors are entitled at their meetings to take their business in such order as they think proper (*t*).

Chairman.

(67.) The directors may elect a chairman of their meetings, and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

Committees:—delegation of powers.

(68.) The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

A committee of the board need not consist of more than one person (*u*).

The directors themselves being agents, the rule *delegatus non potest delegare* is *primâ facie* applicable to them (*x*). But, there being under this article power to delegate, delegated authority will be presumed where one or two directors act in a matter properly within the ordinary business of the company (*y*).

But, apart from some power to delegate, directors cannot delegate powers which they would not have possessed if they had not been expressly conferred upon them. And therefore in a company whose articles excluded Table A., and gave the directors power to purchase on behalf of the company shares in the company, this was a power which the general manager, unauthorized for that purpose, could not exercise; and, *semble*, he could not have exercised it even if the directors had purported to give him authority to do so (*z*).

Chairman of committee.

(69.) A committee may elect a chairman of their meetings: if no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

Proceedings of committee.

(70.) A committee may meet and adjourn as they think proper: Questions arising at any meeting shall be determined by a majority of votes of the members present; and in case of an equality of votes the chairman shall have a second or casting vote.

Acts of disqualified directors.

(71.) All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director,

(*r*) *Featherstone* v. *Cooke*, 16 Eq. 298; *Trade Auxiliary Co.* v. *Vickers*, Ibid. 303. *Quære* these cases, see Lindley on Comp. Law, 578; *Harben* v. *Phillips*, 23 Ch. Div. 14.

(*s*) *Pulbrook* v. *Richmond Co.*, 9 Ch. D. 610; *Harben* v. *Phillips*, 23 Ch. Div. 14; *Bainbridge* v. *Smith*, 41 Ch. Div. 462.

(*t*) *Cawley & Co.*, 42 Ch. D. 209.

(*u*) *Taurine Co.*, 25 Ch. Div. 118.

(*x*) *Howard's Case*, 1 Ch. 561; *Cartmell's Case*, 9 Ch. 691.

(*y*) *Totterdell* v. *Fareham Blue Brick Co.*, L. R. 1 C. P. 674; *et v. supra*, Art. (66).

(*z*) *Cartmell's Case*, 9 Ch. 691.

shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director. **Table A. Art. 72.**

See the note to sect. 67, *supra*, p. 192.

Dividends.

(72.) The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares. Dividends :—

Under an article such as this a dividend cannot be paid otherwise than in cash—as, for instance, by the issue of debentures bearing interest and redeemable by drawings (a).

In a company whose shares are of equal nominal amount if a larger amount have been paid on some shares than on others, such payment being in respect of calls made and not in advance of calls under Art. (7), then under this form of article the share on which the less sum has been paid is entitled to the same and no less dividend than the share on which the larger sum has been paid. as between shares fully and partly paid :—

This has been so held in a case where the facts were these: The company, having a capital of £40,000, in shares of £1 each fully paid up, created and issued a further £20,000 in shares of £1 each, and called only 5*s.* per share on the new shares. The shares with 5*s.* paid was held entitled to the same dividend as the share with £1 paid (*b*).

The expression "in proportion to their shares" cannot mean "in proportion to the number of their shares," taking "share" in its proper meaning. A "share," properly speaking, is that which bears a particular denoting number (sect. 22): which may be transferred (sect. 22): which carries a right of voting (Art. 44). These regulations contemplate (see Art. 26) that "shares" may be of different respective amounts: and if in the same company there are fully paid shares of £50 and of £1 respectively, it cannot be that the latter is to have the same dividend as the former.

The words "in proportion to their shares" must therefore mean "in proportion to the number and amount of their shares," and the question was whether the amount to be considered is the proportionate amount of the subscribed capital, or the proportionate amount of the paid-up capital represented by the share. If the member who has paid 5*s.* receives only one-fourth of the dividend received by the member who has paid £1, the former receives no return for his liability to pay the 15*s.* although the company trades in part upon the credit due to it. On the other hand, if the former receives the same dividend as the latter, he pockets dividend on his 15*s.* while he may be employing the money elsewhere in some other investment. The result of the decision is that under articles in this form dividends are payable in proportion to the amount of the subscribed capital, not of the paid-up capital.

(a) *Wood* v. *Odessa Waterworks Co.*, 42 Ch. D. 636.

(*b*) *Oakbank Oil Co.* v. *Crum*, 19 Sc. L. Rep. 174; 9 Ct. Sess. Cas. 4th Series, 198; 8 App. Cas. 65. See also *Wilkinson* v. *Cummins*, 11 Hare, 337.

Table A. Art. 73.

The same principle has been followed by the House of Lords as to surplus assets remaining after all debts have been paid and all subscribed capital returned (*c*). Such assets are part of the capital divisible in proportion to the members' interests in capital, and this is in proportion to the amount of their shares, not to the amount paid upon them.

as between tenant for life and remainderman.

When a settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital or appropriated as an increase of the capital stock in the concern enures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital (*d*).

Profits retain the character of income till they are converted into capital. Payments out of accumulated profits of past years are not necessarily capital: the inquiry whether they have been converted into capital or not is one of fact upon the circumstances of each case (*d*).

The inquiry as to the time when the profits were earned by the company is immaterial as between tenant for life and remainderman. Their rights are determined by the time not at which the profits are earned by the company, but at which they are by the action of the company made divisible among the members (*d*).

In the case referred to (*d*) the Court of Appeal upon the facts held the bonus to be income and to belong to the tenant for life. The House of Lords approved the principles of law laid down by the Appeal Court, but on the facts held that the profits had been converted into capital.

In this case a long series of previous authorities which for brevity are not cited here, as they will all be found cited in the report of *Sproule* v. *Bouch* (*d*), were digested, and from their somewhat conflicting results were extracted the true principles to be applied.

Where a testator's estate becomes entitled to new shares issued in respect of the capitalization of accumulated profits, but the will does not authorize the trustees to hold such new shares, they may be in a position to secure the benefit of them for the estate by taking the shares and realising them as speedily as possible (*e*).

payable out of profits.

(73.) No dividend shall be payable except out of the profits arising from the business of the company.

What are profits.

The profits of an undertaking are not such sum as may remain after the payment of every debt (*f*), but are the excess of revenue receipts over expenses properly chargeable to revenue account. As to what expenses are properly chargeable to capital and what to revenue it is necessarily impossible to lay down any general rule. In many cases it may be for the shareholders to determine this for themselves provided the determination be honest and within legal limits (*g*).

Where expenses, properly chargeable to capital, have been paid out of

(*c*) *Birch* v. *Cropper*, 14 App. Cas. 525.
(*d*) *Sproule* v. *Bouch*, 29 Ch. Div. 635, 653; 12 App. Cas. 385; *Sugden* v. *Alsbury*, W. N. 1890, 112.
(*e*) *Banting* v. *Pugh*, W. N. 1887, 143.
(*f*) *Mills* v. *Northern Railway of Buenos Ayres Co.*, 5 Ch. 621, 631.
(*g*) *Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. Div. 1, 18, 21, 25.

revenue, the company are justified in recouping the revenue account at a subsequent time out of capital (*h*). **Table A. Art. 73.**

The proper and legitimate way of arriving at a statement of profits is, to take the facts as they actually stand, and, after forming an estimate of the assets as they actually exist, to draw a balance so as to ascertain the result in the shape of profit or loss. If this be done fairly and honestly, without any fraudulent intention or purpose of deceiving any one, it does not render the dividend fraudulent that there was not cash in hand to pay it, or that the company were even obliged to borrow money for that purpose. And the fact that an estimated value was put upon assets which were then in jeopardy and were subsequently lost does not render the balance-sheet delusive and fraudulent (*i*).

"Realised profits," which was the expression in the articles of the *Oxford Building Society* (*k*), means "profits tangible for the purpose of division."

The way in which Table A. contemplates that the profits will be arrived at will be seen from Art. (80).

But if a dividend be declared without proper investigation of the financial position of the company, and no profit and loss account be prepared, but only an account of receipts and payments, making no allowance for risks, the burden is on the directors to shew that the dividend was properly declared, and in default a director will be ordered to refund the dividend he has received (*l*). If directors pay dividends out of capital, they may be liable for the whole amount so misapplied (*m*).

Dividends when capital partly lost.

Capital may be lost in either one of two ways, which may be distinguished as loss on capital account, and loss on revenue account. If a shipowning company's capital be represented by ten ships with which it trades, and one is totally lost and is uninsured, such a loss would be what is here called a loss on capital account. But if the same company begins the year with the ten ships, value say £100,000, and ends the year with the same ten ships, and the result of the trading, after allowing for depreciation of the ships, is a loss of £1000, this would be what is here called a loss on revenue account.

Where a loss on revenue account has been sustained, there is of course no profit until that loss has been made good either by set-off of previous undivided profits still in hand, or by profit subsequently earned. But until *Lee* v. *Neuchatel Asphalte Co.* (*n*) the question was open whether a company under the Companies Acts, which has lost part of its capital by loss on capital account, can continue to pay dividends until the lost capital has been made good.

Lee v. *Neuchatel Asphalte Co.* (*n*) has now shewn the true principle to be, that capital account and revenue account are distinct accounts, and that for the purpose of determining profits you must disregard accretions to or diminutions of capital. Suppose I buy £100 Consols at 97, and at the expiration of a year they have fallen to 94, is my income £3 or nothing? if nothing, then if at the expiration of the year they had risen to par, my income would by parity of reasoning have been £6, not £3. Is the result affected by the question whether at the end of the year I am or am not about

(*h*) *Mills* v. *Northern Railway of Buenos Ayres Co.*, 5 Ch. 621; and see *Hoole* v. *Great Western Railway Co.*, 3 Ch. 262, 269.

(*i*) *Stringer's Case*, 4 Ch. 475; *Glasgow Bank* v. *Mackinnon*, 19 Sc. L. R. 278; 9 Ct. of Sess. Cas. 4th Series, 535; quoted in 35 Ch. D. 506.

(*k*) 35 Ch. Div. 502.

(*l*) *Rance's Case*, 6 Ch. 104; *v. supra*, p. 500.

(*m*) *National Funds Co.*, 10 Ch. D. 118; *Oxford Building Soc.*, 35 Ch. D. 502; *Leeds Estate Co.* v. *Shepherd*, 36 Ch. D. 787. As to the application of the Statute of Limitations, see *ante*, p. 411.

(*n*) *Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. Div. 1.

Table A. Art. 73.

to sell my Consols? Suppose a tramway company lays its line when materials and labour are both dear, both subsequently fall, and the same line could be laid for half the money, and as an asset (independent of deterioration from wear) would cost for construction only half what it did cost. Is the company to make this good to capital before it pays further dividend? If so, then if the cost of materials and labour had risen after the line was laid might not the company have divided as dividend this accretion to capital? Upon such a principle dividends would vary enormously, and sometimes inversely to the actual profit of the concern.

If revenue account be treated as a distinct account, these difficulties disappear (*o*), and subject to the difficulty, which must be encountered, of discriminating between revenue charges and capital charges, a safe and intelligible principle is arrived at. The creditors of the company are entitled to have the capital account fairly and properly kept; but they are not entitled to have losses of capital on capital account made good out of revenue. It is no doubt true, that before arriving at revenue at all, there are payments which must be made good to capital, on account of capital wasted or lost in earning the revenue. For instance, in the common case of leaseholds, which are a wasting property, the whole of the rental will not properly be income; in the case of colliery properties, the difference between the price at which the coal is sold, and the cost of working and raising it, will not all be income, for there must also be a deduction made in favour of capital representing the diminished value of the mine by reason of its containing so many less tons of coal (*p*); in the case of a tramway company you will not have arrived at net profit before you have set apart a sum to make good deterioration (*q*). But when all proper allowances have thus been made in favour of capital, the balance is revenue applicable for payment of dividend.

And as regards wasting properties it will be seen presently that it is not of necessity that depreciation by waste shall be brought in as a debit to revenue account (*r*).

Preferential dividends.

In the absence of anything to the contrary in the company's regulations, the members are entitled to the profits in proportion to their shares in the concern; and their rights in this respect cannot be varied by a majority adversely to a dissentient minority. In the absence therefore of power in its original memorandum and articles, or one of them, a company cannot issue preference shares, and if it have a limited power it cannot enlarge it (*s*).

Where a company having power so to do, issued preference capital carrying a dividend at 10 per cent. per annum, payable half-yearly, and with no words to restrict the preference shareholder to the profits of the current year, it was held that if the profits of any one year were insufficient to pay the 10 per cent. in full, the deficiency was, as between the preference and ordinary shareholder, to be made good out of subsequent profits, (*t*) following *Henry* v. *Great Northern Railway Co.* (*u*).

Vendor's guarantee of dividends.

Upon a sale of a business to a company it is a common arrangement that the vendor as evidence of his confidence in the concern guarantees a minimum dividend for a certain number of years. If the company is wound up during the currency of the guarantee, two questions may arise: first, whether the winding-up puts an end to the guarantee; and secondly, whether as between

(*o*) See also note to Comp. Act, 1880, s. 3.

(*p*) *Knowles* v. *McAdam*, 3 Ex. D. 23. But see *Coltness Iron Co.* v. *Black*, 6 App. Cas. 315.

(*q*) *Davison* v. *Gillies*, 16 Ch. D. 344.

(*r*) *Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. Div. 1.

(*s*) See *ante*, p. 182.

(*t*) *Webb* v. *Earle*, 20 Eq. 556; *Ashton Vale Co.* v. *Abbott*, W. N. 1876, 119.

(*u*) 1 De G. & J. 606.

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the shareholders and the creditors the former can take any sums remaining in hand or receivable under the guarantee.

Upon the first question there is little or no authority (*x*), but if the guarantee is absolute in terms it is conceived that there will not be implied, as a condition precedent to suing on the guarantee, an agreement that the business is to be carried on during the currency of the guarantee. It may be said that no such agreement is to be implied at all, for that the vendor has thought the business to be so profitable as that the company certainly will carry it on during the term over which his guarantee extends, and has been content to take the risk of its not doing so. And, assuming that such an agreement is to be implied, then if during the term the company unnecessarily discontinues the business, the matter will adjust itself in this way, that so soon as the company sues on the guarantee the vendor will protect himself by a cross action for the damage he has sustained by reason of the company discontinuing the business which earned the profit (*y*).

Where the sale was of several businesses and the company discontinued one of them, the vendor was held not to be discharged (*z*).

As to the existence of any implied agreement at all, see *E. p. Maclure* (a); *Rhodes* v. *Forwood* (*b*).

The second question is not an easy one, and must depend upon the *bonâ fides* of the transaction, and the form which the guarantee takes. It is clear that guarantees of this sort, if not carefully scrutinized, might lend readily to fraud. By fictitiously increasing the purchase-money by a sum which is then appropriated by the vendor to payment of dividends, the company may be enabled in reality both to pay dividends out of capital while it is a going concern, and also when it is wound up to return in the shape of so-called guaranteed profits a portion of the capital to the shareholders, leaving the creditors unpaid.

Such a transaction, it is conceived, could be over-reached in either one of two ways: it could either be maintained that the trust fund appropriated to the guaranteed dividend was in reality a fictitious increase of purchase-money which never became the vendor's property and of which he therefore could not declare trusts, and that it never ceased to be the company's money; or it might be said that the guarantee was a contingent right purchased with the company's capital, and forming an asset belonging to capital.

At the same time, if the guarantee was honestly given in a *bonâ fide* transaction in which the vendor dealing at arm's length with the company was in truth merely supporting his confidence in the concern, and the guarantee is so expressed as that the proceeds are payable to the shareholders as individuals and not to the company, it is conceived that there is no principle upon which that which never belonged to the company can be made an asset of the company.

The former case is illustrated by *Re Stuart's Trusts* (*c*), where the strong point of the liquidator's case, it is submitted, was that each member's dividend was in fact provided out of his own capital (*d*), the latter by *Re Gelly Deg Colliery Co.* (*e*), and *South Llanharran Colliery Co., E. p. Jegon* (*f*).

(*x*) Some of the cases cited, *ante*, pp. 350, 351, may be useful by analogy.

(*y*) See *per* James, L.J., *Brown and Co.* v. *Brown*, 36 L. T. 272.

(*z*) *Brown and Co.* v. *Brown*, 35 L. T. 54; 36 L. T. 272.

(a) 5 Ch. 737.

(*b*) 1 App. Cas. 256.

(*c*) 4 Ch. D. 213.

(*d*) See the agreement of 24th April, 1872, 4 Ch. D. p. 214.

(*e*) 38 L. T. 440.

(*f*) 12 Ch. Div. 503. See also *Richardson* v. *English Spelter Co.*, W. N. 1885, 31.

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A guarantee to shareholders is not of course necessarily assets of the company at all (*g*).

It is competent to a company to release a guarantee of dividend (*h*).

Payment of dividend out of capital.

The question of payment of dividends out of capital has arisen both in winding-up (*i*) and in going companies (*k*). It is singular that in all the earlier of these cases [except *MacDougall* v. *Jersey Hotel Co.* (*l*)], down to *Alexandra Palace Co.* (*m*) the judgments examined and criticised the articles of association with a view to seeing whether or not they allowed payment of dividend out of capital; thus seeming to assume that if the articles had allowed it, no right of creditors would have intervened to prevent the capital from being so disposed of. It is true that in the *National Funds Co.* (*n*), Jessel, M.R., said that the creditors had the right to have the capital kept for payment of their claims, but that statement was qualified by the words, "as I read the articles, considering the nature of the company." It might possibly be sought to answer to these observations, that as to the cases in winding-up (*i*), the question there was as to the liability of directors to make good dividends thus improperly paid, and that this turned upon the question whether or not they had exceeded their powers; and that as to the cases in going companies (*k*) the rights of creditors had not intervened, and the question was only one between shareholders, and that of course in a going company a creditor cannot interfere with the disposal of the company's assets (*o*). But this does not seem to cover the ground, for as to the former, if the act is illegal the director could not, it is conceived, shield himself behind an authority to do an illegal act; and as to the latter, it is clear (*l*) that as between the shareholders in a going company a shareholder is entitled to see that the capital is not applied to an illegitimate purpose, but can restrain the application of capital to payment of dividend when no profit has been earned.

There is moreover one decision which seems to involve that dividends may be paid out of capital where the articles expressly allow it, and that is *Dent* v. *London Tramways Co.* (*p*).

In *Davison* v. *Gillies* (*q*) it had been held that the London Tramways Company could not, under the provisions of its articles, pay dividend on its ordinary shares except out of net profits, and that there were no net profits until the depreciation of the tramway by wear and tear had been provided for. But in *Dent* v. *London Tramways Co.* (*p*) it was held in the same company that the holders of preference shares whose dividend was "dependent upon the profits of the particular year only" were entitled to a dividend out of the profits of any year after providing for the depreciation of the tramway during that year, and without making good depreciation in preceding years. This was obviously paying dividend out of capital, unless capital and not revenue was the proper account to bear the depreciation: for, for the purpose of ascertaining whether there was or not "profit" for its payment, what was

(*g*) *Waterford Railway Co.*, 5 L. R. Irish, 102.

(*h*) *Sheffield Nickel Co.* v. *Unwin*, 2 Q. B. D. 214.

(*i*) *National Funds Co.*, 10 Ch. D. 118; *Alexandra Palace Co.*, 21 Ch. D. 149; *Flitcroft's Case*, 21 Ch. Div. 519; *Denham & Co.*, 25 Ch. D. 752; *Oxford Building Society*, 35 Ch. D. 509; *Leeds Estate Co.* v. *Shepherd*, 36 Ch. D. 787.

(*k*) *MacDougall* v. *Jersey Hotel Co.*, 2 H. & M. 528; *Davison* v. *Gillies*, 16 Ch. D. 347, n.; *Dent* v. *London Tramways Co.*, 16 Ch. D. 344; *Lambert* v. *Neuchatel Asphalte Co.*, W. N. 1882, 128; 30 W. R. 913.

(*l*) *MacDougall* v. *Jersey Hotel Co.*, 2 H. & M. 528.

(*m*) *Alexandra Palace Co.*, 21 Ch. D. 149.

(*n*) 10 Ch. D. 118, 127.

(*o*) *Mills* v. *Northern Railway of Buenos Ayres Co.*, 5 Ch. 621.

(*p*) 16 Ch. D. 344.

(*q*) 16 Ch. D. 347, n.

Table A. Art. 73.

regarded was whether capital was restored to the position it was in upon the 1st of January in that year, not whether capital was made good altogether. Dividend was held to be payable to a particular class of shareholders when upon taking all depreciation into account there was no fund for its payment. The fact that the company's moneys had previously been improperly applied in paying dividend to the ordinary shareholders could not of course increase the fund unless and until they had been recovered from the ordinary shareholders.

In *Lambert* v. *Neuchatel Asphalte Co.* (*r*) out of a capital of £1,150,000 upwards of £1,000,000 had been expended in and about a concession which would expire in 1907. The articles provided that dividends should be paid only out of net profits, and that the directors should not be bound to form a fund for renewing or replacing the company's interest in any concession. The action was a shareholder's action to restrain payment of dividend on the ground that there were no profits, but Bacon, V.C., held that the articles had given a general meeting power to declare what were "net profits," and that the Court could not assume jurisdiction to determine it. It is obvious that if this company came to be wound up in 1907 it might turn out that there was no capital but the concession, and that would be gone.

Lee v. *Neuchatel Asphalte Co.* (*s*), a case arising in the same company as that last cited, is a decision which demands careful consideration. The two following principles seem to be established by it :—

1. That capital account and revenue account are for purposes of ascertaining profit available for dividend to be treated as separate accounts, and loss on capital account need not be made good before declaring dividend. The company is not debtor to capital, and there may be profit available for dividend when there is an insufficient amount or even nothing to answer in the balance-sheet the debit item of share capital (*t*).

2. That if the objects of the company include the sinking of capital in the acquisition of wasting property, the depreciation by waste is not necessarily a revenue charge, but may by the regulations be thrown upon capital.

If the above statement of principle No. 2 be correct, it goes far to throw light upon the perplexing references to the *articles* of association, as having some bearing upon this matter, which are found again in *Lee* v. *Neuchatel Asphalte Co.* (*s*), and which have already been referred to in the earlier cases.

It is logical, and would seem to be the law that, if the memorandum of association provides that the object of the company shall be to sink its capital in a wasting property and acquire profit by working that property, then the gradual diminution of the property by waste is a gradual destruction of the company's capital, which is within its objects legitimate. If this is so, then it is for the shareholders to say whether or not they will put by a sinking fund to meet the waste, and the proper place to find this is in the articles.

It is upon this ground, and this only, that Cotton, L.J., finds that the two decisions in *Dent* v. *London Tramways Co.* (*u*) and *Davison* v. *Gillies* (*x*) are "entirely consistent with one another." He rests their consistency on the articles. This must mean that the memorandum allowed the capital to be sunk in a wasting property, and that whether depreciation should be charged against revenue or not was, therefore, for the articles to determine.

(*r*) W. N. 1882, 128; 30 W. R. 913.
(*s*) 41 Ch. Div. 1.
(*t*) See particularly 41 Ch. Div. 22, 23, 24.
(*u*) 16 Ch. D. 344.
(*x*) 16 Ch. D. 347, n.

Table A. Art. 74.

And in this there is nothing inconsistent with *Trevor* v. *Whitworth* (*y*). It is one thing to say that the company must not divide its capital or any part of it amongst its members, and another to say that revenue cannot be divided amongst members until revenue has recouped waste of capital.

The foregoing opens a door for escaping from the conclusion that the authorities or any of them affirm the proposition that it is left to the shareholders themselves to determine what shall be the fund, whether capital or income, for payment of dividend—a conclusion which would appear to be wholly inconsistent with *MacDougall* v. *Jersey Hotel Co.* (*z*), and which, after *Guinness* v. *Land Corporation of Ireland* (a) and *Flitcroft's Case* (*b*), cannot, it is conceived, be the law.

The payment of interest to the shareholders, before any profits have been realised, out of capital or borrowed moneys, even though made in pursuance of a resolution at a general meeting, has been held to be *ultra vires*, and has been restrained by injunction on a bill filed by a shareholder, as being in effect a lessening of the capital to the prejudice of creditors (*c*).

But although the improper payment of a dividend will be restrained by injunction on an action brought by a shareholder in the company (*d*), a mere simple contract creditor cannot sustain such a bill on the ground that the fund for payment of his debt is thereby diminished (*e*).

Debenture capital.

It does not follow that because payment out of capital of dividends on share capital is illegal, that the same holds good of what is commonly called debenture capital (*f*). Debenture capital is not in fact capital at all in the proper sense of the word. It is available money raised by borrowing.

And the interest on capital, employed in the construction of works, and in the meantime unproductive, may under certain circumstances in fact form part of the capital employed in the work, and may be properly chargeable to capital account. It seems that this has been held with respect to preference shares (*g*).

As to the meaning of the word "dividend" see *Henry* v. *Great Northern Railway Co.* (*h*).

Reserve fund.

(74.) The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select.

Debts to be deducted from dividends.

(75.) The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise.

(*y*) 12 App. Cas. 409.
(*z*) 2 H. & M. 528.
(a) 22 Ch. Div. 349.
(*b*) 21 Ch. Div. 519.
(*c*) *MacDougall* v. *Jersey Imperial Hotel Co.*, 2 H. & M. 528; 12 W. R. 1142. *Quære*, if the memorandum of association allowed it, see Comp. Act, 1867, s. 9, note.
(*d*) *Hoole* v. *Great Western Railway Co.*, 3 Ch. 262; *Bloxam* v. *Metropolitan Railway Co.*, Ibid. 337.
(*e*) *Mills* v. *Northern Railway of Buenos Ayres Co.*, 5 Ch. 621.
(*f*) *Bloxam* v. *Metropolitan Railway Co.*, 3 Ch. 337, 350.
(*g*) *Bardwell* v. *Sheffield Waterworks Co.*, 14 Eq. 517.
(*h*) 1 De G. & J. 606, 636, 642, 647; *Matthews* v. *Great Northern Railway Co.*, 28 L. J. (Ch.) 375; 5 Jur. (N.S.) 284; 7 W. R. 233; 32 L. T. (O.S.) 355.

(76.) Notice of any dividend that may have been declared shall be given to each member in manner hereinafter mentioned (*a*); and all dividends unclaimed for three years, after having been declared, may be forfeited by the directors for the benefit of the company. **Table A. Art. 76.** Notice and forfeiture of dividends.

(*a*) Arts. (95)—(97).

(77.) No dividend shall bear interest as against the company. Interest.

Accounts.

(78.) The directors shall cause true accounts to be kept,— Accounts:—

Of the stock in trade of the company;

Of the sums of moneys received and expended by the company, and the matter in respect of which such receipt and expenditure takes place; and,

Of the credits and liabilities of the company;

The books of account shall be kept at the registered office of the company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the company in general meeting, shall be open to the inspection (*a*) of the members during the hours of business.

(*a*) s. 156, when winding-up order made; ss. 56—61 by inspectors in going company.

Directors keeping fraudulent accounts or publishing fraudulent statements are, by 24 & 25 Vict. c. 96 (*i*), guilty of a misdemeanour, and further powers against delinquent directors are given by the Companies Act, 1862 (*k*). Falsification of:—

In an action by a shareholder on behalf, &c., against directors the plaintiff is, by analogy to the rule that a *cestui que trust* is entitled to see opinions, &c., obtained by the trustee at the expense of the trust, entitled to production of documents relating to the subject of the action between the company and its solicitors when paid for out of the company's funds (*l*). Inspection of.

A clause giving a right to inspect the books ceases to apply when the company goes into voluntary liquidation (*m*), although if the winding-up be for reconstruction it may be otherwise (*n*).

A clause giving a right of inspection of "the books wherein the proceedings of the company are recorded" does not give a shareholder the right to inspect the book of minutes of the proceedings of the directors (*o*).

As to inspection pending winding-up petition and after order made, see note to s. 156.

(79.) Once at the least in every year the directors shall lay before the company in general meeting, a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting. Annual statement.

(*i*) 24 & 25 Vict. c. 96, ss. 81–84; see note to s. 165, *supra*, p. 400.

(*k*) ss. 166–168. Comp. (W. Up.) Act, 1890, s. 10.

(*l*) *Gouraud* v. *Edison Co.*, W. N. 1888, 82, 94.

(*m*) *Yorkshire Fibre Co.*, 9 Eq. 650; *v. supra*, s. 156.

(*n*) *Glamorganshire Banking Co., Morgan's Case*, 28 Ch. D. 620.

(*o*) *Reg.* v. *Mariquita Mining Co.*, 1 E. & E. 289.

Table A. Art. 80.

(80.) The statement so made shall shew, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters: every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

Profit and loss.

Balance-sheet.

(81.) A balance-sheet shall be made out in every year, and laid before the company in general meeting, and such balance-sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

(82.) A printed copy of such balance-sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter (*a*) directed to be served.

(*a*) Arts. (95)—(97).

Where the articles provided for the presentation at every half-yearly general meeting of a balance-sheet and general summary of accounts which was to be binding and conclusive on the shareholders unless objected to before the next general meeting, and no such balance-sheet or general summary, but only a half-yearly report, was prepared, in which the affairs of the company were mis-stated, it was held that such reports were not binding on the shareholders (*p*).

A director is not necessarily personally responsible for balance-sheets and reports stated to be issued "By order of the directors" (*q*).

Audit.

Auditors:—

(83.) Once at the least in every year, the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained, by one or more auditor or auditors.

appointment of:—

(84.) The first auditors shall be appointed by the directors: subsequent auditors shall be appointed by the company in general meeting.

(85.) If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

(86.) The auditors may be members of the company: but no

(*p*) *Portsmouth Banking Co., Helby's and Others' Cases*, 2 Eq. 167.

(*q*) *Denham & Co.*, 25 Ch. D. 752.

person is eligible as an auditor who is interested otherwise than as a member in any transaction of the company; and no director or other officer of the company is eligible during his continuance in office. Table A. Art. 87.

(87.) The election of auditors shall be made by the company at their ordinary meeting in each year.

(88.) The remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors shall be fixed by the company in general meeting. remuneration of:—

(89.) Any auditor shall be re-eligible on his quitting office. re-eligible:—

(90.) If any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same. casual vacancies:—

(91.) If no election of auditors is made in manner aforesaid the Board of Trade may, on the application of not less than five members of the company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the company for his services. appointment by Board of Trade.

(92.) Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto. Duties of auditors.

(93.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company: he may, at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the company.

(94.) The auditors shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and, in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

The auditors are agents of the shareholders so far as relates to the audit of the accounts, and for the purpose of the audit they will bind the shareholders. But they are not the agents of the shareholders so as to conclude Auditors how far shareholders' agents.

Table A. Art. 95.

the shareholders by any knowledge which in the course of the audit they may have acquired of any unauthorized acts on the part of the directors. It is no part of their office to inquire into the validity of any transaction appearing in the accounts of the company (*r*).

It was said by Lord Justice Turner in *Nicol's Case* (*s*) with respect to fraudulent representations made by the directors as to the position of the company, that "there were auditors of the company appointed by the shareholders. These auditors were within the scope of their duty at least as much the agents of the shareholders as the directors were, and the false and fraudulent representations were discoverable by them." But Lord Chelmsford in *Spackman* v. *Evans* (*t*) expressed himself as unable to concur with the Lord Justice in treating the auditors as the agents of the shareholders for that purpose.

Liability of auditors.

The auditor accepts the duty of making such investigation of and such report upon the company's affairs as the articles require of him. If he does not discharge this duty, and as the natural and immediate consequence of his breach of duty acts are done, such as the payment of dividends out of capital, which are a misapplication of the company's funds, the auditor is liable in damages (*u*). But, *semble*, his liability is for breach of duty, not for breach of trust, and the Statute of Limitations is a defence (*u*).

Notices.

Service of notices.

(95.) A notice may be served by the company upon any member either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.

An order for substituted service of legal proceedings on a member at his registered address is not valid by reason of the existence of a clause of this kind in the articles, if the registered address is not in fact his residence or place of business (*x*).

(96.) All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members; and notice so given shall be sufficient notice to all the holders of such share.

(97.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notices was properly addressed and put into the post-office.

For the ordinary purposes of the business of the company the notice is to be deemed to have been served even if in fact it never reached its destination: but the article does not apply so as to affect the member with notice of a misrepresentation, which notice was in fact given by the document, if the document does not reach his hands (*y*).

(*r*) *Spackman* v. *Evans*, L. R. 3 H. L. 171, 196, 236.
(*s*) 3 De G. & J. 387, 441.
(*t*) L. R. 3 H. L. 171, 236.
(*u*) *Leeds Estate Co.* v. *Shepherd*, 36 Ch. D. 787.
(*x*) *E. p. Chatteris*, 10 Ch. 227.
(*y*) *London and Staffordshire Fire Co.*, 24 Ch. D. 149.

DR. BALANCE-SHEET (a) of the Co. made up to 18 . CR.

CAPITAL AND LIABILITIES.			£ s. d.	£ s. d.	PROPERTY AND ASSETS.			£ s. d.	£ s. d.
I. CAPITAL.		*Shewing:*			III. PROPERTY held by the Company.		*Shewing:*		
	1.	*The Number of Shares* – – –				7.	*Immovable Property, distinguishing—*		
	2.	*The Amount paid per Share* – –					*(a.) Freehold Land* – – –		
	3.	*If any Arrears of Calls, the Nature of the Arrear, and the names of the Defaulters.*					*(b.) „ Buildings* – –		
							(c.) Leasehold „ – –		
	4.	*The Particulars of any forfeited Shares.*				8.	*Movable Property, distinguishing—*		
II. DEBTS AND LIABILITIES of the Company.		*Shewing:*					*(d.) Stock in Trade* – – –		
	5.	*The Amount of Loans on Mortgages or Debenture Bonds.*					*(e.) Plant* – – – –		
	6.	*The Amount of Debts owing by the Company, distinguishing—*					*The Cost to be stated with Deductions for Deterioration in Value as charged to the Reserve Fund or Profit and Loss.*		
		(a.) Debts for which Acceptances have been given.							
		(b.) Debts to Tradesmen for supplies of Stock in Trade or other Articles.					*Shewing:*		
		(c.) Debts for Law Expenses.			IV. DEBTS owing to the Company.	9.	*Debts considered good for which the Company hold Bills or other Securities.*		
		(d.) Debts for Interest on Debentures or other Loans.				10.	*Debts considered good for which the Company hold no Security.*		
		(e.) Unclaimed Dividends.				11.	*Debts considered doubtful and bad* –		
		(f.) Debts not enumerated above.					*Any Debt due from a Director or other officer of the Company to be separately stated.*		
VI. RESERVE FUND.		*Shewing:* *The Amount set aside from Profits to meet Contingencies.*							
VII. PROFIT AND LOSS.		*Shewing:* *The disposable Balance for Payment of Dividends, &c.*			V. CASH AND INVESTMENTS.	12.	*Shewing:* *The Nature of Investment and Rate of Interest.*		
						13.	*The Amount of Cash, where lodged, and if bearing Interest.*		
CONTINGENT LIABILITIES.		*Claims against the Company not acknowledged as Debts.* *Moneys for which the Company is contingently liable.*							

(a) Table A. Arts. (81), (82), *supra.*

Table B.

TABLE B. (z).

TABLE OF FEES to be paid to the REGISTRAR of JOINT STOCK COMPANIES by a Company having a Capital divided into Shares.

	£	s.	d.
For registration of a company whose nominal capital does not exceed £2000, a fee of – – – – – – – – – –	2	0	0
For registration of a company whose nominal capital exceeds £2000, the above fee of £2, with the following additional fees regulated according to the amount of nominal capital; (that is to say,)	£	s.	d.
For every £1000 of nominal capital, or part of £1000, after the first £2000, up to £5000 – – – –	1	0	0
For every £1000 of nominal capital, or part of £1000, after the first £5000, up to £100,000 – – – –	0	5	0
For every £1000 of nominal capital, or part of £1000, after the first £100,000 – – – – – –	0	1	0
For registration of any increase of capital made after the first registration of the company, the same fees per £1000, or part of a £1000, as would have been payable if such increased capital had formed part of the original capital at the time of registration.			
Provided that no company shall be liable to pay in respect of nominal capital, on registration or afterwards, any greater amount of fees than £50, taking into account in the case of fees payable on an increase of capital after registration the fees paid on registration.			
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act (a), the same fee as is charged for registering a new company.			
For registering any document hereby required or authorized to be registered, other than the memorandum of association – – – –	0	5	0
For making a record of any fact hereby authorized or required to be recorded by the registrar of companies, a fee of – – –	0	5	0

Under 51 Vict. c. 8, s. 11, and 52 Vict. c. 7, s. 16, an *ad valorem* stamp duty of two shillings for every hundred pounds and fraction of one hundred pounds is now payable upon the amount of the nominal share capital of a company registered under the Companies Acts with limited liability. And the like duty upon any increase of capital.

TABLE C. (z).

TABLE OF FEES to be paid to the REGISTRAR of JOINT STOCK COMPANIES by a Company not having a Capital divided into Shares.

	£	s.	d.
For registration of a company whose number of members, as stated in the articles of association, does not exceed 20 – – – – –	2	0	0
For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100 – –	5	0	0
For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of £5, with an additional 5s. for every 50 members, or less number than 50 members after the first 100.			
For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of – – –	20	0	0
For registration of any increase on the number of members made after the registration of the company in respect of every 50 members, or less than 50 members, of such increase – – – – – –	0	5	0
Provided that no one company shall be liable to pay on the whole a greater fee than £20 in respect of its number of members, taking into account the fee paid on the first registration of the company.			
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act (a), the same fee as is charged for registering a new company.			
For registering any document hereby required or authorized to be registered, other than the memorandum of association – – –	0	5	0
For making a record of any fact hereby authorized or required to be recorded by the registrar of companies, a fee of – –	0	5	0

(z) ss. 17, 71. (a) ss. 189, 209.

FORM D. **Form D.**

FORM OF STATEMENT referred to in Part III. of the Act (*b*).

* The capital of the company is , divided into shares of each.
The number of the shares issued is
Calls to the amount of pounds per share have been made, under which the sum of pounds has been received.
The liabilities of the company on the first day of January (*or* July) were,—
Debts owing to sundry persons by the company:
On judgment, £
On specialty, £
On notes or bills, £
On simple contracts, £
On estimated liabilities, £
The assets of the company on that day were,—
Government securities [*stating them*], £
Bills of exchange and promissory notes, £
Cash at the bankers, £
Other securities, £

* If the company has no capital divided into shares, the portion of the statement relating to capital and shares must be omitted.

SECOND SCHEDULE (*c*).

FORM A.

MEMORANDUM of ASSOCIATION of a Company limited by Shares (*d*).

1st. The name of the company is "The Eastern Steam Packet Company, Limited."
2nd. The registered office of the company will be situate iu England.
3rd. The objects (*e*) for which the company is established are, "The conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive (*f*) to the attainment of the above object."
4th. The liability of the members is limited.
5th. The capital of the company is two hundred thousand pounds divided into one thousand shares of two hundred pounds each. [*See next page.*

(*b*) ss. 44, 71.
(*c*) s. 71.
(*d*) s. 8.
(*e*) One object often introduced into the memorandum is "To adopt and carry into effect an agreement dated, &c., and made between A. B. of the one part, and C. D., a trustee for the intended company, of the other part." *Quære*, the effect of this in the absence of a substituted or new agreement after incorporation. The company not being in existence at the date of the agreement cannot ratify the contract: *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Scott* v. *Lord Ebury*, Ibid. 255; *Melhado* v. *Porto Alegre Railway Co.*, L. R. 9 C. P. 503; *Empress Engineering Co.*, 16 Ch. Div. 125; *Northumberland Avenue Hotel Co.*, 33 Ch. Div. 16 (although it may after incorporation enter into a new contract in the terms of the old one, or may upon equitable grounds become equitably bound by the terms of the contract, see *Touche* v. *Metropolitan Railway Warehousing Co.*, 6 Ch. 671; *Spiller* v. *Paris Skating Rink Co.*, 7 Ch. D. 368; *Empress Engineering Co.*, 16 Ch. Div. 125; *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156); and A. B. not being a party to the memorandum and articles, these do not constitute a contract between him and the company: *Melhado* v. *Porto Alegre Railway Co.*, L. R. 9 C. P. 503; *Pritchard's Case*, 8 Ch. 956; *Eley* v. *Positive Government Assurance Society*, 1 Ex. Div. 20, 88; *Rotherham Alum Co.*, 25 Ch. Div. 103; neither even if A. B. be a member do the articles constitute a contract with the company, but only a contract between him and the other members: *Browne* v. *La Trinidad*, 37 Ch. Div. 1; and see Comp. Act, 1867, s. 25, n.

It does not follow that the company becomes bound by the contract because it acts under the mistaken belief that it is bound: *Northumberland Avenue Co.*, 33 Ch. Div. 16.

Care should be taken in the preparation of such an agreement to protect C. D. from personal liability; for, unless the contract be so worded as to exclude this, C. D. signing on behalf of a non-existent principal is personally liable, even though the company purport subsequently to ratify the contract: *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Scott* v. *Lord Ebury*, Ibid. 255.

(*f*) As to what these words will include, see *Simpson* v. *Westminster Palace Hotel Co.*, 2 D. F. & J. 141, 146, 152; 8 H. L. C. 712; *Joint Stock Discount Co.* v. *Brown*, 3 Eq. 139, 150; *Peruvian Railways Co.*, 2 Ch. 617; *Baglan Hall Colliery Co.*, 5 Ch. 346, 356; *Guinness* v. *Land Corporation of Ireland*, 22 Ch. Div. 349; *Studdert* v. *Grosvenor*, 33 Ch. D. 528, 538; *Small* v. *Smith*, 10 App. Cas. 119, 129; and see *Leifchild's Case*, 1 Eq. 231, 235; *Taunton* v. *Royal Insurance Co.*, 2 H. & M. 135.

Form B. We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.			Number of Shares taken by each Subscriber.
"1. John Jones of	in the county of	merchant	200
"2. John Smith of	in the county of	–	25
"3. Thomas Green of	in the county of	– –	30
"4. John Thompson of	in the county of	– –	40
"5. Caleb White of	in the county of	– –	15
"6. Andrew Brown of	in the county of	– –	5
"7. Cæsar White of	in the county of	–	10
	Total shares taken	–	325

Dated the 22nd day of November, 18 .
Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM B.

Memorandum and Articles of Association of a Company limited by Guarantee, and not having a Capital divided into Shares (*g*).

Memorandum of Association.

1st. The name of the company is "The Mutual London Marine Association Limited."

2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are, "the mutual insurance of ships belonging to members of the company, and the doing all such other things as are incidental or conducive (*h*) to the attainment of the above objects."

4th. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding-up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding ten pounds.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association.

Names, Addresses, and Descriptions of Subscribers.

"1. John Jones of in the county of merchant.
"2. John Smith of in the county of
"3. Thomas Green of in the county of
"4. John Thompson of in the county of
"5. Caleb White of in the county of
"6. Andrew Brown of in the county of
"7. Cæsar White of in the county of

Dated the 22nd day of November, 18 .
Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

(*g*) ss. 9, 14. (*h*) See p. 525, note (*f*).

ARTICLES of ASSOCIATION to accompany preceding MEMORANDUM of ASSOCIATION (*i*). **Form B.**

(1.) The company, for the purpose of registration, is declared to consist of five hundred members (*k*).

(2.) The directors hereinafter mentioned may, whenever the business of the association requires it, register an increase of members.

Definition of Members.

(3.) Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained (*l*).

General Meetings.

(4.) The first general meeting shall be held at such time, not being more than three months after the incorporation of the company, and at such place, as the directors may determine.

(5.) Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year at such place as may be determined by the directors.

(6.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

(7.) The directors may, whenever they think fit, and they shall, upon a requisition made in writing by any five or more members, convene an extraordinary general meeting.

(8.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.

(9.) Upon the receipt of such requisition the directors shall forthwith proceed to convene a general meeting: If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other five members, may themselves convene a meeting.

Proceedings at General Meetings.

(10.) Seven days' notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

(11.) All business shall be deemed special that is transacted at an extraordinary meeting: and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance-sheets, and the ordinary report of the directors.

(12.) No business shall be transacted at any meeting, except the declaration of a dividend, unless a quorum of members is present at the commencement of such business, and such quorum shall be ascertained as follows: that is to say, if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed thirty.

(13.) If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if convened upon the requisition of the members, shall be dissolved: In any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.

(14.) The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.

(15.) If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of such meeting.

(16.) The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place, but no business shall be transacted at

(*i*) s. 14.

(*k*) As to notice of increase of number, see s. 34.

(*l*) See *United Kingdom Association* v. *Nevill*, 19 Q. B. Div. 110; *Ocean Association* v. *Leslie*, 22 Q. B. D. 722, n.; *Great Britain Association* v. *Wyllie*, 22 Q. B. Div. 710.

Form B.

any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(17.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

(18.) If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting.

Votes of Members.

(19.) Every member shall have one vote and no more.

(20.) If any member is a lunatic or idiot he may vote by his committee, *curator bonis*, or other legal curator.

(21.) No member shall be entitled to vote at any meeting unless all moneys due from him to the company have been paid.

(22.) Votes may be given either personally or by proxies: a proxy shall be appointed in writing under the hand of the appointor, if such appointor is a corporation, under its common seal.

(23.) No person shall be appointed a proxy who is not a member, and the instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

(24.) Any instrument appointing a proxy shall be in the following form:—

Company, Limited.

I of in the county of , being a member of the Company, Limited, hereby appoint of as my proxy, to vote for me and on my behalf at the [ordinary *or* extraordinary, *as the case may be*] general meeting of the company to be held on the day of , and at any adjournment thereof to be held on the day of next [*or* at any meeting of the company that may be held in the year].

As witness my hand, this day of .

Signed by the said in the presence of .

Directors.

(25.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

(26.) Until directors are appointed, the subscribers of the memorandum of association shall for all the purposes of this Act [*sic*] be deemed to be directors.

Powers of Directors.

(27.) The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not hereby required to be exercised by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Election of Directors.

(28.) The directors shall be elected annually by the company in general meeting.

Business of Company.

[*Here insert Rules as to Mode in which business of Insurance is to be conducted.*]

Accounts.

(29.) The accounts of the company shall be audited by a committee of five members to be called the audit committee.

(30.) The first audit committee shall be nominated by the directors out of the body of members.

(31.) Subsequent audit committees shall be nominated by the members at the ordinary general meeting in each year.

(32.) The audit committee shall be supplied with a copy of the balance-sheet, and it shall be their duty to examine the same with the accounts and vouchers relating thereto.

(33.) The audit committee shall have a list delivered to them of all books kept by the company, and they shall at all reasonable times have access to the books

and accounts of the company: they may, at the expense of the company, employ accountants or other persons to assist them in investigating such accounts, and they may in relation to such accounts examine the directors or any other officer of the company.

(34.) The audit committee shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations of the company, and properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanation or information from the directors, whether such explanation or information have been given by the directors, and whether they have been satisfactory, and such report shall be read together with the report of the directors at the ordinary meeting.

Notices.

(35.) A notice may be served by the company upon any member either personally, or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.

(36.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed, and put into the post-office.

Winding-up.

(37.) The company shall be wound up voluntarily whenever an extraordinary resolution, as defined by the Companies Act, 1862 (*m*), is passed requiring the company to be wound up voluntarily.

Names, Addresses, and Descriptions of Subscribers.

"1. John Jones of in the county of merchant.
"2. John Smith of in the county of
"3. Thomas Green of in the county of
"4. John Thompson of in the county of
"5. Caleb White of in the county of
"6. Andrew Brown of in the county of
"7. Cæsar White of in the county of

Dated the 22nd day of November, 18 .

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM C.

MEMORANDUM and ARTICLES of ASSOCIATION of a Company limited by Guarantee, and having a Capital divided into Shares (*n*).

Memorandum of Association.

1st. The name of the company is "The Highland Hotel Company, Limited."

2nd. The registered office of the company will be situate in Scotland.

3rd. The objects for which the company is established are the "facilitating "travelling in the Highlands of Scotland, by providing hotels and conveyances by "sea and by land for the accommodation of travellers, and the doing all such other "things as are incidental or conducive (o) to the attainment of the above object.

4th. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding-up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding twenty pounds.

(*m*) s. 129. (*n*) ss. 9, 14. (o) See p. 525, note (*f*).

Form D. We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses, and Descriptions of Subscribers.

"1. John Jones of in the county of merchant.
"2. John Smith of in the county of
"3. Thomas Green of in the county of
"4. John Thompson of in the county of
"5. Caleb White of in the county of
"6. Andrew Brown of in the county of
"7. Cæsar White of in the county of

Dated the 22nd day of November, 18 .
Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

Articles of Association to accompany preceding Memorandum of Association (p).

1. The capital of the company shall consist of five hundred thousand pounds, divided into five thousand shares of one hundred pounds each.
2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares.
3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.
4. All the articles of Table A. shall be deemed to be incorporated with these articles, and to apply to the company.

We, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.	Number of Shares taken by each Subscriber.
"1. John Jones of in the county of – –	200
"2. John Smith of in the county of – –	25
"3. Thomas Green of in the county of – –	30
"4. John Thompson of in the county of – –	40
"5. Caleb White of in the county of – –	15
"6. Andrew Brown of in the county of – –	5
"7. Cæsar White of in the county of – –	10
Total shares taken – –	325

Dated the 22nd day of November, 18 .
Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM D.

MEMORANDUM and ARTICLES of ASSOCIATION of an unlimited Company having a Capital divided into Shares (q).

Memorandum of Association.

1st. The name of the company is "The Patent Stereotype Company."
2nd. The registered office of the company will be situate in England.
3rd. The objects for which the company is established are "the working of a patent method of founding and casting stereotype plates, of which method John Smith, of London, is the sole patentee" (r).

(p) s. 14.
(q) ss. 10, 14.
(r) As to what these words will include, see *Leifchild's Case*, 1 Eq. 231, 235.

WE, the several persons whose names are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association. **Form D.**

Names, Addresses, and Descriptions of Subscribers.

"1. John Jones of in the county of merchant.
"2. John Smith of in the county of
"3. Thomas Green of in the county of
"4. John Thompson of in the county of
"5. Caleb White of in the county of
"6. Andrew Brown of in the county of
"7. Abel Brown of in the county of

Dated 22nd day of November, 18
Witness to the above signatures,
A. B., No. 20, Bond Street, Middlesex.

Articles of Association to accompany the preceding Memorandum of Association (*s*).

Capital of the Company.

The capital of the company is two thousand pounds, divided into twenty shares of one hundred pounds each.

Application of Table A.

All the Articles of Table A. (*t*) shall be deemed to be incorporated with these articles, and to apply to the company.

WE, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.			Number of Shares taken by Subscribers.
"1. John Jones of	in the county of	merchant	1
"2. John Smith of	in the county of	– –	5
"3. Thomas Green of	in the county of		2
"4. John Thompson of	in the county of	– –	2
"5. Caleb White of	in the county of		3
"6. Andrew Brown of	in the county of	– –	4
"7. Abel Brown of	in the county of	– –	1
	Total shares taken	– –	18

Dated the 22nd day of November, 18 .
Witness to the above signatures,
A. B., No. 20, Bond Street, Middlesex.

(*s*) s. 14. (*t*) *Supra*, pp. 445–523.

FORM E (SECT. 26).

As altered by the Board of Trade, by Notice in the *London Gazette* of the 14th day of April, 1885, pursuant to s. 71 of the Companies Act, 1862.

SUMMARY of CAPITAL and SHARES of the COMPANY, made up to the day of 18 (being the fourteenth day succeeding the date of the First Ordinary General Meeting in 18).

Nominal capital £ divided into [1] shares of £[1] each.
[2] Number of shares taken up to the day of 18 .[3]
[3] There has been called up on each of shares £
" " " £
[4] Total amount of calls (including payments on application and allotment) received £
Total amount (if any) agreed to be considered as paid on shares £
Total amount of calls unpaid £
Total amount (if any) paid on [5] shares forfeited £

[1] *When there are shares of different kinds (e.g. A or B, or £100 or £5), state the numbers and nominal values separately.*
[2] *Specify the existing shares only, as shown in the list.*
[3] *Where various amounts have been called, or there are shares of different kinds (e.g. A or B, or £100 or £5), state them separately.*
[4] *Include what has been received on forfeited as well as on existing shares.*
[5] *State the aggregate number of shares forfeited (if any).*

The Return is to be signed at the End, by a director, manager, secretary, or other authorized officer of the company.

Presented for filing by _____

LIST of persons holding shares in the Company, on the day of , 18 , and of persons who have held shares therein at any time during the year immediately preceding the said date, shewing their Names and Addresses, and an account of the Shares so held.

Folio in Register Ledger containing particulars.	NAMES, ADDRESSES, AND OCCUPATIONS.				ACCOUNT OF SHARES.					Remarks.
	Surname.	Christian Name.	Address.	Occupation.	[6] Number of Shares held by existing Members at Date of Return.[7]	[8] Particulars of Shares transferred during the preceding year by persons who are still Members.		[8] Particulars of Shares transferred during the preceding year by persons who have ceased to be Members.		
						Number.[7]	Date of Registration of Transfer.	Number.[7]	Date of Registration of Transfer.	

(*Signature*) _____

(*Officer*) _____

[6] The aggregate number of shares held and not the distinctive numbers is to be stated, and the column should be added up throughout, so as to make one total to agree with that stated in the summary to have been taken up.
[7] When the shares are of different classes, these columns may be subdivided, so that the number of each class held, or transferred, may be shown separately.
[8] The list should include all transfers since the date of the last return, and the date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the "*Remarks*" column, immediately opposite the particulars of each transfer.

Form F.

FORM F.

LICENCE to hold LANDS (*x*).

The Lords of the Committee of Privy Council appointed for the consideration of matters relating to Trade and Foreign Plantations hereby license the Assooiation, Limited, to hold the lands hereunder described [*insert description of lands*]. The conditions of this licence are [*insert conditions, if any*].

THIRD SCHEDULE (*y*).

FIRST PART.

Date and Chapter of Act.	Title of Act.
21 & 22 Geo. 3, c. 46 (Parliament of Ireland)	An Act to promote Trade and Manufactures by regulating and encouraging Partnerships.
7 & 8 Vict. c. 110	An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies.
7 & 8 Vict. c. 111	An Act for facilitating the winding-up the Affairs of Joint Stock Companies unable to meet their pecuniary Engagements.
7 & 8 Vict. c. 113	An Act to regulate Joint Stock Banks in England.
8 & 9 Vict. c. 98	An Act for facilitating the winding-up the Affairs of Joint Stock Companies in Ireland unable to meet their pecuniary Engagements.
9 & 10 Vict. c. 28	An Act to facilitate the Dissolution of certain Railway Companies.
9 & 10 Vict. c. 75	An Act to regulate Joint Stock Banks in Scotland and Ireland.
10 & 11 Vict. c. 78	An Act to amend an Act for the Registration, Incorporation, and Regulation of Joint Stock Companies.
11 & 12 Vict. c. 45	An Act to amend the Acts for facilitating the winding-up the Affairs of Joint Stock Companies unable to meet their pecuniary Engagements, and also to facilitate the dissolution and winding-up of Joint Stock Companies, and other Partnerships.
12 & 13 Vict. c. 108	An Act to amend the Joint Stock Companies Winding-up Act, 1848.
19 & 20 Vict. c. 47 (*z*)	An Act for the Incorporation and Regulation of Joint Stock Companies and other Associations.
20 & 21 Vict. c. 14	An Act to amend the Joint Stock Companies Act, 1856.
20 & 21 Vict. c. 49	An Act to amend the Law Relating to Banking Companies.
20 & 21 Vict. c. 78	An Act to amend the Act Seven and Eight Victoria, Chapter One hundred and eleven, for facilitating the winding-up the Affairs of Joint Stock Companies unable to meet their pecuniary Engagements, and also the Joint Stock Companies Winding-up Acts, 1848 and 1849.
20 & 21 Vict. c. 80	An Act to amend the Joint Stock Companies Act, 1856.
21 & 22 Vict. c. 60	An Act to amend the Joint Stock Companies Acts, 1856 and 1857, and the Joint Stock Banking Companies Act, 1857.
21 & 22 Vict. c. 91	An Act to enable Joint Stock Banking Companies to be formed on the Principle of Limited Liability.

(*x*) s. 21.
(*y*) s. 205.
(*z*) With the exception of Table B. in the schedule thereto; *ante*, s. 206 (5).

SECOND PART (a).

7 & 8 Vict. c. 113, s. 47.

Existing companies to have the powers of suing and being sued.

Every company of more than six persons established on the sixth of May, one thousand eight hundred and forty-four, for the purpose of carrying on the trade or business of bankers within the distance of sixty-five miles from London, and not within the provisions of the Act passed in the session holden in the seventh and eighth years of the reign of her present Majesty, chapter one hundred and thirteen, shall have the same powers and privileges of suing and being sued in the name of any one of the public officers of such co-partnership as the nominal plaintiff, petitioner or defendant on behalf of such co-partnership; and all judgments, decrees, and orders made and obtained in any such suit may be enforced in like manner as is provided with respect to such companies carrying on the said trade or business at any place in England, exceeding the distance of sixty-five miles from London, under the provisions of an Act passed in the seventh year of the reign of King George the Fourth, chapter forty-six, intituled "An Act for the better regulating co-partnerships of certain Bankers in England, and for amending so much of an Act of the Thirty-ninth and Fortieth Years of the Reign of His late Majesty King George the Third, intituled 'An Act for establishing an Agreement with the Governor and Company of the Bank of England for advancing the Sum of Three Millions towards the Supply for the Service of the Year One Thousand eight hundred,' as relates to the same," provided that such first-mentioned company shall make out and deliver from time to time to the Commissioners of Stamps and Taxes the several accounts or returns required by the last-mentioned Act, and all the provisions of the last-recited Act as to such accounts or returns shall be taken to apply to the accounts or returns so made out and delivered by such first-mentioned companies as if they had been originally included in the provisions of the last-recited Act.

20 & 21 Vict. c. 49, part of Section XII.

Power to form banking partnerships of ten persons

Notwithstanding anything contained in any Act passed in the session holden in the seventh and eighth years of the reign of her present Majesty, chapter one hundred and thirteen, and intituled "An Act to regulate Joint Stock Banks in England," or in any other Act, it shall be lawful for any number of persons, not exceeding ten, to carry on in partnership the business of banking, in the same manner and upon the same conditions in all respects as any company of not more than six persons could before the passing of this Act have carried on such business.

(a) See s. 205.

THE COMPANIES ACT, 1867.

30 & 31 Vict. c. 131.

An Act to amend "The Companies Act, 1862."

[20th August, 1867.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This Act may be cited for all purposes as "The Companies Act, 1867."

Act to be construed as one with 25 & 26 Vict. c. 89.

2. The Companies Act, 1862, is hereinafter referred to as "The Principal Act;" and the Principal Act and this Act are hereinafter distinguished as and may be cited for all purposes as "The Companies Acts, 1862 and 1867;" and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the Principal Act; and the expression "this Act" in the Principal Act, and any expression referring to the Principal Act which occurs in any Act or other document, shall be construed to mean the Principal Act as amended by this Act.

Commencement of Act.

3. This Act shall come into force on the first day of September one thousand eight hundred and sixty-seven, which date is hereinafter referred to as the commencement of this Act.

Unlimited Liability of Directors.

Company may have directors with unlimited liability.

4. Where after the commencement of this Act a company is formed as a limited company under the Principal Act, the liability of the directors or managers of such company, or the managing director, may, if so provided by the memorandum of association, be unlimited.

Liability of director, past and present, where liability is unlimited.

5. The following modifications shall be made in the thirty-eighth section of the Principal Act, with respect to the contributions to be required in the event of the winding-up of a limited company under the Principal Act, from any director or manager whose liability is, in pursuance of this Act, unlimited.

(1.) Subject to the provisions hereinafter contained, any such director or manager, whether past or present, shall, in

Sect. 6.

addition to his liability (if any) to contribute as an ordinary member, be liable to contribute as if he were at the date of the commencement of such winding-up a member of an unlimited company:

(2.) No contribution required from any past director or manager who has ceased to hold such office for a period of one year or upwards prior to the commencement of the winding-up shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the company:

(3.) No contribution required from any past director or manager in respect of any debt or liability of the company contracted after the time at which he ceased to hold such office shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the company:

(4.) Subject to the provisions contained in the regulations of the company, no contribution required from any director or manager shall exceed the amount (if any) which he is liable to contribute as an ordinary member, unless the Court deems it necessary to require such contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up.

Director with unlimited liability may have set-off as under sect. 101 of 25 & 26 Vict. c. 89.

6. In the event of the winding-up of any limited company, the Court, if it think fit, may make to any director or manager of such company whose liability is unlimited the same allowance by way of set-off as under the one hundred and first section of the Principal Act it may make to a contributory where the company is not limited.

Notice to be given to director on his election that his liability will be unlimited.

7. In any limited company in which, in pursuance of this Act, the liability of a director or manager is unlimited, the directors or managers of the company (if any), and the member who proposes any person for election or appointment to such office, shall add to such proposal a statement that the liability of the person holding such office will be unlimited, and the promoters, directors, managers, and secretary (if any) of such company, or one of them, shall before such person accepts such office or acts therein, give him notice in writing that his liability will be unlimited.

If any director, manager, or proposer make default in adding such statement, or if any promoter, director, manager, or secretary make default in giving such notice, he shall be liable to a penalty not exceeding one hundred pounds, and shall also be liable for any damage which the person so elected or appointed may sustain from

such default, but the liability of the person elected or appointed shall not be affected by such default.

Existing limited company may, by special resolution, make liability of directors unlimited.

8. Any limited company under the Principal Act, whether formed before or after the commencement of this Act, may, by a special resolution (*a*), if authorized so to do by its regulations, as originally framed or as altered by special resolution (*a*), from time to time modify the conditions contained in its memorandum of association (*β*) so far as to render unlimited the liability of its directors or managers, or of the managing director; and such special resolution shall be of the same validity as if it had been originally contained in the memorandum of association, and a copy thereof shall be embodied in or annexed to every copy of the memorandum of association which is issued after the passing of the resolution, and any default in this respect shall be deemed to be a default in complying with the provisions of the fifty-fourth section of the Principal Act, and shall be punished accordingly.

(*a*) Comp. Act, 1862, s. 51. (*β*) Comp. Act, 1862, s. 12.

Reduction of Capital and Shares (*a*).

Power to company to reduce capital.

9. Any company limited by shares may, by special resolution (*β*), so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed or as altered by special resolution (*β*), as to reduce its capital (*γ*): but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the Registrar of Joint Stock Companies, as is hereinafter mentioned (*δ*).

(*a*) Gen. Order, March, 1868, Rules 2–20.
(*β*) Comp. Act, 1862, s. 51.
(*γ*) Comp. Act, 1862, s. 12.
(*δ*) *Infra*, s. 15.

Reduction of capital.

The Companies Act, 1862, did not allow reduction of capital at all by companies governed by the Act. Under Part VII. s. 179, *et seq.*, a company previously unlimited might register under the Act as limited, and thus reduce the liability on shares; but this, subject to ss. 194 and 196 (5).

The Companies Act, 1867, empowers a company limited by shares "to reduce its capital," an expression quite general, and which, until the year 1877, when Jessel, M.R., decided the *Ebbw Vale Co.'s Case* (*b*), was understood to include reduction by reducing paid-up capital, including the writing off lost capital. In *Muntz Metal Co.* (*c*) in 1870, and in *Crédit Foncier of England* (*d*) in 1871, schemes for reduction of paid-up capital were sanctioned by the Court. In 1877, however, Jessel, M.R., held in the *Ebbw Vale Co.'s Case* (*b*) that the Act of 1867 allowed only reduction of liability in respect of the amount unpaid on a share, and not reduction of the amount paid upon it. The Act of 1877 did not necessarily recognize this decision as law, and

(*b*) 4 Ch. D. 827; and see *Kirkstall Brewery Co.*, 5 Ch. D. 535.
(*c*) 18 W. R. 1064; 39 L. J. (Ch.) 704.
(*d*) 11 Eq. 356.

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Cotton, L.J., has since (*e*) expressed a doubt whether it was correct. The Act of 1877 recited that doubts were entertained, and then enacted that "capital" in the Act of 1867 should include paid-up capital.

In reduction of capital (except where otherwise provided by sect. 4 of the Act of 1877) the creditor is amply protected by sections which provide in substance that if he objects he must either be paid or his debt must be secured; and the reduction is carried out under an order of the Court which must be obtained.

The Companies Act, 1877, allows of reduction by:—

(1) Cancelling lost capital;

(2) Paying off capital in excess of the wants of the company;

(and as to either (1) or (2), either with or without extinguishing or reducing the liability remaining on the shares); and

(3) Cancelling shares which have never been issued.

In case (1), if liability in respect of unpaid capital is not diminished, and paid-up capital is not repaid, creditors are not entitled to object; but the order of the Court is still necessary as under the Act of 1867. In any other case under (1) and (2) the whole proceedings under the Act of 1867 are necessary.

In case (3) no consent of creditors or order of the Court is necessary.

The Companies Act, 1879, extends to companies registered as unlimited under the Act of 1862 the power which, as above mentioned, unlimited companies not registered under that Act previously enjoyed, viz., the power to register as limited. It also provides that companies already registered as limited under that Act may re-register. The effect of this last provision is not obvious.

The Companies Act, 1880, gives a power of so-called reduction of paid-up capital by "returning" accumulated profits to the shareholders with the right to call it again. This remarkable statute is discussed in a note to the Act itself. It need not be further mentioned for the purposes of the present note.

Meaning of "capital."

The word "capital" may have any one of at least three meanings—viz.:—

(1) Nominal capital: the amount named in the memorandum of association, say, £100,000 in 10,000 shares of £10 each.

(2) Issued capital, say 5000 shares of £10 each, part of the above nominal capital.

(3) Paid-up capital, say £25,000, being £5 per share on each of the above 5000 shares.

In which one of these meanings it is used in the Acts, it is very difficult to say: probably it is used sometimes in one and sometimes in another. In the *Dronfield Co.* (*f*), Jessel, M.R., pointed out that in sect. 12 of the Companies Act, 1862, and sect. 9 of the Companies Act, 1867, it must mean not merely "nominal capital," but "issued capital" or "trading capital." By sect. 3 of the Companies Act, 1877, the word as used in the Companies Act, 1867, is to "include" paid-up capital; and looking at sect. 5 of the Companies Act, 1877, it must include nominal capital, for that is the only thing reduced when you reduce capital by cancelling unissued shares. The result, therefore, would seem to be that the Acts of 1867 and 1877 in fact cover all three meanings.

Reduction of capital then by:—

(1) Diminishing the nominal amount of the shares so as to leave a less sum unpaid;

(*e*) *Bannatyne* v. *Direct Spanish Telegraph Co.*, 34 Ch. Div. 287, 302.

(*f*) 17 Ch. D. 76, 86. See also *Kirkstall Brewery Co.*, 5 Ch. D. 535.

(2) Diminishing the nominal amount of the share by writing off or repaying paid-up capital, leaving the same amount unpaid;
(3) Diminishing the nominal amount of the share by combining (1) and (2);
(4) Diminishing the number of shares by cancelling unissued shares;
are all within the Companies Acts, 1867 and 1877, and can be effected, but only by observing the provisions of those Acts.

Purchase by company of its own shares.

The vexed question of the legality of the purchase by a company of its own shares is at last set at rest by the decision of the House of Lords in *Trevor* v. *Whitworth* (*g*), and the principle of the decision in *Re Dronfield Silkstone Co.* (*h*), which for some years created perpetual difficulty in advising upon operations with respect to capital by limited companies under these Acts, is gone. A power in the articles for a company to purchase its own shares is in contravention of the statute and is void (*g*), and Lord Macnaghten is of opinion (*i*), and the Scotch Court has decided in the similar matter of issue of shares at a discount (*k*), that a power in the memorandum would be void also.

The grounds of this decision and the principles which it affirms may be summarized thus: (1) Purchase by a company of its own shares is not forfeiture or surrender or anything like it. Forfeiture is valid, the Act recognizes it (*l*): the company parts with no money, but resumes dominion of a share upon which something has been paid, and this because a further payment cannot be obtained. Surrender may in many cases be valid, *e.g.*, where the company could forfeit and the member dispenses with the formalities. Each case of surrender must be determined upon its merits (*m*): at any rate the company parts with no consideration. Where money is paid or consideration given by the company it is a purchase, and purchase is neither forfeiture nor surrender. (2) The company cannot be a member of itself (*n*). (3) The purchase of its own shares is a reduction of capital. The Acts of 1867 and 1877, in sanctioning reduction of capital under certain conditions and with certain restrictions, impliedly prohibit it unless the prescribed conditions and restrictions are observed. (4) The Acts impliedly prohibit the return of capital to members. The payment of capital to one shareholder is just as much a reduction of capital and just as detrimental to the interests of creditors as the payment of the same amount to all the shareholders rateably. (5) The transaction cannot be justified as "incidental" to the company's objects, *e.g.*, in a private company where it is desired to keep the shares in the hands of a few. To the creditor whose interests the Act intends to protect it makes no difference what the object of the purchase is.

The reduction of capital made when the company purchases its own shares is, (1) a reduction of paid-up capital, and (2) a reduction of issued capital, and (3), except where the shares are fully paid, a reduction of unpaid capital. For as to paid-up capital the company parts with money, and as to issued capital the shares cease to be in issue, since the company cannot be a member of itself, and as to unpaid capital there is no individual external to the company who is now liable for calls on the shares.

The earlier cases are, after the decision in *Trevor* v. *Whitworth* (*g*), of less importance, but for convenience of reference they are retained here.

(*g*) *Trevor* v. *Whitworth*, 12 App. Cas. 409; *Gen. Property Investment* v. *Matheson*, Ct. of Sess. Cas., 4th series, vol. xvi. p. 282.
(*h*) 17 Ch. Div. 76.
(*i*) 12 App. Cas. 436.
(*k*) *Klenck* v. *East India Exploration Co.*, Ct. of Sess. Cas., 4th series, vol. xvi. p. 271.
(*l*) Comp. Act, 1862, s. 26.
(*m*) *Dronfield Co.*, 17 Ch. D. 85; *Trevor* v. *Whitworth*, 12 App. Cas. 409, 418.
(*n*) 17 Ch. D. 83; 12 App. Cas. 424.

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The decision in *Hope* v. *International Financial Society* (*o*) went only to this, that a company which has not by its memorandum and articles of association power so to do, cannot traffic in its own shares by purchasing them with a view to selling them again, and that therefore the acquisition of its own shares by such a company must be improper, because either it is going to issue them again, in which case it is trafficking in its own shares, which, *ex hypothesi*, it has not power to do, or it is not going to issue them again, in which case it is reducing its capital. But it did not decide whether a company which has power to traffic in its own shares can do so, notwithstanding the question of reduction of capital.

The decision in *Re Dronfield Co.* (*p*) was really no decision on the general question, although the grounds of the judgment had a much wider effect than the Court probably contemplated. It was conceded there on all hands that forfeiture of shares for non-payment of calls, *i.e.* forfeiture adversely to a shareholder and without paying anything for the shares, is legal, although no doubt it results *pro tanto* in a reduction of the capital of the company, since, *ex hypothesi*, the shares are not fully paid, and the company loses the liability (if worth anything) of the shareholder. The decision did not necessarily do more than carry the same principle further to this extent, that if there is sufficient power in the original articles, a shareholder with whom there is a dispute, or of whom the other shareholders desire to get rid, may be allowed to surrender his shares to the company, and to receive out of the company's assets a sum of money for so doing. This extension, however, could only be made by adopting principles which the House of Lords has now disaffirmed.

The order itself, as was pointed out in the House of Lords in *Trevor* v. *Whitworth* (*q*), may be supported without adopting the reasoning on which the Court of Appeal proceeded. For Ward's name had been removed from the register seven years before: in the interval the company had been very prosperous and had paid large dividends: there was no creditor whose debt had been incurred while Ward was a member, and the application was to render Ward liable by rectification of the register under the exercise of a judicial power given to the Court "if satisfied of the justice of the case." The liquidator was, therefore, invoking a statutory power of the Court under circumstances such as that he had no equity to set the Court in motion.

But in the absence of special circumstances the member who has sold his shares to the company is liable to be restored to the register and rendered liable, seeing that he has never validly disposed of his shares (*r*).

The decision of Fry, J., in *Colville's Case* (*s*), which was cited in *Re Dronfield Co.* (*t*), but not noticed in the judgments, certainly went a good deal further than *Re Dronfield Co.* (*p*). It was there held that under a power to accept surrenders of shares on such terms as the directors might think fit, which was not in the original articles but was added by special resolution, a surrender was valid which was proposed by the shareholder and accepted by the company and under which the company paid the shareholder £300 for shares on which £1600 had been paid.

In *Phosphate of Lime Co.* v. *Green* (*u*), the directors had advanced money to the promoters of the company to enable them to take up shares which the promoters had bought, and the directors subsequently agreed to abandon

(*o*) 4 Ch. Div. 327.
(*p*) 17 Ch. Div. 76.
(*q*) 12 App. Cas. 409, 420, 429, 439, 440.
(*r*) *Gen. Property Investment* v. *Matheson*, Ct. of Sess. Cas., 4th series, vol. xvi. p. 282.
(*s*) 48 L. J. (Ch.) 633; 41 L. T. 177.
(*t*) 17 Ch. Div. 76, 89.
(*u*) L. R. 7 C. P. 43.

their claim to have the money returned, in consideration of the shares being delivered up to be cancelled. This was held to bo a purchase of shares; but although it was invalid, yet the shareholders having with knowledge or means of knowledge ratified and acquiesced in the transaction, this was held to sustain a plea of accord and satisfaction to an action brought to recover the money advanced. But this case can now, it is conceived, be accepted only with reservation. The question whether the transaction was within the memorandum or was consistent with the Companies Acts was not argued or considered, and it was not then so well settled as it has been since *Ashbury Co.* v. *Riche* (*x*) that a transaction not within the memorandum cannot be ratified.

In *Zulueta's Claim* (*y*) the memorandum of association specified as an object the making advances on and purchases, sales, and dealings in shares of joint stock companies, and some expressions of Giffard, L.J., were often cited to the effect that unless the memorandum [or *semble* the articles] contained a direct authority for the company to purchase its own shares such a purchase was *ultra vires* (*z*).

Return of capital to members subject to re-call.

The statute contains no provisions as to the making of calls, and leaves it to the regulations, of which Table A. is but a specimen, to determine how and when they shall be made. In the going company therefore it rests entirely with the company to determine by its regulations how and when the calls shall be made on the capital which has been issued. Suppose the capital has been called up too fast and the directors are desirous of returning some part to the shareholders on the terms that it may be called again when wanted, and the articles contain a regulation aptly worded to allow this, is a return on such terms legal? The question has never yet been determined. In *Guinness* v. *Land Corporation of Ireland* (a), *Flitcroft's Case* (*b*), and *Trevor* v. *Whitworth* (*c*), there are expressions to the effect that whatever has been paid by a member cannot be returned to him, but the point there was not return subject to recall, but return upon the terms that the members should retain. The wording of sect. 3 of the Companies Act, 1877, must, in considering this question, be borne in mind. You may under that section pay off capital in excess of the wants of the company, and if return subject to recall is within those words, then it can be made only subject to the conditions imposed by the Act. The section however goes on to speak of the "liability (if any) remaining on the shares"—now return subject to recall obviously and necessarily leaves liability remaining, so that, *arguendo*, such a return is not one with which the section is dealing.

Orders have been made sanctioning reduction of capital by the return of money subject to recall (*d*). And if these are right, then it would seem that return of capital subject to recall is without such an order wrong.

See also the note to Companies Act, 1880, s. 3.

Dividends out of capital :—

In connection with the question of the legality of a power for a company to purchase its own shares, should be borne in mind the cases on payment of dividend out of capital which have already been considered (*e*). In each is involved the question whether the statute does not by implication, if not

(*x*) L. R. 7 H. L. 653.

(*y*) 5 Ch. 444.

(*z*) See also *Land Credit Co. of Ireland* v. *Lord Fermoy*, 8 Eq. 7; 5 Ch. 763; *Hodgkinson* v. *National Live Stock Insurance Co.*, 4 De G. & J. 422; *Lawes' Case*, 1 D. M. & G. 421, where authority purported to have been given by an extraordinary meeting; *Marseilles Extension Railway, E. p. Crédit Foncier*, 7 Ch. 161; *Cree* v. *Somervail*, 4 App. Cas. 648; *Nelson Mitchell's Case*, 4 App. Cas. 624.

(a) 22 Ch. Div. 349, 375.

(*b*) 21 Ch. Div. 519, 533.

(*c*) 12 App. Cas. 409.

(*d*) *Fore Street Warehouse Co.*, W. N. 1888, 155.

(*e*) *Ante*, p. 516.

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expressly, provide that the paid-up capital of the company shall (subject of course to loss of which the creditor takes the risk) be retained and kept up as the fund to which the creditors are entitled to look, and shall not, whether by return to the shareholders *pro ratâ* (which, unless carried out under the statute, is impliedly forbidden by Companies Act, 1862, s. 12, and Companies Act, 1877, s. 3), or by return to one or more shareholders in purchase of their shares otherwise than by way of something analogous to a forfeiture, or by payment thereout of dividend when no profit has been earned, be returned to the shareholders (*f*).

under a power in the memorandum.

But suppose the memorandum of association contains, as an object of the company, the application of some part of the capital in paying dividends, is this valid? *Lee* v. *Neuchatel Asphalte Co.* (*g*) has determined that if the memorandum of association (for that must be what is meant) allows of the sinking of the capital in a wasting property the depreciation by waste may be a capital and not a revenue charge, with the result that the credit balance of revenue account may be divided in dividend without deduction of the depreciation by waste. This does not, however, cover the point now under consideration for it is one thing to apply capital in paying dividend, and another to apply revenue in paying dividend without first recouping waste of capital. The case is nearer to *Trevor* v. *Whitworth* (*h*) than to *Lee* v. *Neuchatel Asphalte Co.* (*g*).

In the scheme for the *Land Corporation of Ireland*, after the decision in *Guinness* v. *Land Corporation of Ireland* (*i*), the question presented itself practically in the following form. To carry out the original scheme two companies were there subsequently incorporated, the one the Land Company, to carry out operations in land, the other the Guarantee Company, whose memorandum of association defined its objects to include the application of its capital so far as necessary to supplement the earnings of the Land Company, so as to make up a certain rate of return upon the Land Company's capital. In the form of two such companies the transaction was obviously legal. Could not those two companies have been amalgamated? or could not a single company have been formed whose objects should in its memorandum have been described as being to operate in land, and so far as necessary to devote some part of its capital, say capital subscribed upon B. shares, to make good a dividend, at say 5 per cent. per annum, upon the A. shares? It may be, as Lord Macnaghten said in *Trevor* v. *Whitworth* (*k*), in reference to a power in the memorandum to purchase the company's own shares, that such a provision in the memorandum would be repugnant and contradictory to the rest of the memorandum: or at any rate would have the effect of reducing one of the statutory conditions of the memorandum to an empty form. But it is difficult to see how the creditor could complain, or how any provision of the statute would be broken, if the memorandum itself designated as one of the destinations of the capital subscribed the payment of dividend upon the shares, and there are several expressions in the judgments in *Guinness* v. *Land Corporation of Ireland* (*i*) which lead to the inference that the Court would have been of opinion that a memorandum in the form suggested would have been valid and effectual. The question is continually presenting itself in practice in the form of interest during construction in the case of companies whose objects are to construct large works which are necessarily for many years unremunerative.

(*f*) See *National Funds Co.*, 10 Ch. D. 118, 127; *Holmes* v. *Newcastle Abattoir Co.*, 1 Ch. D. 682.

(*g*) 41 Ch. Div. 1.

(*h*) 12 App. Cas. 409.

(*i*) 22 Ch. Div. 349.

(*k*) 12 App. Cas. 409, 437.

Any dealing with the capital of a company which is a reduction of capital within the Acts and which is not carried out in pursuance of the provisions of the Acts will be restrained (*l*). And if shares have been illegally issued at a discount the Court will not confirm a reduction based upon writing off the discount as "unrepresented by available assets" (*m*).

Injunction against illegal reduction.

The Act is silent as to the manner in which the sum to be written off is to be apportioned as among the several shareholders. The inference is that it is to be borne among them in such manner as under the constitution of the company loss in respect of capital is to be borne. If, therefore, no shares have preferential rights in respect of capital over other shares, the company cannot in reducing capital resolve that some only of the shares shall be reduced (thus making these bear all the loss) while others are not reduced (*n*). And if the company does pass resolutions to that effect, it is conceived that the Court will not confirm them unless the assent of every single shareholder who is adversely affected by the resolutions assents. It is true that in the *Quebrada Co.* (*o*) a reduction which threw the loss exclusively on the ordinary shareholders was ultimately confirmed, although there remained to the last three ordinary shareholders who dissented. But this must have been on the ground that their holding was only 126 shares of £10 each, and the amount by which they were affected was only one penny in the pound, and that they did not appear to oppose. As a decision upon the general question the case would upon this point probably not be followed (*n*).

Reduction in case of preference and ordinary shares.

If there be two classes of shares, viz. ordinary shares, and shares with a preferential right to dividend but without preference as to capital, the Court will not sanction a reduction which reduces the ordinary shares without reducing the preference shares (*n*).

If, on the other hand, there are two classes of shares, viz. ordinary shares, and shares with a preference in respect of capital (either with or without also a preference as to dividend), it is conceived that in such a company the reduction not only may, but must be thrown upon the ordinary shares to the indemnity of the preference shares.

The question is in every case one of construction of the contract under which the shares are taken. It is conceivable that a preferential right to dividend might be expressed in such form as to imply a preference as to capital, *e.g.* if the dividend were expressed to be a perpetual yearly sum of fixed amount being so much per cent. on capital. In such a case it is a question of construction upon the contract under which the shares were taken whether the capital can or not be so reduced as to diminish dividend by giving the defined rate upon a reduced capital sum (*p*).

Where the articles contained a power to reduce capital and the Court was of opinion that this contemplated (*inter alia*) a reduction by writing off lost capital, the preference shareholder was bound by a scheme of reduction by writing off from all shareholders alike one half of their capital as lost, although the result was to reduce the preferential dividend also by one half (*p*).

And where the articles did not, at the date when the preference shares were created, contain power to reduce, and such power was introduced afterwards by special resolution, the Court sanctioned a reduction which

(*l*) *Holmes* v. *Newcastle Abattoir Co.*, 1 Ch. D. 682; *Hope* v. *International Financial Society*, 4 Ch. Div. 327; and see *Bannatyne* v. *Direct Spanish Telegraph Co.*, 34 Ch. Div. 287.

(*m*) *New Chile Gold Co.*, 38 Ch. D. 475.

(*n*) *Union Plate Glass Co.*, 42 Ch. D. 513.

(*o*) 40 Ch. D. 363.

(*p*) *Bannatyne* v. *Direct Spanish Telegraph Co.*, 34 Ch. Div. 287.

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reduced all shares alike. For the preference shares were shares in a company which by the Act were reducible if the company took the proper steps under the Act for the purpose (*q*).

The reduction must in every case be such as to throw the loss upon the several shareholders according to their rights *inter se* in respect of capital (*r*). There is nothing to prevent each company creating such rights in this respect as it thinks proper (*q*). The Acts relating to reduction of capital give powers but do not impose duties on the company (*s*).

Discretion.

At the same time the power given to the Court by sect. 11 is a discretionary power and allows the Court to impose terms and conditions. The Court may, therefore, either confirm the reduction with or without conditions or may decline to confirm it. It is not necessarily confined to seeing that creditors are properly protected, but may take into account whether the reduction would work injustice between the different classes of shareholders, and although it may not fall within its function to impose conditions which amount to an alteration of the scheme, yet if such an alteration appears requisite it may refuse to confirm the reduction, leaving the company to resolve on a reduction in altered form if they think fit (*t*).

Necessary resolutions.

It is noticeable that while under sect. 12 of Companies Act, 1862, a company can increase or consolidate its capital or convert its paid-up shares into stock without a special resolution, it can under sects. 9 and 21 of Companies Act, 1867, and under the Companies Acts, 1877 and 1880, reduce its capital or subdivide its shares only by special resolution: assuming in each case other than as presently mentioned, that its articles authorize the act in question. But for the purposes of the Act of 1880, it is not necessary that the articles should authorize the act in question.

In companies governed by Table A. a difference is again introduced as respects the acts authorized by Companies Act, 1862, s. 12: for Art. (23) as to conversion of shares into stock does not, while Art. (26) as to increase of capital does, require a special resolution.

The reduction of capital and shares can only be effected in the manner provided by the Acts. Where, therefore, the case is not one under the Act of 1880, but is a case where the act in question ought to be authorized by the articles, then if the articles do not contain the power, there must be, *first*, a special resolution altering the regulations of the company so as to authorize it to modify the conditions contained in the memorandum of association; *secondly*, a special resolution modifying the conditions contained in the memorandum; and, *thirdly*, an order of the Court, duly registered, confirming the reduction. And therefore a single special resolution passed, under a power to vary the amount and number of the shares, &c., contained in the articles of association, by an extraordinary meeting was not within the Act, and the Court had no jurisdiction to confirm the reduction (*u*).

Company to add "and reduced" to its name for a limited period.

10. The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the Court may fix, the words "and reduced," as the

(*q*) *Barrow Steel Co.*, 39 Ch. D. 582.

(*r*) *Quebrada Co.*, 40 Ch. D. 363; *Union Plate Glass Co.*, 42 Ch. D. 513; *Gatling Gun, Limited*, 43 Ch. D. 628; *American Pastoral Co.*, W. N. 1890, 62.

(*s*) *Bannatyne* v. *Direct Spanish Telegraph Co.*, 34 Ch. Div. 287.

(*t*) *Direct Spanish Telegraph Co.*, 34 Ch. D. 307; and see 34 Ch. Div. 303, 305; *Barrow Steel Co.*, 39 Ch. D. 582.

(*u*) *West India and Pacific Steamship Co.*, 9 Ch. 11, n.; and see 9 Ch. 23; *Patent Invert Sugar Co.*, 31 Ch. Div. 166. As to a somewhat similar provision in Comp. Act, 1862, s. 12, see note to that section.

last words in its name, and those words shall, until such date, be deemed to be part of the name of the company within the meaning of the Principal Act (*a*).

(*a*) Gen. Order, March, 1868, Rule 20.

The Court has in the following cases ordered the words "and reduced" to be continued during the undermentioned periods from the date of the final order (sect. 11):—

Three months: *In re Sharp, Stewart, & Co.* (*x*); *In re Estate Co.* (*y*); *Re York Street Flax Spinning Co.* (*z*).

A month: *Re Dunaburg and Witepsk Railway Co.* (a); *Barrow Steel Co.* (*b*); *Walker and Lomax, Lim.* (*c*).

A fortnight: *In re Telegraph Construction Co.* (*d*); *Re Muntz' Metal Co.* (*e*); *In re Crédit Foncier of England* (*f*); *Re National Arms Co.* (*g*); *Patent Ventilating Granary Co.* (*h*).

Dispensed with under Comp. Act, 1877, s. 4: *London and City Land Co.* (*i*); *British Land Co. of America* (*k*); *West African Telegraph Co.* (*l*); *Vivian & Co.* (*l*).

Company to apply to the Court for an order confirming reduction.

11. A company which has passed a special resolution (*a*) for reducing its capital may apply to the Court by petition (β) for an order confirming the reduction, and on the hearing of the petition (γ) the Court, if satisfied that with respect to every creditor of the company who under the provisions of this Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured as hereinafter provided (δ), may make an order confirming the reduction on such terms and subject to such conditions as it deems fit.

(*a*) Comp. Act, 1862, s. 51.
(β) Gen. Order, March, 1868, Rule 2.
(γ) Gen. Order, March, 1868, Rules 16—19.
(δ) s. 14, *infra*. *Cf.* Comp. (Mem. of Ass.) Act, 1890, s. 1 (2) (*b*).

The jurisdiction under this section is discretionary (*m*). See note to sect. 9.

As to the proceedings in respect of a petition to reduce capital, see General Order, March, 1868, Rules 2–20, *infra*.

For forms of orders, see *In Re Sharp, Stewart, & Co.* (*n*); *Re York Street Flax Spinning Co.* (*o*); *In re Crédit Foncier of England* (*p*).

Service of the formal notices (*q*) on creditors residing abroad will, in a proper case, be dispensed with, on the company bringing into Court the amounts set opposite to the names of such creditors in the list required by

(*x*) 5 Eq. 155.
(*y*) 5 Ch. 407.
(*z*) M.R. (Ir.) 17 W. R. 816.
(a) 20 L. T. 103.
(*b*) 39 Ch. D. 582, 604.
(*c*) W. N. 1888, 26.
(*d*) 10 Eq. 384.
(*e*) 18 W. R. 1064; 39 L. J. (Ch.) 704.
(*f*) 11 Eq. 356.
(*g*) W. N. 1877, 31.
(*h*) 12 Ch. D. 254.
(*i*) W. N. 1885, 137.
(*k*) W. N. 1885, 205.
(*l*) W. N. 1886, 32.
(*m*) *Direct Spanish Telegraph Co.*, 34 Ch. D. 307; *Barrow Steel Co.*, 39 Ch. D. 582.
(*n*) 5 Eq. 155.
(*o*) M.R. (Ir.) 17 W. R. 816.
(*p*) 11 Eq. 356.
(*q*) See Gen. Order, March, 1868, Rule 9.

Sect. 12.

the General Order (*r*), and on giving them notice that this has been done (*s*).

Definition of "the Court."

12. The expression "the Court" shall in this Act mean the Court which has jurisdiction to make an order for winding-up the petitioning company (*a*), and the eighty-first and eighty-third sections of the Principal Act shall be construed as if the term "winding-up" in those sections included proceedings under this Act, and the Court may in any proceedings under this Act make such order as to costs as it deems fit.

(*a*) Comp. Act, 1862, s. 81; Industrial and Provident Societies Act, 1876, s. 17.

Creditors may object to reduction, and list of objecting creditors to be settled by the Court.

13. Where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the Court (*a*) is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company (*β*), shall be entitled to object to the proposed reduction, and to be entered in the list of creditors who are so entitled to object.

The Court shall settle a list of such creditors, and for that purpose shall ascertain as far as possible, without requiring an application from any creditor, the names of such creditors and the nature and amount of their debts or claims, and may publish notices fixing a certain day or days within which creditors of the company who are not entered on the list are to claim to be so entered, or to be excluded from the right of objecting to the proposed reduction (*γ*).

(*a*) Gen. Order, March, 1868, Rule 4.
(*β*) Comp. Act, 1862, s. 158.
(*γ*) Gen. Order, March, 1868, Rules 6–19.

Debenture-holders, whose names are not known to the company, are creditors not entered on the list, who may, on receiving the notice by advertisement under the 16th Rule of the General Order, March, 1868 (*v. infra*), come forward and claim to be entered, and who, if they fail to do so, are to be excluded from the right of objecting (*t*). But, *quære*, whether Fry, J., would have followed this (*u*), seeing that the amount due to such debenture-holders must be known, although the individuals cannot be found. It does not appear by the report whether, in the case before him (*u*), the debentures were to bearer or not, or whether the names of the particular debenture-holders who did not appear were known. It may be inferred from the report that they were.

In another case notice was allowed to be given to debenture-holders, whose names were not known to the company, by adding to the usual advertisement a notice to the following effect: "And, further, take notice that by an order dated his Lordship, the Master of the Rolls, gave leave that the notice required by Rule 9 of the General Orders of the High Court of Chancery to

(*r*) See Gen. Order, March, 1868, Rule 9.
(*s*) *West Indian and Pacific Steamship Co.*, 19 L. T. 310.
(*t*) *In re Credit Foncier of England*, 11 Eq. 356.
(*u*) *Patent Ventilating Granary Co.*, 12 Ch. D. 254.

be served on the creditors of the above-named company should be served on the holders of the debentures of the said company by the insertion of this advertisement" (*x*).

Court may dispense with consent of creditor on security being given for his debt.

14. Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the Court may, if it think fit, dispense with such consent, on the company securing the payment of the debt or claim of such creditor by setting apart and appropriating, in such manner as the Court may direct, a sum of such amount as is hereinafter mentioned: (that is to say,)

(1.) If the full amount of the debt or claim of the creditor is admitted by the company, or, though not admitted, is such as the company are willing to set apart and appropriate, then the full amount of the debt or claim shall be set apart and appropriated:

(2.) If the full amount of the debt or claim of the creditor is not admitted by the company, and is not such as the company are willing to set apart and appropriate, or if the amount is contingent or not ascertained, then the Court may, if it think fit, inquire into and adjudicate upon the validity of such debt or claim, and the amount for which the company may be liable in respect thereof, in the same manner as if the company were being wound up by the Court, and the amount fixed by the Court on such inquiry and adjudication shall be set apart and appropriated.

Consent.

A creditor who "does not consent," does, it seems, include a creditor who remains perfectly passive, having the opportunity of opposing. Where creditors named in the list, whose debts were not yet due, and were secured, had neither assented to nor dissented from the proposed reduction, it was held that they were not to be considered creditors who did "not consent," but must be taken to have assented (*y*). But Fry, J., refused to follow this case, and held that debenture-holders who had not attended in Chambers and did not appear in Court could not be taken to have consented, and that unless a consent brief were produced the amount due to them must be paid into Court to answer their debt (*z*).

Company's lessor.

When a limited company reduces its capital a lessor to the company is entitled to have a sum impounded to answer future rent (a).

Order and minute to be registered.

15. The Registrar of Joint Stock Companies, upon the production to him of an order of the Court confirming the reduction

(*x*) *Re General Bank for Promotion of Agricultural and Public Works*, 17 W. R. 304; 38 L. J. (Ch.) 168.

(*y*) *In re Crédit Foncier of England*, 11 Eq. 356.

(*z*) *Patent Ventilating Granary Co.*, 12 Ch. D. 254.

(a) *In re Telegraph Construction Co.*, 10 Eq. 384; and see note to Comp. Act, 1862, s. 158, *supra*, p. 355.

Sect. 15. of the capital of a company, and the delivery to him of a copy of the order and of a minute (approved by the Court) shewing with respect to the capital of the company, as altered by the order, the amount of such capital, the number of shares in which it is to be divided, and the amount of each share, shall register the order and minute, and on the registration the special resolution confirmed by the order so registered shall take effect.

Notice of such registration shall be published in such manner as the Court may direct.

The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requisitions of this Act with respect to the reduction of capital have been complied with, and that the capital of the company is such as is stated in the minute.

Advertisement.

The General Order of March, 1868 (see *post*), made under this Act, requires three advertisements, viz.:—

(1.) Advertisement of the presentation of the petition (Rule 5, Form No. 2).

(2.) Advertisement of the list of creditors (Rule 10, Form No. 5).

(3.) Advertisement of the hearing of the petition (Rule 16, Form No. 8).

The statute (sect. 15) requires one further notice, viz.:—

(4.) Notice of the registration of the order and of the minute. This is again referred to in Gen. Order, March, 1868, R. 20.

As regards No. (4) the Court has no power to dispense with the notice, and whether the case is under sect. 4 of the Comp. Act, 1877, as not affecting creditors or not the notice must be given, the Court has only a discretion as to how it shall be given (*b*); in the absence of special circumstances it should be given by advertisement (*c*).

As regards Nos. (1), (2), and (3)—

(*A.*) In cases not within sect. 4 of the Comp. Act, 1877, the Gen. Order must of course be followed, and

(*B.*) In cases within sect. 4 of the Comp. Act, 1877, it must be borne in mind that the Act of 1877 is not an independent Act, but is to be read with and as part of the Act of 1867, and that a petition in these cases is a petition under the Act of 1867, although it can be presented only by virtue of the Act of 1877. Being under the Act of 1867, the Gen. Order of March, 1868, applies, except so far as that order requires something to be done which is inconsistent with the later Act (*d*).

If no list of creditors is settled No. (2) obviously does not apply; and if there are no proceedings in chambers, or none of any length between presentation and hearing of petition, Nos. (1) and (3) may coalesce. The presentation and hearing of the petition, however, are to be advertised unless the Judge in the exercise of the discretion (which no doubt he has as to this) shall otherwise direct (*d*). And obviously these petitions ought in the large majority of cases to be advertised. It is question of fact whether the capital alleged to have been lost has been lost or not, and how is the Court to know

(*b*) *London Steamboat Co.*, W. N. 1883, 123; 31 W. R. 781; *London and City Land Co.*, W. N. 1885, 137; *West African Telegraph Co.*, W. N. 1886, 32; 34 W. R. 411; 55 L. J. (Ch.) 436; 54 L. T. 384; *Vivian & Co.*, W. N. 1886, 32; 54 L. T. 384.

(*c*) *Canada Land Co.*, W. N. 1885, 61.

(*d*) *Tambracherry Estates Co.*, 29 Ch. Div. 683.

whether creditors ought, under the Act of 1877, to be allowed to object, unless an opportunity is given them of attending the hearing, and showing cause why they should be so allowed?

The Court was at one time very lax in requiring proper evidence that the capital had in fact been lost, so much so that a mere statutory affidavit in Form No. 2 to the Gen. Order, Nov. 1862, was held to be sufficient (*e*); but sufficient and satisfactory evidence is now always required (*f*).

Advertisement of the petition will not be dispensed with except under special circumstances (*g*).

Advertisement of the petition has been dispensed with in:—*London and City Land Co.* (*h*), *British Land Co. of America* (*i*), *Vivian & Co.* (*k*), *Great Western Steamship Co.* (*l*), *E. C. Powder Co.* (*m*); and has been required in *Tambracherry Estates Co.* (*n*), *People's Café Co.* (*o*).

For form of minute, see *In re Sharp, Stewart, & Co.* (*p*), *In re Crédit Foncier of England* (*q*), *Re Ebbw Vale Co.* (*r*). The minute ought to shew not only what the amount of the capital as reduced will be, but also the amount from which it is reduced (*s*).

By sect. 4 of the Companies Act, 1877, the minute is further to state the amount (if any) at the date of the registration of the minute proposed to be deemed to have been paid up on each share.

Minute to form part of memorandum of association.

16. The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of association of the company, and shall be of the same validity and subject to the same alterations as if it had been originally contained in the memorandum of association; and, subject as in this Act mentioned, no member of the company, whether past or present, shall be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount which has been paid on such share and the amount of the share as fixed by the minute.

Saving of rights of creditors who are ignorant of proceedings.

17. If any creditor who is entitled in respect of any debt or claim to object to the reduction of the capital of a company under this Act is, in consequence of his ignorance of the proceedings taken with a view to such reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and after such reduction the company is unable, within the meaning of the eighteenth section of the Principal Act, to pay to the creditor the amount of such debt or claim, every person who was a member of the company at the date of the registration of the order and minute relating to the reduction of the capital of the company

(*e*) *Mains Manufacturing Co.*, W. N. 1884, 171.
(*f*) *E.g. Pilsen Joel Co.*, W. N. 1886, 203.
(*g*) *Cons. Telephone Co.*, W. N. 1885, 42; 33 W. R. 408.
(*h*) W. N. 1885, 137.
(*i*) W. N. 1885, 205; 53 L. T. 753.
(*k*) W. N. 1886, 32; 54 L. T. 384.
(*l*) W. N. 1886, 177.
(*m*) W. N. 1887, 93.
(*n*) 29 Ch. Div. 683.
(*o*) W. N. 1885, 226.
(*p*) 5 Eq. 155.
(*q*) 11 Eq. 356.
(*r*) 4 Ch. D. 827.
(*s*) *Barrow Steel Co.*, 39 Ch. D. 582, 603; *West Cumberland Steel Co.*, W. N. 1888, 54; *Britannia Mills*, W. N. 1888, 103.

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shall be liable to contribute for the payment of such debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day prior to such registration; and on the company being wound up the Court, on the application of such creditor, and on proof that he was ignorant of the proceedings taken with a view to the reduction, or of their nature and effect with respect to his claim, may, if it think fit, settle a list of such contributories accordingly, and make and enforce calls and orders on the contributories settled on such list in the same manner in all respects as if they were ordinary contributories in a winding-up; but the provisions of this section shall not affect the rights of the contributories of the company among themselves.

Copy of registered minute.

18. A minute when registered shall be embodied in every copy of the memorandum of association issued after its registration; and if any company makes default in complying with the provisions of this section, it shall incur a penalty not exceeding one pound for each copy in respect of which such default is made, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Penalty on concealment of name of creditor.

19. If any director, manager, or officer of the company wilfully conceals the name of any creditor of the company who is entitled to object to the proposed reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor of the company, or if any director or manager of the company aids or abets in or is privy to any such concealment or misrepresentation as aforesaid, every such director, manager, or officer shall be guilty of a misdemeanour.

Power to make Rules extended to making Rules concerning matters in this Act.

20. The powers of making Rules concerning winding-up conferred by the *one hundred and seventieth* (*a*), one hundred and seventy-first, one hundred and seventy-second, and one hundred and seventy-third sections of the Principal Act shall respectively extend to making Rules concerning matters in which jurisdiction is by this Act given to the Court which has the power of making an order to wind up a company, and until such Rules are made the practice of the Court in matters of the same nature shall, so far as the same is applicable, be followed.

(*a*) Struck out by 44 & 45 Vict. c. 59.

See General Order, March, 1868, *infra*.

Subdivision of Shares.

Shares may be divided into

21. Any company limited by shares may by special resolution (*a*) so far modify the conditions contained in its memorandum

of association, if authorized so to do by its regulations as originally framed, or as altered by special resolution, as, by subdivision of its existing shares or any of them, to divide its capital, or any part thereof, into shares of smaller amount than is fixed by its memorandum of association (β):

shares of smaller amount.

Provided that in the subdivision of the existing shares the proportion between the amount which is paid and the amount (if any) which is unpaid on each share of reduced amount shall be the same as it was in the case of the existing share or shares from which the share of reduced amount is derived.

(α) Comp. Act, 1862, s. 51. (β) Comp. Act, 1862, s. 12.

A power to divide the capital into shares of smaller amount was not included in sect. 12 of the Principal Act. And the reason why this could not have been allowed without the protection afforded by the special provisions of this Act may be given in the words of Lord Cairns:—

"A consolidation and increase of the nominal value of shares preserves the same amount of capital, but may bring it into fewer hands, and may be more beneficial to creditors by making the capital more easy of collection. . . . A subdivision of shares, on the other hand, if valid at all, must be valid to whatever extent it may be carried, and thus creditors of the company may, upon a winding-up, be left, and left without any previous notice given to them by the Act of Parliament, with the unpaid capital of the company scattered through such a number of hands that the sum recoverable from each would not pay for the trouble and expense of collection" (t).

Transfer of improperly reduced shares.

But where, after an unauthorized reduction of shares, the reduced shares which correspond to an original share can be ear-marked and traced to the hands of a transferee, he will be held to be a member in respect of such share.

Thus where the memorandum of association provided for shares of £100 each, "subject to be increased or modified," and the articles gave the directors power to divide the shares into shares of smaller amount, and the directors, in exercise of this power, converted each £100 share into five £20 shares, the conversion was held, under the Act of 1862, to be void; but A. having transferred to B. fifty of the £20 shares which could be identified with ten of the £100 shares, the transfer was held effectual, and B. was placed on the list of contributories (u).

Teasdale's Case (x) was a somewhat similar case, except that the shares were there not reduced, but their amount was re-distributed.

Special resolution to be embodied in memorandum of association.

22. The statement of the number and amount of the shares into which the capital of the company is divided, contained in every copy of the memorandum of association issued after the passing of any such special resolution, shall be in accordance with such resolution; and any company which makes default in complying with the provisions of this section shall incur a penalty not exceeding one pound for each copy in respect of which such

(t) *Per* Cairns, L.J., *In re Financial Corporation, Holmes' Case*, 2 Ch. 714, 733.

(u) *In re Financial Corporation, Feiling and Rimington's Case*, 2 Ch. 714; and see *In re New Zealand Banking Corporation, Sewell's Case*, 3 Ch. 131.

(x) 9 Ch. 54.

Sect. 23. default is made, and every director and manager of the company who knowingly or wilfully authorizes or permits such default shall incur the like penalty.

Associations not for Profit.

Special provisions as to associations formed for purposes not of gain.

23. Where any association is about to be formed under the Principal Act as a limited company, if it proves to the Board of Trade that it is formed for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, (*a*) and that it is the intention of such association to apply the profits, if any, or other income of the association, in promoting its objects, and to prohibit the payment of any dividend to the members of the association, the Board of Trade may, by licence under the hand of one of the secretaries, or assistant secretaries, direct such association to be registered with limited liability, without the addition of the word limited to its name, and such association may be registered accordingly, and upon registration shall enjoy all the privileges and be subject to the obligations by this Act imposed on limited companies, with the exceptions that none of the provisions of this Act that require a limited company to use the word limited as any part of its name, or to publish its name, or to send a list of its members, directors, or managers to the registrar, shall apply to an association so registered (*β*).

The licence by the Board of Trade may be granted upon such conditions and subject to such regulations as the Board think fit to impose, and such conditions and regulations shall be binding on the association, and may, at the option of the said Board, be inserted in the memorandum and articles of association, or in both or one of such documents.

(*a*) *Quære*, this means not necessarily exclusively, but as its main and chief object. *Cf. Inst. of Civil Engineers*, 20 Q. B. Div. 621.

(*β*) Comp. Act, 1862, ss. 8, 9, 26, 41, 42, 45, 46.

Calls upon Shares.

Company may have some shares fully paid and others not.

24. Nothing contained in the Principal Act shall be deemed to prevent any company under that Act, if authorized by its regulations as originally framed or as altered by special resolution (*a*), from doing any one or more of the following things; namely,—

(1.) Making arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of payment of such calls:

(2.) Accepting from any member of the company who assents

thereto the whole or a part of the amount remaining unpaid on any share or shares held by him, either in discharge of the amount of a call payable in respect of any other share or shares held by him, or without any call having been made:

(3.) Paying dividend in proportion to the amount paid up on each share in cases where a larger amount is paid up on some shares than on others (β).

(α) Comp. Act, 1862, s. 51.
(β) See note to Comp. Act, 1862, s. 109.

Manner in which shares are to be issued and held.

25. Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same (a) shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.

(a) *i.e.* the terms of payment: *Almada and Tirito Co.*, 38 Ch. Div. 415, 425.

Object and effect of section.

The object of this section was probably to prevent such contracts as were before the Court in *Pellatt's Case* (*y*) and *Elkington's Case* (*z*), under which a man was to take shares and to pay for them by supplying goods when wanted (a); and further to put a stop to the dangers and abuses incident to such arrangements as those in *Drummond's Case* (*b*), *Re Baglan Hall Colliery Co.* (*c*), and the similar cases (*d*) before considered (*e*).

Under the Act of 1862 it is conceived that the contract of the subscriber of the memorandum, or other allottee of shares, was already to take the shares and pay for them in cash, but this was a contract which was capable of being altered by subsequent agreement and arrangement with the directors. The effect of this section, therefore, appears to be, to declare the law to be what it was already, and to superimpose the restriction that by no arrangement made subsequent to the issue of the shares, and by no previous arrangement unless registered, shall payment otherwise than in cash be allowed (*f*). It is a restrictive, not an enabling section.

The meaning of the section is that you are prohibited from contracting that shares issued shall be paid for otherwise than in cash except by a registered contract (*g*).

Section applies to going company.

The section applies to the company at all times and under all circumstances, and not merely to proceedings in the liquidation of the company (*h*).

And a company which enforces calls upon shares agreed to be issued as fully paid is not taking advantage of its own wrong. For assuming that the default to register a contract was a wrong of the company, the statute

(*y*) 2 Ch. 527.
(*z*) 2 Ch. 511.
(a) *Per* James, L.J., *Spargo's Case*, 8 Ch. 407, 412.
(*b*) 4 Ch. 722.
(*c*) 5 Ch. 346.
(*d*) *v. supra*, p. 47.
(*e*) *Per* Selborne, L.C., *Fothergill's Case*, 8 Ch. 270, 279; and see *Pritchard's Case*, 8 Ch. 956, 960.
(*f*) See judgment of Mellish, L.J., *Fothergill's Case*, 8 Ch. 270, 282; and of Bacon, V.C., *Ferrao's Case*, 9 Ch. 355, 356, n.
(*g*) *British Farmers' Co.*, 7 Ch. Div. 533, 535.
(*h*) *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004, 1015; *Burangah Oil Co.*, *Arnot's Case*, 36 Ch. Div. 702, 710; *quære Blyth's Case*, 4 Ch. Div. 140; see *infra*, p. 558.

Sect. 25. does not allow such a wrong to be set up as a defence. There are only two possible defences under the statute, viz., (1) payment, and (2) that a contract was registered. If the going company seeks to enforce calls, no doubt the proper remedy is rectification; but if the company be in liquidation, and rectification is therefore precluded, then the statute must necessarily prevail (*i*).

And it has been held in Ireland that even in the distribution of surplus assets amongst shareholders in voluntary winding-up the same principle is to be applied. In the case referred to (*k*) there were £1 shares on which 20*s.* had been paid, and £1 shares issued at a discount of 7*s.* 6*d.*, upon which 12*s.* 6*d.* had been paid upon the terms that they should be then deemed fully paid: no contract had been registered: it was held that in the distribution of surplus assets the latter must be treated as shares, having only 12*s.* 6*d.* paid. And in England North, J., has adopted the same view (*l*).

Payment in cash.

By payment "in cash" is meant any such transaction as would in an action at law for calls on the shares support a plea of payment. But that is not a payment "in cash" which would support only a plea of accord and satisfaction (*m*); and, *quære*, that which was said in *Coates' Case* (*n*), that this section has not "made any alteration whatever with regard to what shall be good payment for shares which have been admittedly subscribed for," must be understood subject to this qualification.

"There must be money due from the one to the other on both sides, and the parties must agree to set one demand of money against the other demand of money" (*o*).

"The Act of Parliament is satisfied if at the time there was money due by the company to the shareholder which could be satisfied by the calls due on the shares, and if there was an agreement in effect that it should be so satisfied" (*p*).

At the same time, what must be shewn is not a mere agreement to pay money, but a payment of money. It may, therefore, be very important to see whether the matter has been carried out, *e.g.*, by proper entries in the company's books (*q*). In short, if set-off is relied upon, it must be shewn that the set-off was made. If the set-off is made, the omission by the company to make the entries in their books cannot prejudice the shareholder (*r*).

A good payment in cash will have been made:—

If, there being due and presently payable to a subscriber of the memorandum in respect of property sold to the company a sum of cash, such sum, or any portion of it, be set off against sums presently payable on the shares (*s*).

Or if, the company being indebted in a sum of cash to a third party, payment of a portion thereof is at his request made by crediting a shareholder with a sum sufficient to make his shares fully paid up (*t*).

(*i*) *London Celluloid Co.*, 39 Ch. Div. 190.

(*k*) *Newtownards Gas Co., E. p. Stephenson*, 15 L. R. (Irish), 51; *Gibson, Little, and Co.*, 5 L. R. (Irish) 139.

(*l*) *Weymouth Packet Co.*, W. N. 1890, 149.

(*m*) *Fothergill's Case*, 8 Ch. 270, 282; *Spargo's Case*, 8 Ch. 507, 411, 414; *White's Case*, 12 Ch. Div. 511, 517.

(*n*) 17 Eq. 169, 176.

(*o*) Brett, L.J., *White's Case*, 12 Ch. Div. 517.

(*p*) Cotton, L.J., Ibid. 519.

(*q*) *Kent's Case*, 37 Ch. D. 508; 39 Ch. Div. 259.

(*r*) *Jones, Lloyd, and Co.*, 41 Ch. D. 159.

(*s*) *Spargo's Case*, 8 Ch. 407; *cf. Maynard's Case*, 9 Ch. 60. As to *Coates' Case*, 17 Eq. 169, see *post*. Compare, as to payment by set-off of a sum due, *Inns of Court Hotel Co.*, 6 Eq. 82, 89.

(*t*) *Ferrao's Case*, 9 Ch. 355; *Barrow in Furness Co.*, 14 Ch. Div. 400; *Jones, Lloyd, and Co.*, 41 Ch. D. 159.

Or if, the company having *bonâ fide* entered into an arrangement with a shareholder under which a sum of cash becomes payable to him, payment is made by crediting the amount to the shareholder upon his shares, notwithstanding that the company be shortly afterwards wound up (*u*).

And by a credit so made payment may be made upon shares in advance of calls (*x*).

But it will not be a good payment in cash:—

If A. being a subscriber of the memorandum, and being also interested jointly with B. and C. in a certain property, enter together with B. and C. into an agreement with the company, which is registered with the memorandum and articles, to sell that property to the company, and to accept payment partly in paid-up shares. In such a case the shares taken under the agreement will be no satisfaction of the liability incurred by the subscription of the memorandum, for two reasons:—(i.) that the joint contract under the agreement cannot be set off against the separate contract under the subscription; and (ii.) that shares cannot be set off against a money demand (*y*).

With regard to this second reason, it is to be observed that there was in *Fothergill's Case* (*y*) a registered contract, but so far as this section was concerned it was ineffectual, because it failed to shew that the shares to be taken for the purchase of the property were the same as the shares for which subscription was made to the memorandum. It is submitted, with great deference, that the same observation is applicable to *Coates' Case* (*z*), and that the Court, having there found (a) that the registered document did not identify the two sets of shares as being the same, could not consistently with that which was said by Selborne, L.C., in *Fothergill's Case* (*b*), look at the subsequent or any other proceedings of the parties, or at any unregistered document, to ascertain that the intention was that they should be the same. Apart from the registered contract, the facts appear to bring that case within those decisions which shew that a set-off of shares against a money demand is not payment (*c*).

So where newspaper proprietors agreed to advertise a company's prospectus, and to receive in payment fully paid-up shares, and shares were allotted to them without any contract having been registered, they were rendered liable as contributories (*d*).

And where the shareholder was assignee of a debt payable by instalments, an arrangement come to with the directors that payment should be made in advance of calls by set-off of a future instalment was not a payment in cash (*e*). In this case the result (so far as this point is concerned) might have been different if (as was not the case) the proper entries had been made in the company's books. The company might have made themselves debtors *in præsenti* for the instalment, which theretofore was payable *in futuro*.

There may sometimes be a difficulty in ascertaining upon the facts what

(*u*) *Adamson's Case*, 18 Eq. 670; and see *E. p. Wilson*, W. N. 1874, 139; 22 W. R. 766, which was in a going company, but the attempt was to shew that no consideration had in fact passed.

(*x*) *Jones, Lloyd, and Co.*, 41 Ch. D. 159.

(*y*) *Fothergill's Case*, 8 Ch. 270; *cf. Dent's Case*, 8 Ch. 768, 777.

(*z*) 17 Eq. 169; an appeal in this case was defeated by inrolment, see 9 Ch. 266.

(a) See 17 Eq. 175.

(*b*) 8 Ch. 270, 279.

(*c*) At 17 Eq. 179, Malins, V.C., said that the contract "would have justified their paying Mr. Coates £2500 in cash." If so, the last observations in the text are misplaced. But, *quære*, how does it appear from the facts that this was so?

(*d*) *Pagin and Gill's Case*, 6 Ch. D. 681; *Andress' Case*, 8 Ch. Div. 126; *White's Case*, 10 Ch. D. 720; 12 Ch. Div. 511.

(*e*) *Kent's Case*, 37 Ch. D. 508; 39 Ch. Div. 249.

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the contract between the parties is, but the principle is abundantly clear, that if the contract be for sale for cash presently payable, then no registered contract is necessary, for by set-off of the cash payable by the company against the cash payable upon the shares to the company, the shares are paid in cash: but that on the other hand if the contract be for sale for paid-up shares, then, inasmuch as there is no cash ever payable by the company, there is nothing to set off, and in the absence of a registered contract, the statute renders the shares unpaid.

A case which looks at first a little perplexing was this:—There was originally an agreement by A. to sell to B. for cash, and an agreement by B. to sell to the company for cash. Subsequently letters passed from the solicitor of the company to A., in which occurred the expressions "unless you take so much of the purchase-money in paid-up shares," and "unless you took up £2000 in fully paid-up shares in part payment of the purchase-money." The conveyance by A. to the company as ultimately executed expressed the consideration to be (in part) 400 fully paid shares allotted to A., and the allotment made was of 400 fully paid shares in part payment of purchase-money. There was no registered contract. It was held that the shares were paid for in cash. For the original contract was a cash contract: there had never been any novation, any substitution of a new contract, but the original contract was satisfied in this way, that A. accepted an allotment of 400 shares, and in substance the company, by direction of B., paid £2000, part of the money which the company owed B., and which B. owed A. by crediting on the shares (*f*).

In *Bentley's Case* (*g*) the facts were these. A. was the holder of 300 shares, and he agreed to take 50 more, and to give up certain rights, and accept a certain reduced commission upon the terms that there should be credited to him upon the 350 shares (1) forthwith, three-fourths of the amount already paid on the 300 shares; (2) as he made further payments on the 350 shares, three-fourths of the amount he paid; until the amounts so credited amounted in the aggregate to £750. In other words, every £1 paid or to be paid was to be credited as £1 15*s*. There was no registered contract. A. made further payments amounting to £481 5*s*.; and while the company was a going company he claimed, and was allowed, a credit of £360 18*s*. 9*d*. (being three-fourths of £481 5*s*.), and the credit was entered up in the books. It was held in the winding-up that the £360 18*s*. 9*d*. had been paid in cash.

Now suppose in these two cases the company had sued A. for calls. In the former case (*f*) A.'s defence would have been, You the company owed money to B., B. owed money to me, by direction of B. part of your debt to him was applied in paying the amount due on my shares: you were thus relieved of a cash debt, in respect of which B. could have sued you and recovered money: that was payment in cash. In the latter case (*g*) A.'s defence must have been, You were bound by contract when I paid you 20*s*. to credit me with 35*s*. I cannot sue you for 15*s*. for you never contracted to pay me that amount, but I can sue you for damages for not making the credit you contracted to make. The former pleading would, it is conceived, have disclosed a payment, but would the latter have done so? Is not the latter case the same as that of the newspaper proprietor who agrees to insert advertisements and to receive payment in fully paid-up shares: his defence to an action for calls could only be, You agreed not to pay me money, and I cannot sue you for money, but to credit me with the full amount of the shares, and I can sue you for damages for not doing so.

(*f*) *Barrow in Furness Co.*, 14 Ch. Div. 400.

(*g*) *Regent United Stores*, 12 Ch. D. 850.

Option to pay in cash or shares.

If the contract is to pay in cash or shares at the option of either the company or the vendor, and the option is exercised in favour of shares, the fact that there was an option to pay in cash does not assist the allottee. For there never was money due. Until the option was exercised, the consideration remained undetermined, and when the option was exercised, shares, not cash, formed the consideration (*h*).

No payment.

It is, of course, no payment at all by a subscriber to the memorandum, that he was the original vendor of property which was by his vendees sold to the company. In such a case the subscriber, having had no dealings with the company at all, has paid nothing to them, and it is idle to say that the conveyance by his vendees was any payment by him (*i*). If by direction of his vendees cash owing from the company to them were credited on the shares, this would be another matter.

In *Cleland's Case* (*k*) shares allotted to B. at the request of A., and purporting to be paid up by the cancellation of a debt due from the company to A. for services rendered, were held not to have been paid in cash. This was the earliest case under the section, and *dicta* in the judgment will be found inconsistent with subsequent cases above referred to. *Quære*, the decision itself must be taken to be overruled, unless it is considered to have been proved that the remuneration for services was not presently payable (*l*).

Evidence of payment.

The word "held" in the section means "originally held": the section deals simply with the original character of the shares issued. It does not in any way affect the question of how the payment which the section requires is to be proved. If, therefore, a holder of the shares produces evidence that the shares as he acquired them purported to be and were represented by the company as being paid up, and that he had no notice to the contrary (*m*), he cannot be confronted with the statute, and told that, notwithstanding the evidence upon which he acted, and notwithstanding the representations of the company, the statute renders the shares unpaid (*n*).

Thus, if an allottee of shares, which from want of a registered contract must be treated as unpaid, transfers them to a stranger who knows nothing of the circumstances, and who acts upon the faith of the certificates issued by the company to his transferor stating the shares to be fully paid, the shares in the hands of the transferee are paid-up shares (*n*).

If, on the other hand, the transferee had notice, then in his hands (*m*), and in the hands of any subsequent transferee with notice (*h*), the shares are unpaid.

If his transferor had no certificate, but the certificate that the shares are fully paid is issued for the first time to the transferee, the principle of *Burkinshaw* v. *Nicolls* (*n*) does not apply (*o*).

The transferee without notice not only has himself a good title to the shares as paid up, but can give a good title to others, and it was held in *Barrow's Case* (*h*) that he can give such a title not only to people who had no notice, but to people who had. But this has since been doubted (*p*). It does not follow that because A. has acquired a good title by estoppel, he can transfer it to B. who knows the true facts.

To sum up therefore:—the original allottee and (subject to what follows)

(*h*) *Barrow's Case*, 14 Ch. Div. 432.
(*i*) *Fraser's Case*, 28 L. T. 158; 21 W. R. 642; 42 L. J. (Ch.) 358.
(*k*) 14 Eq. 387.
(*l*) See 14 Eq. at p. 392.
(*m*) *Crickmer's Case*, 10 Ch. 614.
(*n*) *British Farmers' Co.*, 7 Ch. Div. 533. Affirmed *sub nom.*, *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004, 1016; *Turpin's Case*, W. N. 1877, 70.
(*o*) *Vulcan Ironworks Co.*, W. N. 1885, 120.
(*p*) *London Celluloid Co.*, 39 Ch. Div. 190, 197; and see *Railway Tables Co.*, *E. p. Sandys*, 42 Ch. D. 98, 110.

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every subsequent transferee with notice holds the shares as unpaid. A transferee without notice who takes the shares as paid upon the faith of the certificate issued by the company holds the shares as paid, and (if *Barrow's Case* (*q*) is right, but not otherwise) by passing through him the title to the shares is purged, so that a subsequent transferee whether with or without notice holds the shares as paid.

If the transferee has taken the shares in the ordinary course of business for valuable consideration, the onus of proving that he had notice lies on the person who asserts it (*r*). But the onus of proving purchase in the ordinary course of business for valuable consideration is on the person who asserts that (*s*).

By notice is meant either actual notice, or notice such that but for his own gross negligence in the matter in question he would have acquired knowledge. In other words, you must show not that he might have but that he ought to have acquired notice (*t*).

Blyth's Case (*u*) is difficult to understand as reported. It is conceived that it must have been decided either on the ground that no certificates having been issued, the company were not estopped, and the transferee having acted upon insufficient evidence must take the consequences (*x*); or that the transferee knew the facts.

In cases where the transferee is entitled to hold the shares as paid, *quære* whether the liability upon them does not remain in the transferor (*y*). If so, *quære* whether the transferor is liable as a present or a past member, and whether he is discharged after a year from the transfer. If he is liable only as a past member, then, as between the A. contributories, the contributions on these shares will be lost: and if the liability ceases at the expiration of the year, the creditors may lose the amount of these shares altogether.

Contract to take paid-up shares.

In cases arising under this section between the company and an original allottee, it is not competent to the shareholder to avail himself of the argument which succeeded in *Carling's Case* (*z*) and *Anderson's Case* (a), and say that all he agreed was to take paid-up shares, and that a contract to take shares unpaid cannot be forced upon him (*b*). The man did not contract to take paid-up shares; he contracted to take shares and pay for them, but he contracted to pay in an illegal manner. His contract to take shares is therefore enforced against him, and having got the shares he holds them by virtue of the statute as unpaid (*c*).

It is necessary, however, to distinguish the case where the name has been placed on the register with the assent of the allottee, from the case where the matter rests in contract. In the former case the requisites of sect. 23 of the Companies Act, 1862, have been complied with; the man is a member, and must perform his obligations as such. In the latter the company or the official liquidator is seeking specific performance of a contract, and if it is

(*q*) 14 Ch. Div. 432.

(*r*) *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004; *Hall & Co.*, 37 Ch. D. 712.

(*s*) *London Celluloid Co.*, 39 Ch. Div. 190.

(*t*) *Hall & Co.*, 37 Ch. D. 712.

(*u*) 4 Ch. Div. 140. The head-note of the report states that there is no fraud on the part of a company towards a purchaser of shares in not registering a contract, and that this section is in favour of creditors, and does not apply as between the company and the shareholders. *Quære*, whether the case decided either of those two propositions. The latter, at any rate, was negatived in *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004.

(*x*) See note (*n*), p. 557.

(*y*) *Per* Mellish, L.J., *Spargo's Case*, 8 Ch. 407, 410. See *Waterhouse* v. *Jamieson*, L. R. 2 H. L., Sc. 29, and *ante*, p. 70, note (*d*).

(*z*) 1 Ch. Div. 115, reversing 20 Eq. 580.

(a) 7 Ch. Div. 75, 94.

(*b*) *Pagin and Gill's Case*, 6 Ch. D. 681; *Andress' Case*, 8 Ch. Div. 126; *Potter and Brown's Case*, 26 W. R. 839; 38 L. T. 757.

(*c*) *Cf. ante*, p. 409.

a contract to take paid-up shares, that is the only contract which can be enforced: a liability to take unpaid shares cannot then attach (*d*).

Contract in the articles.

The articles of association are a contract (*e*) only as between the members *inter se* in respect of their rights as shareholders. Supposing they contain some stipulation as to acts to be done between the company and a third party, the only result is that the members have covenanted with each other that those acts shall be done, but this gives no right to the third party to enforce performance of such acts. Thus, if the articles provide that the company shall pay preliminary expenses, this does not give promoters a right of action against the company for their payment (*f*); or if they provide that a certain person shall be employed in a particular office, *e.g.* as solicitor to the company, there is no contract with such officer for breach of which he can sue (*g*). And even if such person be a member the authorities have established that the contract which, by virtue of Comp. Act, 1862, s. 16, exists in such case is only a contract between him and his co-members, and not a contract between him and the company (*h*) (*g*).

The contract contemplated by this section which is to be registered, must be a contract not merely between the shareholders *inter se*, but between the company (or some one representing the company, as *e.g.* a trustee for the company before incorporation (*i*)) and some person external to the company (*k*), *i.e.*, some one acting in his individual character, and not merely as a person co-operating in the formation of the company (*l*).

It follows, therefore, that the articles of association, although they may contain an agreement for purchase of a property and payment for it in shares, and although they of course are registered, will not necessarily constitute a contract in writing within the section (*m*).

It was held in *Re Appletreewick Lead Mining Co.* (*n*) that *Pritchard's Case* (*m*) does not go so far as to lay down that under no circumstances can such a contract as is required by this section be contained in the articles: and it is to be observed that the judgment in *Pritchard's Case* (*m*) went upon this, that the effect of the articles was simply to give the directors authority to make the purchase, and not to effect a completed contract for that purpose. In *Re Appletreewick Lead Mining Co.* (*o*) it was, therefore, held that under the circumstances of that case the contract contained in the articles was sufficient. That was a case in which a cost-book partnership was turned into a company; the partners signed the memorandum for the total number of shares in the company, and the articles purported to transfer all the property of the partners to the company in consideration of £7 per share credited as paid (*p*).

As regards the argument, that a contract in the articles is insufficient because the articles may be altered under Companies Act, 1862, s. 50, it is conceived that this was effectually answered by saying that an alteration would leave the matter untouched, because, unless registered before the issue of the shares, it is for the purposes of this section inoperative.

(*d*) *Barangah Oil Co., Arnot's Case*, 36 Ch. Div. 702.

(*e*) Comp. Act, 1862, s. 16.

(*f*) *Melhado* v. *Porto Alegre Railway Co.*, L. R. 9 C. P. 503; *Hereford Waggon Co.*, 2 Ch. Div. 621; *Rotherham Alum Co.*, 25 Ch. Div. 103.

(*g*) *Eley* v. *Positive Assurance Co.*, 1 Ex. Div. 20, 88.

(*h*) *Browne* v. *La Trinidad*, 37 Ch. Div. 1, 13, 14.

(*i*) *Hartley's Case*, 10 Ch. 157.

(*k*) *Per* Mellish, L.J., *Crickmer's Case*, 10 Ch. 614.

(*l*) See *Anderson's Case*, 7 Ch. Div. 104.

(*m*) *Pritchard's Case*, 8 Ch. 956.

(*n*) 18 Eq. 95, 111.

(*o*) 18 Eq. 95.

(*p*) *Quære*, apart from registered contract, this was a good payment in cash, *v. supra*, p. 555.

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But it is clear, from subsequent authorities and those above referred to that a contract in the articles will not do. Thus where the articles provided for the issue of debentures, and that with each debenture the company should issue by way of bonus fully paid shares, this was no contract within the section; there was no contract by anybody to take the shares at all (*q*).

"Duly made in writing" means "made by the contracting party" (*q*).

So articles which provided that all the original shares should be considered as fully paid-up shares did not protect the shares from being liable for calls (*r*).

If the contract to take the shares be founded upon the articles (as in the case of director's qualification), and the articles also provide for allotment of a like number of paid-up shares, then no doubt the company must either affirm or disaffirm the contract as a whole, and cannot make the director liable for unpaid shares (*s*).

Issue of shares at a discount.

In a company limited by shares the benefit of limited liability, that is to say, of not being liable to pay more than the nominal amount of the share, is obtained upon the terms (*inter alia*) that the member shall be liable to pay to the company that nominal amount. A stipulation or agreement, therefore, that a less cash sum shall be accepted as payment upon the share is repugnant and void. In other words, shares in a company limited by shares cannot be issued at a discount, whether with (*t*) or without (*u*) the protection of a registered contract.

If there is an agreement that certain shares shall be paid for not in cash but in kind, and the agreement is duly registered, then no doubt the question to be regarded is not whether the property given was of value equal to the nominal amount of the shares, but whether the company *bonâ fide* agreed to give for the property the sum which is equal to that nominal amount. This, however, raises a difficulty which awaits resolution by future decision. A company may well *bonâ fide* agree to give a certain sum in paid-up shares for a property when it would not *bonâ fide* agree to give the same sum in cash. If its shares are at fifty per cent. discount it might well *bonâ fide* agree to give twice as much in paid-up shares as it would give in cash. In such a case it is submitted that the issue of the shares as fully paid up under the protection of a registered contract would be an issue at a discount, and illegal. The difficulty of fact in every case is considerable, for the relevant fact is not what the value of the property is, but what cash sum the company *bonâ fide* agreed or would have agreed to give for it.

The only dictum at present upon this point is a passage in the judgment of Cotton, L.J., in *Almada and Tirito Co.* (*x*): "If the contract defines the value, then, unless the contract is set aside as fraudulent, that will fix the shares as paid up, the contract being that a certain property or quantity of goods is to be taken in payment in full of the shares of the company. But suppose in such a case there was a contract that the person taking the shares should give the company goods or an acre of land fixed by the contract, and admitted by the parties as worth not the amount of the shares but only 10s. [in the pound], then, although it does not arise for decision here, I in no way intimate any opinion that if such a company were wound

(*q*) *Firmstone's Case*, 20 Eq. 524.
(*r*) *Crickmer's Case*, 10 Ch. 614.
(*s*) *Miller's Case*, 3 Ch. D. 668; 5 Ch. Div. 70.
(*t*) *Almada and Tirito Co.*, 38 Ch. Div. 415, overruling *Plaskynaston Tube Co.*, 23 Ch. D. 542; *Ince Hall Co.*, 23 Ch. D. 545, n. See also *New Chile Gold Co.*, 38 Ch. D. 475.
(*u*) *Addlestone Linoleum Co.*, 37 Ch. Div. 191; *London Celluloid Co.*, 39 Ch. D. 190. See also *Licensed Victuallers Association, E. p. Audain*, 42 Ch. Div. 1.
(*x*) 38 Ch. Div. 415, 423.

up a person who took shares on an admission that he was only giving half their value would not be held liable for the remainder, as a sum which on his own admission and on the contract on which he took the shares must be considered as only payment of part of the amount of the shares, leaving the other half unpaid, and therefore to be called up if there was a winding-up."

This sentence cannot mean that the question is to be determined merely upon investigating whether the contract upon its face admits that the property is worth only half the amount of the shares, or whether you find an admission under the hands of the parties that this is so; neither, bearing in mind *Burkinshaw* v. *Nicolls* (*y*), can it mean that the rights of the company in the matter can be asserted only in winding-up. It must mean that if you show as a fact that the agreement was to give in paid-up shares a sum larger than would have been given in cash, you may either set aside the agreement as fraudulent, or may enforce liability upon the shares for the difference (*z*).

At the same time, it is difficult to reconcile with the plain and intelligible principle, that either cash to the full nominal amount or property which the company has agreed to buy at the full nominal amount of the shares must be paid upon the shares, indications of opinion to be traced here and there amongst the authorities. For instance, in *Lee* v. *Neuchatel Asphalte Co.* (a) the judgments (*b*) proceed upon the basis that the capital represented not money paid but certain assets acquired from previous companies, and it was said (*c*) that the case was very different from that of a company where money has been paid on all the shares, inferring that the assets acquired with the paid-up capital might be less in the one case than in the other. But first, in that case the question whether the shares had been properly paid up in full or not was not the question to be decided, and, for the purposes of the decision, was to be taken in the affirmative; and secondly, no one can dispute that if the company makes an improvident bargain, and *bonâ fide* agrees to give in cash twice what a property is really worth, the issue of shares as fully paid up to that amount will be good; in other words, the paid-up capital need not necessarily be represented by cash or property to the full nominal amount.

Rectification where shares issued at a discount.

The argument is specious and plausible that inasmuch as a company limited by shares cannot issue shares at a discount, a contract so to do is not voidable but void, and that therefore any person who has been registered in pursuance of such a contract is entitled to have the register rectified. But a little consideration shows the fallacy of such a view. The member necessarily under the statute, if he agrees to take shares agrees to pay for them, and if he makes it part of his bargain that he shall not pay anything, or shall incur a liability less than that which the statute imposes, this does not avoid his agreement to be a member, but goes for nothing, as the attempted imposition of a condition in respect of his membership which the law does not allow.

If the contract remains *in fieri*, and has not been executed by entry of the name on the register, it is a contract which of course cannot be enforced, for it contains a term with which the company cannot comply. And if the name has been entered on the register, but the facts are that the allottee, immediately on finding that his name has been put upon the register, applies to be relieved from the contract, and the company does not oppose on the

(*y*) 3 App. Cas. 1004, 1015, and *London Celluloid Co.*, 39 Ch. Div. 190.

(*z*) See also *Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. Div. 1, 16.

(a) 41 Ch. Div. 1.

(*b*) See *per* Stirling, J., 41 Ch. D. 9; *per* Cotton, L.J., Ibid. 15.

(*c*) 41 Ch. Div. 15.

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But otherwise the contract if executed is binding, and the liability follows not from any agreement on the part of the member (for *ex concessis* he never agreed to be liable), but from the statute operating upon the agreement to be a member. If, therefore, the name has been entered on the register, and the allottee has assented to membership, he cannot have rectification, but must remain a member, and as such be liable for calls (*e*); liable, that is, not merely in winding-up, but also in the going company.

It would seem that in *Klenck* v. *East India Exploration Co.* (*f*) this point was overlooked in argument.

Consideration. If there is no consideration it may be that the contract is not a contract within the section at all (*g*).

A subsequent failure of consideration is not a ground for treating shares as unpaid, *e.g.*, where the consideration was the assignment of certain patents, and the vendors failed to assign (*h*).

Brokerage on issue of shares. If the company agrees with A. that if he takes so many shares the company will allow him a commission of so much per cent., this may be the same thing as issuing the shares at a discount. But if A. is a broker and is employed by the company as broker in the issue of its capital, it is difficult to see how a payment made to him for his services as broker can be *ultra vires*, and if the payment be not of improper amount so as to lead to the conclusion that it is a device, it is difficult also to see how the payment becomes *ultra vires* by reason of its being measured by a commission of so much per share on the shares issued through him as broker.

However, in the *Faure Electric Co.* (*i*), Kay, J., has held that payment of brokerage to a broker for placing shares is an improper application of capital; and if so, it may well follow, upon the principle of *Trevor* v. *Whitworth* (*k*), that even power in the memorandum of association to pay such brokerage would not render it legal. It is submitted that the grounds of this judgment as a decision on the general question are not satisfactory. If it be assumed, as the judgment does assume, that the payment is not really payment for work and labour, but is or may be made to induce the broker to commit a fraud upon his customers by puffing an unsound investment, grounds other than and in addition to *ultra vires* suggest themselves for saying that the transaction would be bad in law. But if the point arises again for decision, and there is evidence that the services of a broker are reasonably necessary, and are properly employed in the issue of capital, and that a payment of commission at so much per share is a fair payment for the work done, there seems no ground in principle why such a payment should be *ultra vires*.

In the *Licensed Victuallers' Association* (*l*) the Court of Appeal, having to construe the word "discount" in an underwriter's letter, held that it meant commission, with the result that the obligation of the underwriter (which they held to be an obligation himself to take, and not to guarantee the taking by others, of shares) was enforceable. The decision, therefore, proceeded

(*d*) *Almada and Tirito Co.*, 38 Ch. Div. 415.

(*e*) *Railway Tables Co., E. p. Sandys*, 42 Ch. Div. 98; *London Celluloid Co.*, 39 Ch. Div. 190.

(*f*) Ct. of Sess. Cas., 4th series, vol. xvi. p. 271.

(*g*) *Anderson's Case*, 7 Ch. Div. 75, 104, 108, 112; *Crickmer's Case*, 10 Ch. 614; *Firmstone's Case*, 20 Eq. 524.

(*h*) *Mege and Angier's Case*, W. N. 1875, 208.

(*i*) 40 Ch. D. 141.

(*k*) 12 App. Cas. 409, 436.

(*l*) *E. p. Audain*, 42 Ch. Div. 1.

upon the footing that payment of such a commission was legal. But neither party finding it to be his interest to argue that the payment of the commission was illegal, the point passed *sub silentio*.

The only other cases which bear upon the point, viz. *Bagnall* v. *Carlton* (*m*) and *Lydney Co.* v. *Bird* (*n*), are, it is submitted, for rather than against the legality of a proper commission for a broker's service.

Contract executed by company only.

The contract, which is registered, must be (1) made, (2) made in writing and (3) filed, before the issue of the shares. The filing of a document which discloses all the facts, but which is executed by the company only, and is not, until after the issue of the shares, assented to by the allottee, is not a compliance with the section (*o*). In the case referred to the allottee was a debenture-holder, who had voted in favour of resolutions for reconstruction under a scheme which included the issue to the debenture-holders of fully paid shares in lieu of their debentures, and there was filed before the issue of the shares a document sealed by the new company, which was in form an agreement between the new company and the persons named in the schedule (being ten debenture-holders), but none of those persons executed it. On a motion by the allottee to rectify the register, it was held that the section had not been complied with. *Semble*, the registration of the agreement between the old company and its liquidator and the new company (executed by both companies) might have been sufficient (*o*).

Contract with trustee for company.

A contract entered into before the formation of the company with a trustee for the company and subsequently adopted by the company, is within the section. The statute does not require it to be made with the company (*p*).

Such a contract may be ratified by the company after it comes into existence (*q*). But in practice it is usual and desirable to exclude any question by expressly adopting it by a short agreement under the company's seal.

Contract with trustee for allottees.

And *semble* a contract with a trustee for the allottees may be sufficient (*r*). But *quære* this requires more consideration.

Belief that contract registered.

After winding-up it can make no difference that the allottee believed that the contract had been registered, or that he sent it for registration, and that the non-registration arose through some neglect (*s*).

Company must see to registration.

The statute does not throw upon the allottee the obligation of registering the contract: it is rather for those who seek to enforce it to do all that is necessary for its completion (*t*).

Damages in winding-up.

In *Mudford's Claim* (*u*), and *E. p. Appleyard* (*x*), Hall, V.C., held that where an intended allottee of fully paid shares has, by reason of default in registering a contract, become in fact the holder of unpaid shares, he is entitled in the winding-up to prove for damages to the amount of the calls which have been or may be made upon him. It has already been pointed out (*y*) that these cases are not consistent with *Houldsworth* v. *Glasgow Bank* (*z*): and must now be taken to be overruled (a).

Set-off in winding-up.

Apart from this section it is clear that a company cannot contract with a shareholder that in the winding-up he shall set off debts against calls, or

(*m*) 6 Ch. Div. 371.
(*n*) 33 Ch. Div. 85.
(*o*) *New Eberhardt Co., E. p. Menzies*, 43 Ch. Div. 118.
(*p*) *Hartley's Case*, 10 Ch. 157; *Carling's Case*, 1 Ch. Div. 115, 128, reversing 20 Eq. 580, 583.
(*q*) *Spiller* v. *Paris Skating Rink Co.*, 7 Ch. D. 363; see, however, *ante*, p. 525 (*e*).
(*r*) *New Eberhardt Co., E. p. Menzies*, 43 Ch. Div. 118, 126.
(*s*) *Barrow's Case*, 14 Ch. Div. 432.
(*t*) *Barangah Oil Co., Arnot's Case*, 36 Ch. Div. 702, 708, 711.
(*u*) 14 Ch. D. 634.
(*x*) 18 Ch. D. 587.
(*y*) *Ante*, p. 123.
(*z*) 5 App. Cas. 317.
(a) *Addlestone Linoleum Co.*, 37 Ch. Div. 191.

Sect. 25. that, in other words, the rule in *Grissell's Case* (*b*), being a rule based on the construction of the Act of 1862, shall not apply to him; and, *quære*, such a result could not be obtained by a contract registered under this section (*c*).

What is "issue."

It was supposed to have been decided in *Bush's Case* (*d*) that by the "issue" of shares was meant the issue of the certificates for the shares, so that where the directors passed a resolution that shares agreed to be paid for a purchase should at once be allotted, but, being advised that a contract under this section must first be registered, delayed the issue of the certificates till it had been registered, the registration was made before the issue of the shares.

But this is a misapprehension (*e*). It is not necessarily either the allotment of the share or the issue of the certificate that constitutes the issue of the share. The question is whether the shareholder has or not been put completely in possession of his share, and this may be so, although some formal act may not have been completed (*f*).

Thus shares may have been issued which have been allotted, but for which no certificates have ever been issued (*e*), and on the other hand shares as to which a resolution to allot has been made may not have been issued (*g*).

In the former case (*e*) the shareholder had been registered and the shares had been dealt with by transfer; in the latter (*g*) all proceedings upon the allotment had been forthwith suspended in consequence of the discovery that the contract which had been sent down to Cornwall for registration had not been registered. In the interval before the registration of the contract, transfers of the shares had been executed, but the company neither issued certificates nor put the allottees on the register, nor recognized the transfers until after the contract was registered.

"At" or before the issue.

From the context "at or before" *at* cannot mean *before*, and must be complied with if the issue of the shares and the filing of the certificate are substantially part of one and the same transaction. Where late in the day there were handed simultaneously to the allottee the contract duly executed for registration and a certificate of the shares as fully paid, and it was too late to file the contract that day, but it was filed on the following morning, it was held that the contract was filed "at" the issue (*h*).

Identification of shares by number.

It will be well that shares issued as paid up under a registered contract and the persons to whom they are allotted should be so described in the contract as to be capable of identification by persons inspecting the contract and the register of shareholders (*i*). But this is not essential (*k*).

The statute does not require that the contract to be registered shall identify the shares by number, and it is not necessary that it should do so (*l*). But in settling these contracts it is certainly desirable so to identify the shares.

Ad valorem stamp duty.

When a contract under this section is taken to the registrar to be filed, the question arises whether the agreement is properly stamped. Before the recent Act (*m*) the question of *ad valorem* duty upon such a contract was governed by sect. 70 of the Stamp Act, 1870, and the schedule to that Act, and upon that Act it was held in *Commissioners of Inland Revenue* v. *Angus* (*n*)

(*b*) 1 Ch. 528; *v. supra*, p. 286.
(*c*) *Black & Co.'s Case*, 8 Ch. 254, 261.
(*d*) 9 Ch. 554; 30 L. T. 458, 737; 22 W. R. 685, 699.
(*e*) See *Blyth's Case*, 4 Ch. Div. 140.
(*f*) *Cf.* as to debentures *Mowatt* v. *Castle Steel Co.*, 34 Ch. Div. 58.
(*g*) *Clarke's Case*, 8 Ch. Div. 635.
(*h*) *Tunnel Mining Co., Pool's Case*, 35 Ch. D. 579.
(*i*) *Pritchard's Case*, 8 Ch. 956, 961.
(*k*) *Buenos Ayres Railway Co.*, W. N. 1875, 59; *Hartley's Case*, see the report in 32 L. T. 106, S. C. 10 Ch. 157.
(*l*) *Delta Syndicate, E. p. Forde*, 30 Ch. D. 153.
(*m*) 52 & 53 Vict. c. 42, s. 15.
(*n*) 23 Q. B. Div. 579.

that an agreement for sale (in that case of a good will), whereby an equitable interest was created as between vendor and purchaser, but which was not an "instrument" transferring the property, was not within that Act an "instrument" whereby property is "equitably transferred" so as to be a "conveyance or sale," and liable as such to *ad valorem* duty. It may under that Act have been matter of moment whether the agreement was executory, or whether it was executed in the sense that the relative positions of the parties were by the agreement itself determined and settled so that nothing remained to be done for that purpose (*o*).

In May, 1889, the statute 52 Vict. c. 7, s. 18, extended the charge of *ad valorem* duty to contracts whether executed or executory, but this section was in August, 1889, repealed and replaced by 52 & 53 Vict. c. 42, s. 15, which contains the present statutory law upon the point.

Where *ad valorem* duty is payable, the fact that the lands agreed to be sold are not in this country makes no difference (*p*).

If the registrar takes exception to the stamp duty paid on the contract, the proper remedy is not by mandamus to him to register (*q*), but by request to the commissioners to state their opinion under sect. 18 of the Stamp Act, 1870, and if necessary appeal under sect. 19 from their assessment.

Rectification of register.

If shares intended to be issued as fully paid up have been issued without registration of a contract, and it be shewn that the allottees were ignorant (*r*) of the omission to register the contract before the issue (*s*) or left the matter in the hands of their solicitor and were not aware that any precaution had been omitted (*t*), and if it be shewn that the company is solvent (*u*), the Court will, with the consent of the company, make an order to rectify the register by striking out the shareholders' names, and that the shares shall be re-issued after registration of the contract (*x*).

The Court has not power to get over the difficulty by ordering registration of the contract as of a date antecedent to the issue of the shares (*y*).

If, on discovering the non-registration, the directors have cancelled the allotment, and then, after registering the contract, have re-issued the shares, they have only done what the Court would have done on an application for the purpose, and the holder will, therefore, not be liable for unpaid shares (*z*).

Section not retrospective.

Semble, this section is not retrospective (a).

Transfer of Shares.

Transfer may be registered at request of transferor.

26. A company shall, on the application of the transferor of any share or interest in the company, enter in its register of

(*o*) As to executory and executed contracts, see *e.g. Wolverhampton Railway* v. *L. & N. W. R.*, 16 Eq. 433, 439; and see *Wilmot* v. *Wilkinson*, 6 B. & C. 508; Tilsley on Stamps, 188, *et seq.*

(*p*) *Wright* v. *Commissioners of Inland Revenue*, 25 L. J. (Ex.) 49.

(*q*) *Reg.* v. *Registrar of Companies*, 36 W. R. 695.

(*r*) *Secus*, if they were not ignorant, *Droitwich Salt Co.*, W. N. 1874, 133; 22 W. R. 767; 43 L. J. (Ch.) 581.

(*s*) *New Zealand Kapanga Co.*, *E. p. Thomas*, 18 Eq. 17, n.; *Denton Colliery Co.*, *E. p. Shaw*, 18 Eq. 16; *Droitwich Salt Co.*, W. N. 1874, 133; 22 W. R. 767; 43 L. J. (Ch.) 581; *Dublin Manure Co.*, 13 L. R. Ir. 198. The application may be by motion under Comp. Act, 1862, s. 35.

(*t*) *Darlington Forge Co.*, 34 Ch. D. 522. No contract in writing had here been prepared.

(*u*) *Darlington Forge Co.*, 34 Ch. D. 522. The judge here required existing debts to be provided for. *Broad Street Dwellings Co.*, W. N. 1887, 149.

(*x*) See form of contract, 34 Ch. D. 526.

(*y*) *Harwich Harbour Co.*, W. N. 1875, 235.

(*z*) *Hartley's Case*, 18 Eq. 542; 10 Ch. 157.

(a) See *Forbes' Case*, 8 Ch. 768, 774; *Ferrao's Case*, 9 Ch. 355.

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members the name of the transferee of such share or interest, in the same manner and subject to the same conditions as if the application for such entry were made by the transferee (*a*).

(*a*) Comp. Act, 1862, ss. 22, 35.

Upon a sale of registered shares in a company the only contract is that the seller shall execute a valid transfer of the shares and hand it to the transferee, and so do all that is necessary to enable the transferee to insist with the company on his right to be registered. It is then for the transferee to pay the consideration money and get the transfer registered. It is no part of the contract that the transferor will get it registered (*b*). And this position is not altered by this section. The section is only for the protection of the transferor if the transferee fails to perform his duty (*b*).

It is the duty, as well as the interest, of the transferor to see that all formalities necessary to complete the transfer are performed (*c*), but if the directors neglect to have formalities performed, which it is their duty to see performed, it does not follow that after a lapse of time the transferor can be held responsible (*d*).

Re Stranton Iron and Steel Co. (*e*) is a case in which registration of a transfer has been ordered upon the motion under Companies Act, 1862, s. 35, of the transferor.

Ward v. *Dowling* (*f*) is an instance of bill filed for this purpose.

Share Warrants to Bearer.

Warrant of limited shares fully paid up may be issued in name of bearer.

27. In the case of a company limited by shares, the company, if authorized so to do by its regulations as originally framed or as altered by special resolution, and subject to the provisions of such regulations, may, with respect to any share which is fully paid up, or with respect to stock, issue under their common seal a warrant stating that the bearer of the warrant is entitled to the share or shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the share or shares or stock included in such warrant, hereinafter referred to as a share warrant.

Effect of share warrant.

28. A share warrant shall entitle the bearer of such warrant to the shares or stock specified in it, and such shares or stock may be transferred by the delivery of the share warrant.

Re-registration of bearer of a share warrant in the register.

29. The bearer of a share warrant shall, subject to the regulations of the company, be entitled, on surrendering such warrant for cancellation, to have his name entered as a member in the register of members, and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register of members the name of any bearer of a share warrant

(*b*) *Skinner* v. *City of London Marine Corporation*, 14 Q. B. Div. 882; *Ward and Henry's Case*, 2 Ch. 431, 438; *London Founders' Association* v. *Clarke*, 20 Q. B. Div. 576.

(*c*) *Cf. supra*, pp. 39, 133, 134.

(*d*) *Bush's Case*, 6 Ch. 246; L. R. 6 H. L. 37, 53, 81.

(*e*) 16 Eq. 559.

(*f*) 19 L. T. 277.

in respect of the shares or stock specified therein without the share warrant being surrendered and cancelled.

Regulations of the company may make the bearer of a share warrant a member.

30. The bearer of a share warrant may, if the regulations of the company so provide, be deemed to be a member of the company within the meaning of the Principal Act (*a*), either to the full extent or for such purposes as may be prescribed by the regulations:

Provided that the bearer of a share warrant shall not be qualified in respect of the shares or stock specified in such warrant for being a director or manager of the company in cases where such a qualification is prescribed by the regulations of the company.

(*a*) Comp. Act, 1862, s. 23.

Quære, the effect of provisions in the articles that the qualification shall be the holding of so many share warrants (*g*).

Entries in register where share warrant issued.

31. On the issue of a share warrant in respect of any share or stock the company shall strike out of its register of members the name of the member then entered therein as holding such share or stock as if he had ceased to be a member, and shall enter in the register the following particulars:

(1.) The fact of the issue of the warrant;

(2.) A statement of the shares or stock included in the warrant, distinguishing each share by its number;

(3.) The date of the issue of the warrant:

and until the warrant is surrendered the above particulars shall be deemed to be the particulars which are required by the twenty-fifth section of the Principal Act to be entered in the register of members of a company; and on the surrender of a warrant the date of such surrender shall be entered as if it were the date at which a person ceased to be a member.

Particulars to be contained in annual summary.

32. After the issue by the company of a share warrant, the annual summary required by the twenty-sixth section of the Principal Act shall contain the following particulars,—the total amount of shares or stock for which share warrants are outstanding at the date of the summary, and the total amount of share warrants which have been issued and surrendered respectively since the last summary was made, and the number of shares or amount of stock comprised in each warrant.

Stamps on share warrants.

33. There shall be charged on every share warrant a stamp duty of an amount equal to three times the amount of the *ad valorem* stamp duty which would be chargeable on a deed trans-

(*g*) *Pearson's Case*, 4 Ch. D. 222; 5 Ch. Div. 336. The point does not seem to have been raised.

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ferring the share or shares or stock specified in the warrant, if the consideration for the transfer were the nominal value of such share or shares or stock.

By 33 & 34 Vict. c. 97, s. 127:—

"If a share warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, is the managing director or secretary or other principal officer of the company, shall forfeit the sum of fifty pounds."

Penalties on persons committing forgery.

34. Whosoever forges, or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any share warrant or coupon, or any document purporting to be a share warrant or coupon, issued in pursuance of this Act, or demands or endeavours to obtain or receive any share or interest of or in any company under the Principal Act, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered share warrant, coupon, or document, purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Penalties on persons falsely personating owner of shares.

35. Whosoever falsely and deceitfully personates any owner of any share or interest of or in any company, or of any share warrant or coupon issued in pursuance of this Act, and thereby obtain or endeavours to obtain any such share or interest, or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Penalties on persons engraving plates, &c.

36. Whosoever, without lawful authority or excuse, the proof whereof shall be on the party accused, engraves or makes upon any plate, wood, stone, or other material any share warrant or coupon purporting to be a share warrant or coupon issued or made by any particular company under and in pursuance of this Act, or to be a blank share warrant or coupon issued or made as aforesaid, or to be a part of such a share warrant or coupon, or uses any such plate, wood, stone, or other material for the making or printing

any such share warrant or coupon, or any such blank share warrant or coupon, or any part thereof respectively, or knowingly has in his custody or possession any such plate, wood, stone, or other material, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Contracts.

Contracts, how made.

37. Contracts on behalf of any company under the Principal Act may be made as follows: (that is to say,)

(1.) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged:

(2.) Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged:

(3) Any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged.

And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors and all other parties thereto, their heirs, executors, or administrators, as the case may be.

This section is similar to sect. 97 of the Companies Clauses Act (8 & 9 Vict. c. 16). Sect. 47 of the Companies Act, 1862, contains a special enactment as to promissory notes and bills of exchange; and sect. 42 a penalty on not using the proper name of the company.

Apart from this section, and under the Act of 1862, contracts entered into by a trading corporation for a purpose connected with the object for which the company was incorporated might be enforced, though not under seal (*h*)

(*h*) *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463; Ibid. 4 C. P. 617; and cases there cited; *Totterdell* v. *Fareham Blue Brick Co.*, L. R. 1 C. P. 674.

Sect. 38. *Secus* where by statute a corporation, *e.g.*, a local board, is to seal every contract into which it enters (*i*).

Cases under sub-section (2) are *Beer* v. *London and Paris Hotel Co.* (*k*), *Jones* v. *Victoria Graving Dock Co.* (*l*); and under sub-section (3) *Bourke* v. *Alexandra Hotel Co.* (*m*).

Prospectus, &c., to specify dates and names of parties to any contract made prior to issue of such prospectus, &c.

38. Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus unless he shall have had notice of such contract.

What contracts must be disclosed.

This difficult section has been the subject of much discussion and much difference of judicial opinion. The wonderful comprehensiveness of its language is such as to include within its literal meaning every contract entered into by the company, or by its promoters, directors, or trustees before the issue of the prospectus or notice. The question is upon what principles a limitation is to be placed upon words which manifestly cannot be literally construed.

First, as respects contracts entered into by the company itself, the words clearly include every such contract however trivial or unimportant, and it may some day be necessary to decide whether the consequence of omitting the particulars of some contract, say a contract whose disclosure would be of no importance to anyone, is to raise the statutory fraud which the section creates. To comply with the section, even as respects this portion of it, *i.e.* as to contracts entered into by the company, is in many cases impossible. For instance, a company which has been in existence, say, ten years, issues fresh capital: during the ten years it may have entered into hundreds of contracts with officers, servants, customers, and people of all sorts, the great majority of which will not be in formal legal shape, or even in writing at all. To collect and specify these is an impossibility. In practice the knot has to be cut by introducing into the form of application for shares, words excluding the section altogether.

But this portion of the section is easy in comparison with the words which follow, and which require disclosure of the particulars of any contract entered into by the promoters, directors, or trustees before the issue of the prospectus or notice, whether subject to adoption by the directors or the company or otherwise. This, if literally read, includes every contract entered into by the promoters, &c., whether it relate to the affairs of the company or not. Of course some limitation must be put on so general an enactment; the cases that have been decided upon the section are addressed to determining what this limitation is to be.

It may be safely assumed that the section applies only to contracts relating

(*i*) *Hunt* v. *Wimbledon Local Board*, 4 C. P. Div. 48.
(*k* 20 Eq. 412.
(*l*) 2 Q. B. D. 314.
(*m*) W. N. 1877, 30.

to the affairs of the company, but it is by no means easy to draw the line between contracts which do, and contracts which do not so relate, or to determine even whether every contract which does so relate is within the section.

In *Charlton* v. *Hay* (*n*), the first case in which the question was raised, it was held that contracts whereby promoters agreed to provide directors with their qualifications, to pay a trustee for the company a salary, to appoint a certain person managing director on certain terms, to pay to the vendor of property to be purchased by the company a sum much less than the purchase-money payable by the company and to retain the residue, are, or at any rate the last is, within the section.

And from this case and *Cornell* v. *Hay* (*o*), it will be seen that the leaning of the Court was to refuse so to limit the section as to include within it only contracts by which an obligation is imposed upon the company to the exclusion of contracts entered into by promoters, &c., *inter se* relating to the formation or affairs of the company.

The present position of the conflict of opinion upon the question what contracts by promoters, &c., must be disclosed, may best be presented by referring to the conclusions at which different judges have arrived.

Thus the section "includes every contract made before the issue of the prospectus the knowledge of which might have an effect upon a reasonable subscriber for shares in determining him to give or withhold faith in the promoter, director, or trustee issuing the prospectus, whether such contract was made by such promoter, director, or trustee before or after he became a promoter, director, or trustee, and whether or not such contract was made on behalf of, or so as if adopted to impose a liability on the company" (*p*).

Cockburn, C.J., in *Twycross* v. *Grant* (*q*), adopted this view, and said he thought the section "was intended to protect the shareholder against deceptions too often practised in the creation of companies by insuring him full information as to all the material circumstances attending the formation of the company he is invited to join antecedently to the issuing of the prospectus." The section is not limited to "contracts entered into on behalf of or binding on the company" (*r*).

Again: "The contracts which must be disclosed are contracts calculated to influence persons reading a company's prospectus in making up their minds whether or not they will apply for shares in it," not meaning only contracts which impose obligations on the company (*s*).

Again: "Every contract relating to the formation of a company or to its capital, property, or business when formed, or to the position, pecuniary or otherwise, in regard to the company or its promoters or vendors, of the directors or other officers of the company, and which is material to be made known to persons invited to take shares in order to enable them to form a judgment as to the policy of so doing, is a contract within the meaning of s. 38 of the Companies Act, 1867, and as such must be disclosed under the circumstances and to the extent which the section points out, provided that one of the parties to it is at its date or subsequently becomes a promoter, director, or trustee of the company" (*t*).

(*n*) 31 L. T. 437; 23 W. R. 129; *coram* Blackburn, Mellor and Lush, JJ.

(*o*) L. R. 8 C. P. 328.

(*p*) Brett, L.J., *Gover's Case*, 1 Ch. Div. 200; adhered to in *Twycross* v. *Grant*, 2 C. P. Div. 546.

(*q*) 2 C. P. Div. 539.

(*r*) 2 C. P. Div. 530, 533.

(*s*) Coleridge, C.J., and Grove and Lindley, JJ., *Twycross* v. *Grant*, 2 C. P. D. 485.

(*t*) Thesiger, L.J., *Sullivan* v. *Mitcalfe*, 5 C. P. Div. 461.

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Again: "Every contract which upon a reasonable construction of its purport and effect would assist a person in determining whether he would become a shareholder in the company, is a contract within the meaning of the 38th section of the Act of 1867" (*u*).

On the other hand it has been said that: "Only those contracts are meant which affect the company, which put an obligation on it, whether with or without some benefit attached" (*x*): the section is to be "limited to those which bind the company or which may be adopted or assumed by the company, and so affect it when formed" (*y*).

"A contract to be within the provision must have been made with the company if it has been formed, and if not, with the promoters or the directors or the trustees representing or purporting to act on behalf of the future company, and with the intent that the company when formed shall execute a corresponding contract and so in effect ratify the act done by the promoters or other body of persons mentioned before its formation: also it must be such as to impose or to be intended to impose a burden or obligation, or a loss or a liability upon the company which would affect the value of the shares in the hands of a purchaser. It seems to me clear likewise that no contract made between one promoter and another, or by or between any person or persons, and to which neither the company nor one of the three bodies of persons mentioned in the clause are parties, can be brought within its operation" (*z*).

The contract must be one entered into by the promoter "as such" (a); by using the plural "promoters," "directors," "trustees," the section obviously intends the bodies of persons there mentioned, and does not refer to them as individuals (*b*). A contract entered into by a person before he is a promoter is not within the section (*c*).

On the other hand it has been said that the section extends "to every contract made with a person who afterwards becomes a promoter or director, provided the company have become entitled to the benefit of the contract or have become liable to perform the provisions of the contract before the prospectus was issued" (*d*). It does not apply only to contracts entered into by the promoters, &c., "as such" (*e*).

Upon the balance of authority as contained in the decisions above referred to, the law must at present be taken to be that the prospectus must disclose not only contracts which impose an obligation on the company, but also all contracts entered into by the promoters, &c., whether before or after they become promoters, &c., which relate to the affairs of the company or of its promoters, vendors, directors, and officers, and which are material for an intending applicant to know. But little assistance however is to be had towards ascertaining what are contracts which so relate.

There may perhaps be found in the closing words of the section something which may assist in the construction of the whole. The prospectus is to be deemed fraudulent as regards any person taking shares "on the faith of such prospectus (*f*), unless he shall have had notice of such contract." Do not

(*u*) Baggallay, L.J., *Sullivan* v. *Mitcalfe*, 5 C. P. Div. 465.

(*x*) Bramwell, L.J., *Twycross* v. *Grant*, 2 C. P. Div. 497.

(*y*) Bramwell, L.J., *Sullivan* v. *Mitcalfe*, 5 C. P. Div. 455.

(*z*) Kelly, C.B., *Twycross* v. *Grant*, 2 C. P. Div. 506.

(a) Bramwell, B., *Gover's Case*, 1 Ch. Div. 192; Bramwell, L.J., *Twycross* v. *Grant*, 2 C. P. Div. 499.

(*b*) Kelly, C.B., *Twycross* v. *Grant*, 2 C. P. Div. 506, 510.

(*c*) James, L.J., *Gover's Case*, 1 Ch. Div. 186. But see *per* Cotton, L.J., in *Bagnall* v. *Carlton*, 6 Ch. Div. 407.

(*d*) Mellish, L.J., *Gover's Case*, 1 Ch. Div. 191. See Brett, L.J., Ibid. 200.

(*e*) Coleridge, C.J., Grove and Lindley, JJ., *Twycross* v. *Grant*, 2 C. P. D. 485.

(*f*) It is singular that the words "or notice" are omitted.

these words mean "on the faith that there was no such contract inasmuch as the prospectus did not mention it"? and does not this at once let in the one rational test, viz., whether the concealed contract is such as if disclosed would have deterred a prudent man from joining the concern? For, assume that the contract was immaterial, then all the shareholder has to say is, "I took my shares on the faith that there was not in existence a certain contract which, had I known of its existence, would not have influenced me in any way." Must not the shareholder who comes into Court with a grievance under the section in fact say, "I took my shares on the faith of this prospectus, that is, on the faith that it told me all that was material; it did not tell me of this contract, it is a material contract, I had no notice of its existence, give me relief" (*g*).

Verbal contract.

A contract need not be in writing to be within the section (*h*). If in *Arkwright* v. *Newbold* (*i*) there had been proved a contract existing at the date of the prospectus to remunerate the directors, it would, it is conceived, have been within the section.

Cases decided.

The particular cases which have been the subject of decision are these:—

Where the prospectus failed to state that the company's property was purchased in the first instance by one of the directors, and by him sold to the company at a greatly increased price, Malins, V.C., held that it was fraudulent within the section (*k*).

By agreement of 23rd of July, 1873, S. agreed to sell M. a patent for £65,000 in cash and shares in a company which M. agreed to form. If M. failed to form the company a deposit of £1000 was to be forfeited, and the agreement to become void. By agreement of 23rd of October, 1873, M. agreed with W. as trustee for the company to sell the patent for £125,000. The company was registered 4th of November, 1873, and M. was appointed a director. In January, 1874, G. applied for shares upon a prospectus which did not disclose the agreement of the 23rd of July, 1873. G.'s application for removal of her name from the register on the ground of non-disclosure of the agreement was refused. The Court (*diss.* Brett, J.) did not necessarily decide anything more than that G. was not entitled to that particular relief. But opinions were expressed in which the Court was equally divided as to whether the agreement of the 23rd of July was or not within the section—James, L.J., and Bramwell, B., holding that it was not; and Mellish, L.J., and Brett, J., that it was (*l*).

On the 26th of March, 1873, P. wrote to C. and other persons who were interested with him in mines which required coal, mentioning a colliery property then for sale, recommending it as an investment, and offering it to C. and others in the terms of a prospectus about to be issued. The letter mentioned the capital and number of shares in a company proposed to be formed for working the property. By deed of 10th of May, 1873, P. contracted to purchase the property for £16,125 in cash by instalments. By agreement of 29th of May, 1873, P. agreed to sell the property to two trustees for the intended company. On the 2nd of June, 1873, a prospectus was issued naming P. as managing director, in which the agreement of 10th of May, 1873, was not disclosed. On the 9th of June C. took shares on the faith of the

(*g*) This was a view in substance adopted in *Sullivan* v. *Mitcalfe* by Thesiger, L.J., 5 C. P. Div. 460, and by Baggallay, L.J., Ibid. 464, but rejected by Bramwell, L.J., Ibid. 477, as being an amendment, not an interpretation of the statute.

(*h*) *Capel* v. *Sim's Co.*, 58 L. T. 807.

(*i*) 17 Ch. Div. 301.

(*k*) *Askew's Case*, 22 W. R. 762; reversed, but only on the ground that the applicant was a paid-up shareholder, 9 Ch. 664.

(*l*) *Gover's Case*, 20 Eq. 114; 1 Ch. Div. 182.

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prospectus. In a suit by C. against P., Bacon, V.C., held that the agreement of the 10th of May, 1873, was not within this section (*m*). This decision was disapproved by Cockburn, C.J., in *Twycross* v. *Grant* (*n*), and in consequence an attempt was made, but unsuccessfully, to obtain leave to appeal (*o*).

A contract for the purchase by C. of certain foreign concessions for the construction of tramways which the company was afterwards incorporated to make and work, the consideration being cash and "shares in a company now in course of formation," and the agreement being voidable in case the capital of the company should not be subscribed, or C. should not obtain the contract for constructing the lines: and a contract as to payments to be made by C. to G. in consideration of his financing the company and obtaining the contract for C., were contracts which the prospectus ought to have disclosed (*p*).

The owners of a patent agreed to sell it to a company for £56,000, but by a series of contracts it was arranged that only £2000 should be retained by them, and the balance of £54,000 should be divided among the promoters. It was held by Baggallay and Thesiger, L.JJ. (Bramwell, L.J., dissenting), that the contracts were within the section (*q*).

Remedy where section applies.

Where the section is applicable it gives to shareholders a remedy against the promoters, &c., personally (*r*), but does not entitle the shareholder to relief under Companies Act, 1862, s. 35, by the removal of his name from the list of shareholders (*s*).

And the section gives no right of action to any person other than a shareholder, as, *e.g.*, a bondholder (*t*), for it cannot be divided into two parts, the latter only of which is confined to shareholders, while the former creates a statutory duty for which a bondholder or—to carry the argument to its logical consequence—any member of the public may sue (*t*).

Death of plaintiff.

The right of action against a promoter to recover the value of shares on the ground of prospectus fraudulent under this section, is capable of "transmission" on the plaintiff's death to his legal personal representative, and he may accordingly prosecute the action (*u*).

Knowingly issuing.

The words "knowingly issuing" mean intentionally issuing a prospectus without inserting the contracts, which are by this section required to be specified, although they are omitted under the *bonâ fide* belief that it is unnecessary to specify them (*x*).

Waiver of benefit of section.

This section creates a particular statutory fraud on which arises a right of action in the person taking shares without notice of the contract. It is conceived that such a person may covenant not to sue in respect of this right of action. The case is different from a breach of such a statutory duty as was created by sect. 52 of the Coal Mines Regulation Act, 1872 (*y*), by which default is made an offence against the Act, in which case the maxim *Volenti non fit injuria* does not apply (*z*). It is very usual, and in many cases indeed

(*m*) *Craig* v. *Phillips*, 3 Ch. D. 722.
(*n*) 2 C. P. Div. 469, 539.
(*o*) See 7 Ch. Div. 249.
(*p*) *Twycross* v. *Grant*, 2 C. P. Div. 469.
(*q*) *Sullivan* v. *Mitcalfe*, 5 C. P. Div. 455.
(*r*) *Charlton* v. *Hay*, 31 L. T. 437; 23 W. R. 129; *Twycross* v. *Grant*, 2 C. P. Div. 469.
(*s*) *Gover's Case*, 20 Eq. 114; 1 Ch. Div. 182 (*diss.* Brett, L.J. *Quære*, the assent which Cockburn, C.J., in *Twycross* v. *Grant*, 2 C. P. Div. 539, gave to the views of Brett, L.J., must be taken to refer only to the question then before the Court of Appeal, viz.: What contracts are within the section? and not to the remedy by way of rectification of the register? See also *Sullivan* v. *Mitcalfe*, 5 C. P. Div. p. 465); *Bagnall & Co., E. p. Dick*, 32 L. T. 536.
(*t*) *Cornell* v. *Hay*, L. R. 8 C. P. 328.
(*u*) *Twycross* v. *Grant*, 4 C. P. Div. 40.
(*x*) *Twycross* v. *Grant*, 2 C. P. Div. 469.
(*y*) 35 & 36 Vict. c. 76.
(*z*) *Baddeley* v. *Earl Granville*, W. N. 1887, 151; and see *Thomas* v. *Quartermaine*, 18 Q. B. Div. 685.

quite necessary to introduce into the prospectus conditions of waiver of this section, and the application made "upon the conditions of the prospectus" is, it is submitted, in such case a valid abnegation of the right to sue in respect of this cause of action. Sect. 38.

Promoter. To define a promoter, or to determine the moment at which a man becomes or ceases to be a promoter, is no easy task. Cockburn, C.J., has defined a promoter to be "one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose" (a). Bowen, L.J., says that "the term promoter is a term not of law but of business, usefully summing up in a single word a number of business operations familiar to the commercial world, by which a company is generally brought into existence" (b).

Lindley, L.J., says (c):—"With respect to the word 'promoter,' we are of opinion that it has no very definite meaning. As used in connection with companies the term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company, or what is called floating it, and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumed towards it."

Some observations as to "promotion" will be found in *Barry Railway Co.* (d).

The promoter cannot be considered an agent or trustee for the company which is not yet in existence, but the principles of the law of agency and trusteeship have been extended to meet his case. He stands in a fiduciary relation to the company which he promotes, and is accountable to it just as if the relationship of principal and agent or of trustee and *cestui que trust* had existed (e). The case of a promoter seems an exceptionally strong case of fiduciary relationship, inasmuch as the trustee or agent, so far from being selected by his *cestui que trust* or principal, here actually creates the principal in whose affairs he acts. So that if it could ever be said by a fraudulent agent to the person whom he has defrauded, "You have only yourself to blame, you should not have trusted me," such an argument would here be excluded, for the company had no choice in the matter as to who should call it into existence.

Date of becoming promoter. It is often of the essence of cases against promoters to ascertain the date at which they became promoters, and it is generally the most difficult question to determine. It may be taken that intention to promote is not enough (f), and even agreement to promote is not enough (g); you must shew promotion in fact. An invitation to the public to join in acquiring the property no doubt is enough (h). To take an active part in suggesting the formation of the company, in preparing the prospectus and memorandum and articles, in appointing the directors, and in negotiating the purchase may be enough, and the more so if it be part of the arrangements that the promoter shall receive a benefit (i). But to lay down any general rule is impossible, and one may predict that the Court will never attempt it.

Promotion as agent. Moreover some of the acts above suggested as tests, *e.g.*, the preparation of

(a) *Twycross* v. *Grant*, 2 C. P. Div. 541. See also *Bagnall* v. *Carlton*, 6 Ch. D. 381; *Emma Mining Co.* v. *Grant*, 11 Ch. D. 918, 936.

(b) *Whaley Bridge Co.* v. *Green*, 5 Q. B. D. 111.

(c) *Emma Mining Co.* v. *Lewis*, 27 W. R. 836; 40 L. T. 749; 48 L. J. (C. P.) 257.

(d) 4 Ch. Div. 315.

(e) *Lydney Co. v. Bird*, 33 Ch. Div. 85; *New Sombrero Co.* v. *Erlanger*, 5 C. P. Div. 73, 112, 118, 123; 3 App. Cas. 1218; *Emma Mining Co.* v. *Grant*, 11 Ch. D. 918, 936.

(f) *Ladywell Co.* v. *Brookes*, 34 Ch. D. 398; 35 Ch. Div. 400, 410.

(g) *Gover's Case*, 1 Ch. Div. 182.

(h) See 35 Ch. Div. 411.

(i) *Lydney Co.* v. *Bird*, 33 Ch. Div. 85.

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documents, are such as may or must often be performed by persons who are mere agents, and not promoters at all. The solicitor who prepares the contracts, for instance, is not by rendering professional service rendered a promoter (*k*), although in proving him to be a promoter his professional service may be a link in the chain of evidence. The vendors and promoters may employ an agent to act for them, who may be a mere agent and not a promoter at all, and in *Lydney Co.* v. *Bird* (*l*) Pearson, J., held that Bird & Co. held this position. With this view of the facts the Court of Appeal did not agree (*m*); they held that James Bird was a promoter, and that the fact that he was acting in the promotion as the agent of the vendors did not exonerate him from liability to account for the secret profit which he had made. On the other hand William Bird, who in fact received £5000, bnt was not a promoter, escaped.

Trustee for company.

It has been held that a trustee for the company does not come within the meaning of the word "officer," and that therefore a prospectus cannot be deemed fraudulent against a trustee (*n*).

Several actions. Stay of proceedings.

Where many actions have been brought by different plaintiffs against directors for misappropriation or for fraud, an order may be made staying proceedings in all but one until after the trial of that one as a test action, proper provision being made in case the test action does not satisfactorily dispose of the question in all (*o*).

Rescission or other remedy by company.

It would seem that this section gives no remedy to the shareholder against the company (see *ante*, p. 574), and also no remedy to the aggregate body of shareholders, *i.e.*, to the corporation against the promoters. The particular statutory fraud by concealment of contract arises only as between the deceived shareholder and the person deceiving him.

The following cases therefore of proceedings taken by the company against the promoters are cases not under this section, but on the general ground of misrepresentation, and are only added here as being germane to the general question of fraud by promoters.

A man may properly purchase, or a body of persons may properly combine to purchase a property with the object and intention of selling it at a profit, whether to a company or to anyone else; but if it be shewn that the vendors to the company were promoters of the company, that they in fact created their own purchaser, the transaction will at the instance of the company be set aside (*p*), or if they were promoters at the date at which they bought, the profit will be ordered to be paid over (*q*).

The fact is, that in these cases the so-called contract for sale to the company is nothing more than an agreement between A. and B. in their own names, of the one part, with themselves under the aliases of C. and D., as trustees for the intended company, of the other part, carried into effect by themselves under the aliases of X. Y. and Z., as so-called directors of the company. The vendors find the person who is called the trustee for the intended company, they find and qualify the directors who are to act for the company in carrying out the contract; and then the argument is that at the date of the transaction, everyone was of one mind on the subject, and that subsequent shareholders cannot complain.

(*k*) *Great Wheal Polgooth, Re Turner*, W. N. 1883, 114; 53 L. J. (Ch.) 42; 49 L. T. 20; 32 W. R. 107.
(*l*) 31 Ch. D. 328.
(*m*) 33 Ch. Div. 85.
(*n*) *Cornell* v. *Hay*, L. R. 8 C. P. 328.
(*o*) *Bennett* v. *Lord Bury*, 5 C. P. D. 339.
(*p*) *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221.
(*q*) See *infra*, "rescission or repayment." *Secus* if the company bought with knowledge of the profit: *Whaley Bridge Co.* v. *Green*, 5 Q. B. D. 109.

It is now abundantly clear that this is not so: that the corporation, as subsequently composed of shareholders who knew nothing of and never assented to the fraud, can complain of it (*r*), that the directors cannot be heard to say that all the shareholders at the time assented, inasmuch as they owed a duty to the future shareholders who were to form the real company, and that the company may sue and alone can sue (*s*) for rescission or repayment, although the relief given may enure for the benefit of some of the wrongdoers, if any are shareholders in the company, at the expense of others who are not (*t*).

Where therefore a syndicate, suppressing the fact that they were charging the company double what they had given, sold a property to a company which they promoted and whose directors were in fact their nominees, the sale to the company was set aside, and the members of the syndicate, including the estate of a deceased member, were held jointly and severally liable for repayment of the purchase-money (*t*).

And where persons who were owners of a concession which they knew was voidable combined to form a company to purchase it, they were held jointly and severally liable to repay the purchase-money, although the concession had become voidable and had been avoided: the trustees for the company who had received money in the nature of a bribe were ordered to repay it; and all the defendants, including the solicitors, who had acted both for vendors and company, and had concealed the invalidity in the title, were held liable for the costs of the suit (*u*).

In *Bagnall* v. *Carlton* (*x*) the company sued the vendors, R. a financial agent, C. and G. who were promoters, and D. and Co. the vendors' solicitors who became solicitors to the company, praying rescission or repayment. Before the suit came to a hearing, they compromised with the vendors in consideration of a payment of £31,000 to the company, and abandoned rescission. At the hearing, R. C. and G. were held liable to repay the secret profit they had made without any allowance in respect of the £31,000; but were held entitled to their expenses properly incurred in bringing out the company and (the plaintiffs having offered it by their bill) to a fair commission. As against D. and Co., the bill was dismissed without costs up to the time of the compromise with the vendors, and with subsequent costs.

Rescission or repayment.

Where promoter or other person standing in a fiduciary relation towards the company has sold to the company his own property without disclosing his interest the company is entitled to rescind, and for this purpose it is immaterial whether at the time when he acquired the property he stood in a fiduciary relation or not.

If he stood in a fiduciary relation when he bought the company has the alternative either to rescind or to retain the property, paying for it no more than he gave (*y*).

(*r*) *Quære, secus*, if every shareholder knew and assented at a time when no one contemplated the introduction of other members: *British Seamless Paper Box Co.*, 17 Ch. Div. 467. But clearly where the transaction is one which the shareholders cannot ratify (*e.g.* payment of dividends out of capital which is *ultra vires*) the corporation cannot by assent of the shareholders lose its right of action: *Flitcroft's Case*, 21 Ch. Div. 519.

(*s*) See 5 Ch. Div. 122.

(*t*) *New Sombrero Co.* v. *Erlanger*, 5 Ch. Div. 73; affirmed, 3 App. Cas. 1218; Cairns, L.C., doubting as to laches.

(*u*) *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. Div. 394.

(*x*) 6 Ch. Div. 371.

(*y*) *Bank of London* v. *Tyrrell*, 10 H. L. C. 26, 47; Lindley on Company Law, 5th ed., p. 348; *Emma Mining Co*, v. *Grant*, 11 Ch. D. 918, 938; *Ambrose Lake Co.*, *E. p. Taylor*, 14 Ch. Div. 390, 394; *Great Luxembourg Co.* v. *Magnay*, 25 Beav. 586, 595, 596; *Bentinck* v. *Fenn*, 12 App. Cas. 652, 658.

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The test whether the company is entitled to the property at the lower price which he gave is, whether at the date of its acquisition he stood in a fiduciary relation to the company, so that the company is in a position to say, I as your *cestui que trust* am entitled to the benefit of the bargain which you made (*z*).

If he did not stand in a fiduciary relation when he bought, then if the company does not elect to rescind, or rescission has become impossible [*quære*, otherwise than by the act of the promoter himself (a)], the company may be without remedy (*b*). For although, where an agent employed to buy goods sells his own goods to his principal without disclosing that they are his, he may be compelled to pay the difference between the price he has charged and the market price, yet promoters' cases are not generally such as to fall within that principle, for the agency is generally not to buy any property, but to buy a specific property (*b*). The company is not entitled to buy at the price which the promoter gave at the date when he was not promoter, and to say that the company shall buy at the fair price is to make a new contract adversely to the vendor (*b*).

But at the same time, when rescission has become impossible, it is possible that the promoter may be reached (*c*), and it is conceived that the claim might be put either as one for damages for misfeasance in inducing the company to buy without proper disclosure (*d*), or as one for misapplication of the company's funds (if the promoter was a director) in completing a purchase in which the company was being defrauded.

If the company (being entitled so to do) elect to retain the property and recover the profit, then in arriving at the amount of the profit the party charged is entitled to deduct all expenses "properly incurred" (*e*) or moneys *bonâ fide* paid (*f*), whether for purposes which the Court approves or not, so as to ascertain how much more money he has got than he would have had if he had never entered into the transaction. On this principle deduction was allowed of payments made to an agent who procured directors, to directors for their qualification, to brokers for sustaining the market, to brokers for waiving an option to take certain shares, and to the press for puffing the company (*f*). The allowance will include payments for report on the property, fees paid to solicitors and brokers, payments for advertisements, printing, etc., but not a sum paid for a guarantee that the company's capital shall be taken (*g*). It is "wholly wrong to make the company pay for the issue of its own shares" (*g*). But these words were not, it is conceived, intended to exclude proper broker's commission. Fees to brokers were expressly allowed. See, however, *ante*, p. 562.

To make out a case of promotion money it is not sufficient to shew that all the purchase consideration did not reach the vendor's pocket, he naturally and necessarily adds something for expenses to the net price which he is willing to take. To make out promotion money you must shew that the price was swollen and exaggerated purposely and fraudulently for

(*z*) *Ambrose Lake Co., E. p. Taylor*, 14 Ch. Div. 390, 398; *Cape Breton Co.*, 29 Ch. D. 811.

(a) See 29 Ch. Div. 811; *Great Luxembourg Co.* v. *Magnay*, 25 Beav. 586.

(*b*) *Cape Breton Co.*, 26 Ch. D. 221; 29 Ch. Div. 795; *Bentinck* v. *Fenn*, 12 App. Cas. 652, 659; *Ladywell Co.* v. *Brookes*, 34 Ch. D. 398; 35 Ch. Div. 400.

(*c*) *Bentinck* v. *Fenn*, 12 App. Cas. 652.

(*d*) Consider 29 Ch. Div. 808; and *contra*, Ibid. 812; *Ladywell Co.* v. *Brookes*, 34 Ch. D. 410; 35 Ch. Div. 400.

(*e*) *Bagnall* v. *Carlton*, 6 Ch. Div. 371, 400, 408; and see as to these words, 11 Ch. D. 939.

(*f*) *Emma Mining Co.* v. *Grant*, 11 Ch. D. 918, 938.

(*g*) *Lydney Co.* v. *Bird*, 33 Ch. Div. 85, 95.

the purpose of making the company pay promotion money in addition to what was understood to be the real purchase-money (*h*).

Company's action to enforce agreement to pay promotion money.

Where G., the vendor, had agreed out of the purchase-money to pay to S., a promoter, £3000, the company were held entitled to recover from G. so much of the £3000 as he had not previously paid to S., on the footing that the company could treat the bargain between G. and S. as made by S. on behalf of the company, and could therefore recover from G. by suing on the agreement (*i*).

Meetings (*a*).

Company to hold meeting within four months after registration.

39. Every company formed under the Principal Act after the commencement of this Act, shall hold a general meeting within four months after its memorandum of association is registered; and if such meeting is not held the company shall be liable to a penalty not exceeding five pounds a day for every day after the expiration of such four months until the meeting is held; and every director or manager of the company, and every subscriber of the memorandum of association, who knowingly authorizes or permits such default shall be liable to the same penalty.

(*a*) Comp. Act, 1862, s. 49.

The first meeting may be either an ordinary or an extraordinary meeting (*k*); the difference is, in companies governed by Table A., important for the purposes of Art. (58) (*l*).

Winding-up.

Contributory when not qualified to present winding-up petition.

40. No contributory of a company under the Principal Act shall be capable of presenting a petition for winding-up such company (*a*) unless the members of the company are reduced in number to less than seven (β), or unless the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for a period of at least six months during the eighteen months previously to the commencement of the winding-up (γ), or have devolved upon him through the death of a former holder:

Provided that where a share has during the whole or any part of the six months been held by or registered in the name of the wife of a contributory either before or after her marriage, or by or in the name of any trustee or trustees for such wife or for the contributory, such share shall for the purposes of this section be

(*h*) *Arkwright v. Newbold*, 17 Ch. Div. 301, 319.

(*i*) *Whaley Bridge Co.* v. *Green*, 5 Q. B. D. 109.

(*k*) *Lord Claud Hamilton's Case*, 8 Ch. 548.

(*l*) See the note to that article, *supra*.

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deemed to have been held by and registered in the name of the contributory.

(α) Comp. Act, 1862, s. 82. (β) Comp. Act, 1862, s. 79 (3).
(γ) *Cf.* Table A. (47), as to voting.

It is well that a contributory's petition should contain allegations shewing that he has held his shares for the requisite six months, but the omission of such allegations does not render it demurrable (*m*).

Semble:—The holder of a share warrant cannot petition (*n*).

"Held" means that the name has been on the register for the requisite time. A transmission during the six months to a trustee in liquidation whose name has never been put on the register and whose title has dropped by a composition being accepted does not affect the "holding" (*o*).

41-46. [Sects. 41-46, which empowered the High Court to refer a winding-up to the County Court and contained necessary consequential enactments, are repealed by the Comp. (W. Up) Act, 1890, and are replaced by sects. 1 and 3 of that Act.]

Saving.

Not to exempt companies from provisions of s. 196 of 25 & 26 Vict. c. 89.

47. Nothing in this Act contained shall exempt any company from the second or third (*a*) provisions of the one hundred and ninety-sixth section of the Principal Act, restraining the alteration of any provision in any Act of Parliament or charter.

(*a*) *Quære*, "third or fourth" was meant.

(*m*) *City and County Bank*, 10 Ch. 470.
(*n*) *Positive Assurance Co.*, W. N. 1877, 23; *Wala Wynaad Co.*, 21 Ch. D. 849; 30 W. R. 915.
(*o*) *Wala Wynaad Co.*, 21 Ch. D. 849; 30 W. R. 915.

THE JOINT STOCK COMPANIES ARRANGEMENT ACT, 1870.

33 & 34 Vict. c. 104.

An Act to facilitate Compromises and Arrangements between Creditors and Shareholders of Joint Stock and other Companies in liquidation. [10th August, 1870.]

Whereas it is expedient to amend the law relating to the liquidation of joint stock and other companies: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as "The Joint Stock Companies Arrangement Act, 1870."

Where compromise proposed, Court of Chancery may order a meeting of creditors, &c., to decide as to such compromise.

2. Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the Companies Acts, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct; and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company.

Effect of section.

This section enables a majority of *creditors* of a company to bind a minority. The 159th and 160th sections of the Companies Act, 1862, seem to provide that a company by its official liquidator, with the sanction of the Court, is to have exactly the same power of compromising both with its creditors and its debtors as an individual would have; but there is nothing in the Act of 1862 (*p*) which enables one creditor to bind another creditor to accept a compromise, or which enables one debtor to bind another debtor with respect to paying a composition (*q*).

The relation in which this section stands to sects. 136, 159, 160, of the Companies Act, 1862, has already been considered under those sections (*r*).

(*p*) Except in a voluntary winding-up; Comp. Act, 1862, ss. 136, 137.

(*q*) See *Albert Life Assurance Co.*, 6 Ch. 381, 386.

(*r*) *Supra*, pp. 326, 385, 386.

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As regards companies in purely voluntary liquidation, sect. 136 of that Act should be carefully compared with this section: there is between the two sections similarity sufficient to make the reason for the dissimilarity the more hard to find.

Meeting of contributories: *quære* necessary under this Act.

It will be observed that while in a voluntary winding-up, sects. 136, 159, and 160 require the sanction of an extraordinary resolution of the company, this section requires only the sanction of the Court, and, without saying anything about a meeting of contributories, enacts that the compromise, if agreed to by the creditors and sanctioned by the Court, shall be binding upon (amongst others) the contributories. Again sects. 159 and 160 require only the sanction of the Court, and not of any meeting of the company, where the winding-up is compulsory or under supervision. These enactments are consistent in principle, if it be taken that where the matter is to go before the Court there is no need to hold a meeting of the company. But in *Dynevor Collieries Co.* (*s*), it seems to have been assumed that the sanction of an extraordinary resolution was necessary, and one part of the argument in fact was that the compromise was invalid, because the order of the Court was made before this extraordinary resolution was passed. But it was not necessary for the Court to decide, and it did not decide, that the extraordinary resolution was necessary.

Debentures to bearer.

Holders of debentures which pass by delivery are not entitled to vote unless they produce their debentures at or before the meeting (*t*).

Majority.

The sanction of three-fourths in value of the creditors *present* in person or by proxy is sufficient, although it may not be three-fourths of the total amount of debts (*u*).

The majority must be a majority of those present, not of those present and voting. The chairman has only to ascertain how many are present when the question is put, and how many of them vote for the resolution. Thus those who do not vote at all in fact increase the number of those who vote against the resolution (*x*).

Creditors who are also shareholders.

Creditors who are also shareholders are nevertheless entitled to vote as creditors, and in the same class with creditors who are not shareholders. This was so determined by Chitty, J., in the *Madras Irrigation Co.* (*y*), where the nature of the scheme was that the concern should be sold free from incumbrances, and that out of the proceeds the shareholder should take (say) 106 per cent., and the mortgage debenture-holder (say) 75 per cent., so that the debenture-holder who was also a shareholder might, according to the relative amounts of his holdings, have an interest directly opposed to that of the debenture-holders.

"Class of creditors."

It is a strong proposition that under this section a majority of secured creditors of the company may vote away from a minority the security which they hold or make them take a substituted security. But in more than one case holders of debentures carrying a security upon the property of the company have been treated as being a class of creditors within the section capable of being bound by the vote of the statutory majority (*z*).

Upon this point it may be observed that *primâ facie* these Acts of Parliament are not dealing with the secured creditor *quâ* secured creditor at all. The object of the winding-up sections of the Acts is to provide for the administration of the property of the company (which, so far as mortgaged

(*s*) 11 Ch. Div. 605.
(*t*) *Wedgwood Coal Co.*, 6 Ch. D. 627.
(*u*) *Bessemer Steel Co.*, 1 Ch. D. 251.
(*x*) *Cf. Labouchere* v. *Wharncliffe*, 13 Ch. D. 346, 354.
(*y*) W. N. 1881, 172.
(*z*) *Slater* v. *Darlaston Steel Co.*, W. N. 1877, 139; *Dynevor Collieries Co.*, 11 Ch. Div. 605; *Madras Irrigation Co.*, Chitty, J., March, 1882; *Empire Mining Co.*, 44 Ch. D. 402.

property is concerned, is only the equity of redemption), by applying it first in payment of the debts, and then as to the surplus in distribution amongst the shareholders. The secured creditor stands *quâ* his security outside the winding-up altogether, and (since the Judicature Act) he can, if the company is insolvent, rank against the assets to be administered in the winding-up for the balance only of his debt after deducting the value of the security.

This section speaks, it is true, of "classes of creditors," and it may be said that unsecured creditors are only one class, and some other classes must therefore be intended. But Companies Act, 1862, s. 159, also speaks of classes of creditors contemplating the payment of "any classes of creditors in full." This points, it is conceived, to classes of such creditors as would otherwise be entitled only to a dividend, *i.e.* creditors who are to be satisfied in the winding-up, unsecured creditors. For instance, the servants of the company who are creditors for wages, or creditors whose debts are under £10. It would seem more probable that "class of creditors" in this Act should bear a similar meaning.

But as the authorities stand, classes of secured creditors are within the Act. The difficulty is to say what is a class of secured creditors for this purpose. Suppose a company has borrowed largely on mortgage from many people, *e.g.* a land company which buys land, builds houses, raises money on mortgage, buys more land, and repeats the process as a builder does, do all the mortgagees of such a company form a class and can a statutory majority vote away the security of the minority? Suppose a company which does business in many towns in England, keeps a banking account in each, and gives every banker a security for overdraft by deposit of deeds, do all the bankers form a class? To multiply such questions seems much easier than to supply the answer.

In *Richards and Co.* (a) Fry, J., said that as a general rule the Court should not sanction an arrangement under this Act if it would prejudice a creditor whose rights would have been preferential if the winding-up petition had been carried on. The question there was as to leave to judgment creditor to issue execution.

Debts must be capable of estimate.

For the purposes of the section there must be a majority of the creditors of the company which is compromising; and in order to enable the majority to bind the minority the Court must be satisfied that there is a meeting of creditors the amount of whose debts can be estimated, and that three-fourths of the creditors have assented. But if it be impossible to estimate the amounts of the claims of individual creditors, the section cannot be applied.

Therefore in *In re Albert Life Assurance Co.* (*b*), where the A. Life Assurance Company had purchased the business of several companies, and had indemnified them against their liabilities; and some of the policy-holders of the amalgamated companies had accepted the liability of the A. Company, and some had not; and on the A. Company and the other companies being ordered to be wound up a scheme of reconstruction was proposed for the sanction of the Court, James, L.J., held, that considering the different value of policies of the same amount on different lives, and considering that it was uncertain in what cases there had been a novation by the policy-holders of the amalgamated companies, it was not possible to estimate the amounts of the claims of the individual creditors of the respective companies, and that therefore the Court could not act under this section.

Bona fides.

The Court will not sanction a scheme if it appear that the majority have not voted *bonâ fide* in favour of the creditors as a class (*c*), or if under all

(a) 11 Ch. D. 676, 679.
(*b*) 6 Ch. 381; and see note to Comp. Act, 1862, s. 160.
(*c*) *Wedgwood Coal Co.*, 6 Ch. D. 627.

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the circumstances it does not approve it (*d*). It is no doubt in the character of creditor and as a member of a class that the creditor is entrusted with his vote, and the consequent power of controlling the minority. This power, therefore, must be used for the benefit of the class, and not for the individual interest of the voter as opposed to that of the class (*e*).

Schemes :—

Under this Act of Parliament it would seem that the unsecured creditor may be converted into a partner by making him take fully paid shares in satisfaction of his debt (*f*), and the majority of secured creditors may bind the minority, *e.g.* as to the disposal of the property included in the security by granting a lease of it (*g*), or by compelling the minority to give up their security upon payment of less than the amount due to them (*h*).

A scheme has been sanctioned by which one creditor took over all the assets in consideration of paying the costs of the winding-up and a composition of 5*s.* 3*d.* in the pound to the other creditors (*i*).

Other cases of reconstruction are *Re Tunis Railway Co.* (*k*) and *Re Western of Canada Oil Co.* (*l*), which have been already noticed, *supra*, pp. 391, 259.

cannot be questioned after order made.

Where an order is made sanctioning the scheme, it becomes binding not only on the creditors but also on the liquidators and contributories, so that whether the scheme be a valid one (*e.g.* within sect. 161 of the Companies Act, 1862) or not, a shareholder cannot afterwards question it (*m*).

Compromise *nolente* liquidator.

It seems to have been held (*n*) that, notwithstanding this section, the Court cannot compel the liquidator to accept a compromise of a creditor's disputed claims. It may indeed be a question what is the meaning of the introductory words of the section, "Where any compromise or arrangement shall be proposed," and it might be said that there could be no proposition unless the liquidator were a party to it; but it must not be overlooked that the application to the Court may be made by a creditor, and that, if sanctioned, the arrangement is to be binding on the liquidator.

Practice.

It is conceived that the right practice is to obtain upon summons an order convening the requisite meeting to consider the scheme: if the necessary majority is obtained, the sanction of the Court may then be sought on petition (*o*).

In *Slater* v. *Darlaston Steel Co.* (*p*), the petition (which was in an action) seems to have been presented in the first instance, and was directed to stand over until after the meeting had been held.

Power of majority by condition in debenture.

A general condition in a debenture that the majority at a meeting shall bind all the debenture-holders as if they had consented, does not extend to enable the majority to bind the minority to something contradictory to the debenture deed (*q*).

Interpretation.

3. The word "company" in this Act shall mean any company liable to be wound up under "The Companies Act, 1862."

Act and Companies Act to be read together.

4. This Act shall be read and construed as part of "The Companies Act, 1862."

(*d*) *E. p. Strawbridge*, 25 Ch. Div. 266.
(*e*) See *ante*, p. 485.
(*f*) *Slater* v. *Darlaston Steel Co.*, W. N. 1877, 165. Contrast *Bristol and North Somerset Railway Co.*, 6 Eq. 448, 452.
(*g*) *Dyncvor Collierics Co.*, 11 Ch. Div. 605.
(*h*) *Madras Irrigation Co.*, Chitty, J., March, 1882.
(*i*) *Bessemer Steel Co.*, 1 Ch. D. 251.
(*k*) 30 L. T. 512; 31 L. T. 264; W. N. 1874, 121, 165; 10 Ch. D. 270, n.
(*l*) W. N. 1874, 148.
(*m*) *Nicholl* v. *Eberhardt Co.*, 61 L. T. 489; 1 Megone, 402.
(*n*) *International Contract Co., Hankey's Case*, 26 L. T. 358; W. N. 1872, 63; and see ss. 159, 160; *supra*, pp. 384, 385.
(*o*) See the cases cited *ante*.
(*p*) W. N. 1877, 139, 165.
(*q*) *Hay* v. *Swedish Railway Co.*, W. N. 1889, 95.

THE COMPANIES ACT, 1877.

40 & 41 Vict. c. 26.

An Act to amend the Companies Acts of 1862 *and* 1867.

[23rd July, 1877.]

WHEREAS doubts have been entertained whether the power given by the Companies Act, 1867, to a company of reducing its capital extends to paid-up capital, and it is expedient to remove such doubts: 30 & 31 Vict. c. 131.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The Companies Act, 1877." Short title.

2. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies Acts, 1862 and 1867, and the said Acts and this Act may be referred to as "The Companies Acts, 1862, 1867, and 1877." Construction of Act. 25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131.

3. The word "capital" as used in the Companies Act, 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act, 1867. Construction of "capital" and powers to reduce capital contained in 30 & 31 Vict. c. 131.

This Act was passed in consequence of its having been held (rightly or wrongly (*r*)) in *Re Ebbw Vale Co.* (*s*), that the Act of 1867 allowed only reduction of liability in respect of the amount unpaid on a share, and not reduction of the amount paid upon it.

The general effect of this and the other Acts on reduction of capital is discussed in the note to sect. 9 of the Companies Act, 1867.

4. The provisions of the Companies Act, 1867, as amended by this Act, shall apply to any company reducing its capital in pursuance of this Act and of the Companies Act, 1867, as amended by this Act: Application of provisions of 30 & 31 Vict. c. 131.

(*r*) See 34 Ch. Div. 302.

(*s*) 4 Ch. D. 827.

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Provided that where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital,

(1.) The creditors of the company shall not, unless the Court otherwise direct, be entitled to object or required to consent to the reduction; and

(2.) It shall not be necessary before the presentation of the petition for confirming the reduction to add, and the Court may, if it thinks it expedient so to do, dispense altogether with the addition of the words "and reduced," as mentioned in the Companies Act, 1867.

30 & 31 Vict. c. 131.

In any case that the Court thinks fit so to do, it may require the company to publish in such manner as it thinks fit the reasons for the reduction of its capital or such other information in regard to the reduction of its capital as the Court may think expedient with a view to give proper information to the public in relation to the reduction of its capital by a company, and, if the Court thinks fit, the causes which led to such reduction.

The minute required to be registered in the case of reduction of capital will show, in addition to the other particulars required by law, the amount (if any) at the date of the registration of the minute proposed to be deemed to have been paid up on each share.

"And reduced."

In consequence of the words "before the presentation of the petition" in sub-sect. (2), a question has been raised whether on presentation of the petition the words "and reduced" ought not in these cases to be used, unless an order has been obtained dispensing with them. It is conceived that in strictness they ought, and that if it is desired not to use them, application should be made before or upon presentation of the petition. An order was made on such an application in *Langdale Chemical Manure Co.* (*t*).

The view has been taken, however, that under sub-sect. (2) the Court may at any time dispense with the words, and that accordingly if the petition is presented and brought to a hearing without using them, the Court may then make an order dispensing with them. And certainly numbers of orders have been taken on this footing.

But inasmuch as under Gen. Order, March, 1868, R. 5, the presentation of the petition is to be advertised (as to which, see note to Comp. Act, 1867, s. 15), it is conceived that the words "before the presentation of the petition" were used advisedly, and that the object was that "and reduced" should be used as from presentation, and should appear in the advertisements.

However, many petitions have been presented without using the words, and without applying before the hearing to dispense with them (*u*).

(*t*) 26 W. R. 434. And in *River Plate Meat Co.*, W. N. 1885, 14; *West African Telegraph Co.*, W. N. 1886, 32; 34 W. R. 411; 55 L. J. (Ch.) 436; 54 L. T. 384.

(*u*) *E.g.*, *London and City Land Co.*, W. N. 1885, 137.

An application to dispense with the words "and reduced" must be supported by affidavit (*x*).

Proceedings in Chambers.

The Gen. Order, March, 1868, so far as applicable, applies to proceedings under this Act (*y*). But in point of fact in cases to which the proviso of this section applies, the greater part of the Gen. Order is inapplicable. For instance, under the Gen. Order the petition goes first to Chambers, and a certificate of creditors is obtained, and it is not until eight days after certificate that the petition is to be put in the paper (Rr. 3, 15). In practice, where the case is one in which creditors cannot object, the petition does not go to chambers except for formal directions, no certificate is made, and the petition is answered at once, and comes into the paper in the usual way.

Minute.

"Proposed to be deemed to be paid up on each share." The fact that the minute is to be approved by the Court (Companies Act, 1867, s. 15) relieves these words of the imputation of leaving it open to the company to "propose" to "deem" anything to be paid up on a share, quite irrespective of the true facts.

Power to reduce capital by the cancellation of unissued shares.

5. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital by cancelling any shares which, at the date of the passing of such resolution, have not been taken or agreed to be taken by any person; and the provisions of "The Companies Act, 1867," shall not apply to any reduction of capital made in pursuance of this section.

Reception of certified copies of documents as legal evidence. 25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26.

6. And whereas it is expedient to make provision for the reception as legal evidence of certificates of incorporation other than the original certificates, and of certified copies of or extracts from any documents filed and registered under the Companies Acts, 1862 to 1877: Be it enacted, that any certificate of the incorporation of any company given by the registrar or by any assistant registrar for the time being shall be received in evidence as if it were the original certificate; and any copy of or extract from any of the documents or part of the documents kept and registered at any of the offices for the registration of joint stock companies in England, Scotland, or Ireland, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars for the time being, and whom it shall not be necessary to prove to be the registrar or assistant registrar, shall, in all legal proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as of equal validity with the original document.

(*x*) *Maxim Weston Co.*, W. N. 1888, 211. Div. 683. See Comp. Act, 1867, s. 15 note.
(*y*) *Tambracherry Estates Co.*, 29 Ch.

THE COMPANIES ACT, 1879.

42 & 43 Vict. c. 76.

An Act to amend the Law with respect to the Liability of Members of Banking and other Joint Stock Companies; and for other purposes. [15th August, 1879.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as "The Companies Act, 1879."

Act not to apply to Bank of England.

2. This Act shall not apply to the Bank of England.

Act to be construed with 25 & 26 Vict. c. 89, 30 & 31 Vict. c. 131, and 40 & 41 Vict. c. 26.

3. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies Acts, 1862, 1867, and 1877, and those Acts together with this Act may be referred to as the Companies Acts, 1862 to 1879.

Registration anew of company.

4. Subject as in this Act mentioned, any company registered before or after the passing of this Act as an unlimited company may register under the Companies Acts, 1862 to 1879, as a limited company, or any company already registered as a limited company may re-register under the provisions of this Act.

25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26. 42 & 43 Vict. c. 76.

The registration of an unlimited company as a limited company in pursuance of this Act shall not affect or prejudice any debts, liabilities, obligations, or contracts incurred or entered into by, to, with, or on behalf of such company prior to registration, and such debts, liabilities, contracts, and obligations may be enforced in manner provided by Part VII. of the Companies Act, 1862 (*a*), in the case of a company registering in pursuance of that Part.

25 & 26 Vict. c. 89.

(*a*) Comp. Act, 1862, ss. 194, 195, 196 (5).

The City of Glasgow Bank stopped payment on the 2nd October, 1878: the liability was unlimited: the debts enormous. The prodigious calls which were made in the liquidation opened the eyes of investors to the dangers of unlimited liability, and this Act was the outcome. The title of the Act refers to "Banking and other Joint Stock Companies," and the companies which have availed themselves of it have been principally the leading joint-stock banks throughout the kingdom. The Act contains some sections (sects. 6, 7, 8) applicable only to banking companies, but the rest of the Act is general, and any unlimited company may avail itself of it.

The section speaks simply of "registered" as an unlimited company: not "registered under the Companies Act, 1862;" but the latter must clearly be intended. Companies registered as unlimited under the previous Acts could already register as limited (Companies Act, 1862, s. 180). The word

"re-register" also points to a previous registration under these Acts; and sect. 9 is intelligible only upon the footing that a previous registration under the Companies Acts is contemplated.

"Any company already registered as a limited company may re-register." What these words are intended to effect it is difficult to say—possibly that a company limited by shares may register as limited by guarantee; or *vice versâ*. There seems to be nothing in the subsequent provisions of this Act, or elsewhere, that could enable a company limited by shares to alter its constitution in any way, or effect anything at all by re-registering as a company limited by shares. If by re-registration the limited company is to make any alteration in its constitution, it is not easy to understand why the latter half of the section does not extend to it.

Reserve capital of company, how provided. 25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26. 42 & 43 Vict. c. 76.

5. An unlimited company may, by the resolution (α) passed by the members when assenting to registration as a limited company under the Companies Acts, 1862 to 1879, and for the purpose of such registration or otherwise, increase the nominal amount of its capital by increasing the nominal amount of each of its shares.

Provided always, that no part of such increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up.

And, in cases where no such increase of nominal capital may be resolved upon, an unlimited company may, by such resolution as aforesaid, provide that a portion of its uncalled capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up.

A limited company may by a special resolution (β) declare that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up.

(α) Comp. Act, 1862, s. 179 (4), (5). (β) Comp. Act, 1862, s. 51.

In the case of an unlimited company this section provides for:—

(1.) Increase of nominal amount of share for purposes of reserve;

(2.) Reserve of part of the existing nominal amount where no increase is made.

But does not provide for a combination of (1) and (2).

Thus, suppose £10 shares, £2 paid, you can:—

(1.) Increase to £15 shares, and reserve the new £5: or

(2.) Retain your shares at £10, and reserve £5, part of it.

But you cannot:—

(3.) Increase to £15 shares and reserve £10; viz., the new £5, and £5 part of the old nominal amount.

There seem to be two ways of effecting (3), viz.:—

(*A.*) If the constitution of the company allows it (which would very rarely be the case) increase your shares as a first step, not under the Act, but under

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the deed of settlement, to £15. Then under the Act reserve £10, part of the £15.

(*B.*) Under the Act increase your shares to £15, and reserve the new £5. Register as a limited company with £15 shares, subject to a reserve liability of £5. Then under the fourth paragraph of the section pass a special resolution as a limited company, reserving a further £5.

The section clearly allows of the creation of new capital with reserve liability. Under the fourth paragraph of the section a limited company can from time to time by special resolution create reserve liability in respect of its capital for the time being existing. It may thus reserve liability on shares on which there was previously no reserve liability, or increase the reserve liability on a share some portion of whose uncalled capital is already reserved.

Reserve liability created cannot, it is conceived, be afterwards affected by subsequent special resolution. For its creation effects an alteration in the memorandum of association, and there is no authority in the statute to recall the alteration.

Upon the question of commercial insolvency for the purposes of a winding-up order reserve capital will be set out of consideration (*z*).

25 & 26 Vict. c. 89, s. 182, repealed, and liability of bank of issue unlimited in respect of notes.

6. Section one hundred and eighty-two of the Companies Act, 1862, is hereby repealed, and in place thereof it is enacted as follows:—A bank of issue registered as a limited company, either before or after the passing of this Act, shall not be entitled to limited liability in respect of its notes; and the members thereof shall continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company; but in case the general assets of the company are, in the event of the company being wound up, insufficient to satisfy the claims of both the note-holders and the general creditors, then the members, after satisfying the remaining demands of the note-holders, shall be liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets of the company.

For the purposes of this section the expression "the general assets of the company" means the funds available for payment of the general creditor as well as the note-holder.

It shall be lawful for any bank of issue registered as a limited company to make a statement on its notes to the effect that the limited liability does not extend to its notes, and that the members of the company continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company.

Audit of accounts of banking companies.

7. (1.) Once at the least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an

(*z*) *Bristol Joint Stock Bank*, 44 Ch. D. 703.

auditor or auditors, who shall be elected annually by the company in general meeting.

(2). A director or officer of the company shall not be capable of being elected auditor of such company.

(3.) An auditor on quitting office shall be re-eligible.

(4.) If any casual vacancy occurs in the office of any auditor the surviving auditor or auditors (if any) may act, but if there is no surviving auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the vacancy or vacancies in the auditorship.

(5.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company; and any auditor may, in relation to such books and accounts, examine the directors or any other officer of the company: Provided that if a banking company has branch banks beyond the limits of Europe, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as may have been transmitted to the head office of the banking company in the United Kingdom.

(6.) The auditor or auditors shall make a report to the members on the accounts examined by him or them, and on every balance sheet laid before the company in general meeting during his or their tenure of office; and in every such report shall state whether, in his or their opinion, the balance sheet referred to in the report is a full and fair balance sheet properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, as shewn by the books of the company; and such report shall be read before the company in general meeting:

(7.) The remuneration of the auditor or auditors shall be fixed by the general meeting appointing such auditor or auditors, and shall be paid by the company.

Signature of balance sheet.

8. Every balance sheet submitted to the annual or other meeting of the members of every banking company registered after the passing of this Act as a limited company shall be signed by the auditor or auditors, and by the secretary or manager (if any), and by the directors of the company, or three of such directors at the least.

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Application of 25 & 26 Vict. c. 89, 30 & 31 Vict. c. 131, and 40 & 41 Vict. c. 26.

9. On the registration, in pursuance of this Act, of a company which has been already registered, the registrar shall make provision for closing the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company (*a*); but, save as aforesaid, the registration of such a company shall take place in the same manner and have the same effect as if it were the first registration of that company under the Companies Acts, 1862 to 1879, and as if the provisions of the Acts under which the company was previously registered and regulated had been contained in different Acts of Parliament from those under which the company is registered as a limited company.

25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26, and 42 & 43 Vict. c. 76.

(*a*) Comp. Act, 1862, ss. 183, 184, 185.

Privileges of Act available notwithstanding constitution of company.

10. A company authorized to register under this Act may register thereunder and avail itself of the privileges conferred by this Act, notwithstanding any provisions contained in any Act of Parliament, royal charter, deed of settlement, contract of copartnery, cost book regulations, letters patent, or other instrument constituting or regulating the company.

THE COMPANIES ACT, 1880.

43 Vict. c. 19.

An Act to amend the Companies Acts of 1862, 1867, 1877, *and* 1879.

[24th March, 1880.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited for all purposes as the Companies Act, 1880.

Construction of Acts. 25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26. 42 & 43 Vict. c. 76.

2. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies Acts, 1862, 1867, 1877, and 1879, and the said Acts and this Act may be referred to as the Companies Acts, 1862 to 1880.

Accumulated profits may be returned to shareholders in reduction of paid-up capital.

3. When any company has accumulated a sum of undivided profits, which with the consent of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, it shall be lawful for the company, by special resolution (*a*), to return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount. The powers vested in the directors of making calls upon the shareholders in respect of moneys unpaid upon their shares shall extend to the amount of the unpaid capital as augmented by such reduction.

(*a*) Comp. Act, 1862, s. 51.

The writer has found so much difficulty in struggling to understand this Act of Parliament that he would have preferred to leave it to others to say what it means. But some observations as to what its effect appears to be ought perhaps to be inserted.

There are accumulated profits in hand capable of being distributed among the shareholders in dividend, and retained by them. The Act allows of such profits being "returned" (the word scarcely seems applicable to that which the shareholder never previously had) to the shareholder in reduction of his paid-up capital, and on the terms that his liability shall be increased accordingly. The result is as between shareholders to enable a majority to increase the limit of liability on a share, provided such increase do not exceed the amount payable to the shareholder as dividend. For clearly, so far as liability is concerned, the result is exactly the same as if dividend had been paid in the usual way, and the nominal amount of the share had been increased.

Then, further, if the money had been distributed in dividend, the debit to shareholders in the balance-sheet in respect of their subscriptions to capital would have remained the same. If, however, the money be

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"returned" under the Act the debit to shareholders in the balance-sheet will be the less by the amount "returned." To ascertain how this may affect creditors it is necessary to know on what principle the company arrives at profits available for dividend.

If capital account and revenue account are not regarded as distinct accounts, but profit is taken to be the excess of assets over liabilities, then the result of a "return" under the Act is to leave in hand the same amount of profit as before. Thus, take it in figures, say:—

LIABILITIES.		ASSETS.	
To shareholders for capital paid up	£20,000	Various items	£30,000
To creditors	5,000		
Balance, representing accumulated profits	5,000		
	£30,000		

"Return" the £5000 balance in reduction of paid-up capital, and you have:—

LIABILITIES.		ASSETS.	
To shareholders for capital paid up	£15,000	Various items	£25,000
To creditors	5,000		
Balance	5,000		
	£25,000		

Shewing the same balance as before. The process may then be repeated until you arrive at—

LIABILITIES.		ASSETS.	
To shareholders for capital paid up	Nil.	Various items	£10,000
To creditors	£5,000		
Balance	5,000		
	£10,000		

There is then nothing due to the shareholders for capital, but there remain assets £10,000 to meet debts £5000. The capital has all been repaid, and after providing for the debts, the £5000 profit, still waiting to be "returned," remains the sole survivor of the drama.

If capital account and revenue account are kept distinct, and dividend paid only out of sums standing to credit of revenue account (a), then the result is more sensible. The result of a "return" under the Act will be to transfer the amount "returned" from revenue account to capital account. For the debit to shareholders in capital account will be diminished by the amount "returned," and capital account will come into credit accordingly.

(a) *Ante*, p. 513.

In this case, if the company be a limited company, the creditor is benefited to this extent, that, whereas if the money had been paid in dividend the amount would have passed away altogether so far as he is concerned, the result of the "return" is that the shareholder's liability is *pro tanto* enlarged. In other words, as before stated, the limit of liability on the share is in fact extended.

The Act applies to unlimited as well as limited companies. And as regards unlimited companies, it does have effect to the following extent. In many such companies the capital is divided into shares of fixed amount, with the result that in the going company the directors can call that amount and no more. Upon this limit of liability (which is of course a limit only *inter socios*) the operatiou of the Act will be the same as in the case of a limited company. But in the winding-up of an unlimited company it is obviously immaterial whether the amount appearing to be paid on the share be a larger or a smaller figure.

The writer is indebted to one who has large experience of companies under these Acts for the following explanation of the intention of the Act. For simplicity it is given in figures.

A company limited by shares has a capital fully paid up of £200,000 in 10,000 shares of £20 each. It has a reserve fund of £100,000 representing accumulated profits. It earns £15,000 a year, which is 7½ per cent. on the £200,000. Part of the money employed in the business, say £100,000, is, to use the words of the Act of 1877, "in excess of the wants of the company:" the £15,000 a year could still be earned if £100,000 were handed over to the shareholders. The company has contracts all over the world, many with foreigners, who would be startled and alarmed by proceedings for reduction under the Act of 1877. It is desired to reduce by returning capital, but to escape the publicity of proceedings under the Act of 1877.

Assume that the law is (as it may be, although it has not yet been so decided (*b*)) that a company is not free, under the Acts of 1862, 1867, and 1877, to return capital subject to recall, the intention, it is said, of this Act is that return of capital subject to recall shall be legal to an amount not exceeding the amount of reserve fund in hand, for in such case, it is said, the company has in the reserve fund security so to speak that the recall of the capital will not be fruitless (*c*). The Act (oddly enough, it must be confessed) expresses this by saying that you may return the accumulated profits subject to a power of recall.

Take it then that the above company does this. The peculiarity of the Act discloses itself directly one attempts to express the result in words. The result is: Paid-up capital, £100,000. No reserve fund for that has been "returned." There is another £100,000 in the concern somewhere, for there was £300,000, and we have returned only £100,000. But what this £100,000 is who shall say? Can it be the reserve fund remaining as before, notwithstanding that you have "returned" it? If so, then you may repeat the operation as above described and the supposed safeguard of the Act is gone.

The only alternative seems to be that the Act proceeds on the footing (and rightly, as is submitted) that capital and revenue account are distinct accounts, and that you cannot divide in dividend the credit balance of capital account. The £100,000 which was reserve fund must be intended by the Act to pass to the credit of capital account, and, as standing in that account, to represent an excess of assets over liabilities which cannot be divided as dividend.

If this is right, then the ultimate result is: Debit to shareholders for paid-

(*b*) See note to Comp. Act, 1867, s. 9. (*c*) And see s. 5 of the Act.

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up capital, £100,000; amount standing to credit of capital account not capable of being divided in dividend, representing excess of assets over liabilities (including liability to shareholders), £100,000; annual income, £15,000, representing 15 per cent. on the debit to shareholders.

The result is, then, as above pointed out, to enable a majority of shareholders to increase the liability on the shares. For so far as the investor is concerned his pocket would have been just as full and his annual income just the same if the £100,000 had been divided in dividend. And in that case he would not, as under this Act he will, be liable for £10 per share.

But one further observation must be made. Supposing the remaining £10 per share or part of it is now called up. Is the above-mentioned £100,000 or a proper proportionate part of it then liberated for dividend, and, if so, why? under what authority? The Act does not say so. Either this £100,000 after the operation of "return" subject to recall does remain applicable for payment of dividend or it does not. If it does, the consequences have been already pointed out; if it does not, then the funds of the company available for payment of its debts will have been increased from £200,000 to £300,000.

Consideration of the 5th section of the Act will shew that this is the case. The shareholder who declines to take the "return" is not subject to future call, but the money set apart for him is appropriated to answer the future call. Suppose a "return" to-day and a recall to-morrow without the money having been handed over. The whole of the £100,000 has gone over to capital account.

No resolution to take effect till particulars have been registered.

4. No such special resolution as aforesaid shall take effect until a memorandum, showing the particulars required by law in the case of a reduction of capital by order of the Court (*a*), shall have been produced to and registered by the Registrar of Joint Stock Companies.

(*a*) Comp. Act, 1867, s. 15. Comp. Act, 1877, s. 4.

Power to any shareholder within one month after passing of resolution to require company to retain moneys paid upon shares held by such person.

5. Upon any reduction of paid-up capital made in pursuance of this Act, it shall be lawful for any shareholder, or for any one or more of several joint shareholders, within one month after the passing of the special resolution for such reduction, to require the company to retain, and the company shall retain accordingly, the whole of the moneys actually paid upon the shares held by such person, either alone or jointly with any other person or persons, and which, in consequence of such reduction, would otherwise be returned to him or them, and thereupon the shares in respect of which the said moneys shall be so retained shall, in regard to the payment of dividends thereon, be deemed to be paid up to the same extent only as the shares on which payment as aforesaid has been accepted by the shareholders in reduction of their paid-up capital, and the company shall invest and keep invested the moneys so retained in such securities authorized for investment by trustees as the company shall determine, and upon the money so invested, or upon so much thereof as from time to time exceeds the amount of calls subsequently made upon the shares in respect of which

such moneys shall have been retained, the company shall pay such interest as shall be received by them from time to time on such securities, and the amount so retained and invested shall be held to represent the future calls which may be made to replace the capital so reduced on those shares, whether the amount obtained on sale of the whole or such proportion thereof as represents the amount of any call when made, produces more or less than the amount of such call.

Company to specify amounts which shareholders have required them to retain under s. 5; also to specify amounts of profits returned to shareholders. 25 & 26 Vict. c. 89.

6. From and after such reduction of capital the company shall specify in the annual lists of members, to be made by them in pursuance of the twenty-sixth section of the Companies Act, 1862, the amounts which any of the shareholders of the company shall have required the company to retain, and the company shall have retained accordingly, in pursuance of the fifth section of this Act, and the company shall also specify in the statements of account laid before any general meeting of the company the amount of the undivided profits of the company which shall have been returned to the shareholders in reduction of the paid-up capital of the company under this Act.

Power of registrar to strike names of defunct companies off register.

7. (1.) Where the Registrar of Joint Stock Companies has reasonable cause to believe that a company, whether registered before or after the passing of this Act, is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2.) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received by the registrar, and that if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the *Gazette* with a view to striking the name of the company off the register.

(3.) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer thereto, the registrar may publish in the *Gazette* and send to the company a notice that at the expiration of three months from the date of that notice the name of the company mentioned therein will, unless cause is shewn to the con-

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trary, be struck off the register and the company will be dissolved.

(4.) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shewn by such company, strike the name of such company off the register, and shall publish notice thereof in the *Gazette*, and on the publication in the *Gazette* of such last-mentioned notice the company whose name is so struck off shall be dissolved: Provided that the liability (if any) of every director, managing officer, and member of the company shall continue and may be enforced as if the company had not been dissolved.

It would seem then that a company might be wound up under these circumstances notwithstanding dissolution: there is no other way for a creditor to enforce a member's liability.

(5.) If any company or member thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this section, the company or member may apply to the superior Court in which the company is liable to be wound up; and such Court, if satisfied that the company was at the time of the striking off carrying on business or in operation, and that it is just so to do, may order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had never been struck off.

When the company is in voluntary liquidation it is sufficiently "carrying on business or in operation" to allow of an order under this section (*d*).

(6.) A letter or notice authorized or required for the purposes of this section to be sent to a company may be sent by post addressed to the company at its registered office, or, if no office has been registered, addressed to the care of some director or officer of the company, or if there be no director or officer of the company whose name and address are known to the registrar, the letter or notice (in identical form) may be sent to each of the persons who subscribed the memorandum of association, ad-

(*d*) *Outlay Assurance Society*, 34 Ch. D. 479.

dressed to him at the address mentioned in that memorandum.

(7.) In the execution of his duties under this section the registrar shall conform to any regulations which may be from time to time made by the Board of Trade.

(8.) In this section the *Gazette* means, as respects companies whose registered office is in England, the *London Gazette;* as respects companies whose registered office is in Scotland, the *Edinburgh Gazette;* and as respects companies whose registered office is in Ireland, the *Dublin Gazette.*

THE COMPANIES (COLONIAL REGISTERS) ACT, 1883.

46 & 47 Vict. c. 30.

An Act to authorize Companies registered under the Companies Act, 1862, to keep Local Registers of their Members in British Colonies. [20th August, 1883.]

Whereas many companies registered under the Companies Act, 1862, carry on business in British colonies, and dealings in their shares are frequent in such colonies, but delay, inconvenience, and expense are occasioned by reason of the absence of any legal provision for keeping local registers of members, and it is expedient that such provisions as this Act contains be made in that behalf:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title and construction.

1. This Act may be cited for all purposes as the Companies (Colonial Registers) Act, 1883; and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies Acts, 1862 to 1880, and the said Acts and this Act may be referred to as the Companies Act, 1862 to 1883.

Definitions.

2. In this Act the term "company" means a company registered under the Companies Act, 1862, and having a capital divided into shares; the term "shares" includes stock; the term "colony" does not include any place within the United Kingdom, the Isle of Man, or the Channel Islands, but includes such territories as may for the time being be vested in Her Majesty by virtue of an Act of Parliament for the government of India, and any plantation, territory, or settlement situate elsewhere within Her Majesty's dominions.

Power for companies to keep colonial registers.

3. (1.) Any company whose objects comprise the transaction of business in a colony may, if authorized so to do by its regulations, as originally framed or as altered by special resolution, cause to be kept in any colony in which it transacts business a branch register or registers of members resident in such colony.

(2.) The company shall give to the registrar of joint stock companies notice of the situation of the office where any such branch register (in this Act called a colonial register) is kept, and of any

change therein, and of the discontinuance of any such office in the event of the same being discontinued.

(3.) A colonial register shall, as regards the particulars entered therein, be deemed to be a part of the company's register of members, and shall be *primâ facie* evidence of all particulars entered therein. Any such register shall be kept in the manner provided by the Companies Acts, 1862 to 1880, with this qualification, that the advertisement mentioned in section thirty-three of the Companies Acts, 1862, shall be inserted in some newspaper circulating in the district wherein the register to be closed is kept, and that any competent court in the colony where such register is kept shall be entitled to exercise the same jurisdiction of rectifying the same as is by section thirty-five of the Companies Act, 1862, vested, as respects a register, in England and Ireland in Her Majesty's superior courts of law or equity, and that all offences under section thirty-two of the Companies Act, 1862, may, as regards a colonial register, be prosecuted summarily before any tribunal in the colony where such register is kept having summary criminal jurisdiction. 25 & 26 Vict. c. 89.

(4.) The company shall transmit to its registered office a copy of every entry in its colonial register or registers as soon as may be after such entry is made, and the company shall cause to be kept at its registered office, duly entered up from time to time, a duplicate or duplicates of its colonial register or registers. The provisions of section thirty-two of the Companies Act, 1862, shall apply to every such duplicate, and every such duplicate shall, for all the purposes of the Companies Acts, 1862 to 1880, be deemed to be part of the register of members of the company.

(5.) Subject to the provisions of this Act with respect to the duplicate register, the shares registered in a colonial register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a colonial register shall, during the continuance of the registration of such shares in such colonial register, be registered in any other register.

(6.) The company may discontinue to keep any colonial register, and thereupon all entries in that register shall be transferred to some other colonial register kept by the company in the same colony, or to the register of members kept at the registered office of the company.

(7.) In relation to stamp duties the following provisions shall have effect:—

(*a.*) An instrument of transfer of a share registered in a colonial

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register under this Act shall be deemed to be a transfer of property situated out of the United Kingdom, and unless executed in any part of the United Kingdom shall be exempt from British stamp duty.

(*b.*) Upon the death of a member registered in a colonial register under this Act, the share or other interest of the deceased member shall for the purposes of this Act so far as relates to British duties be deemed to be part of his estate and effects situated in the United Kingdom for or in respect of which probate or letters of administration is or are to be granted, or whereof an inventory is to be exhibited and recorded in like manner as if he were registered in the register of members kept at the registered office of the company.

(8.) Subject to the provisions of this Act, any company may, by its regulations as originally framed, or as altered by special resolution, make such provisions as it may think fit respecting the keeping of colonial registers.

By 52 & 53 Vict. c. 42, s. 18, it is enacted that—

Notwithstanding provision (*b*) in s. 7 of the Comp. (Colonial Registers) Act, 1883, the share or other interest of a deceased member, registered in a colonial register under that Act, who shall have died domiciled, elsewhere than in the United Kingdom, shall, so far as relates to British duties, not be deemed to be part of his estate and effects situated in the United Kingdom, for or in respect of which probate or letters of administration is or are to be granted, or whereof an inventory is to be exhibited and recorded.

THE COMPANIES ACT, 1886.

49 Vict. c. 23.

An Act to amend the Companies Acts of 1862, 1867, 1870, 1877, 1879, 1880, *and* 1883. [4th June, 1886.]

Whereas it has become expedient to amend the provisions of the Companies Act, 1862, and of the other Acts amending the same hereinafter recited, in so far as the said provisions relate to the liquidation of companies in Scotland: 25 & 26 Vict. c. 89.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the Companies Act, 1886. Short title.

2. This Act shall, so far as is inconsistent with the tenor thereof, be construed as one with the Companies Acts, 1862, 1867, 1877, 1879, 1880, and 1883, and the Joint Stock Companies Arrangement Act, 1870, and the said Acts and this Act may be referred to as the Companies Acts, 1862 to 1886. Construction of Acts. 25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26. 42 & 43 Vict. c. 76. 43 Vict. c. 19. 46 & 47 Vict. c. 28. 33 & 34 Vict. c. 104.

3. In the winding-up, by or subject to the supervision of the Court, of any company under the Companies Acts, 1862 to 1886, whose registered office is in Scotland, where the winding-up shall commence after the passing of this Act, the following provisions shall have effect:

(1.) Such winding-up shall, in the case of a winding-up by the Court as at the commencement thereof, and in the case of a winding-up subject to the supervision of the Court as at the date of the presentation of the petition, on which a supervision order is afterwards pronounced, be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding; and no arrestment or poinding of the funds or effects of the company, executed on or after the sixtieth day prior to the commencement of the winding-up by the Court, or to the presentation of the petition on which a supervision order is made, as the case may be, shall be effectual; and such funds or effects, or the proceeds of such effects, if sold, shall be made forthcoming to the liquidator: Provided that any arrester or poinder, before the Effect of diligence within 60 days of winding-up by or subject to supervision of Court.

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date of such winding-up, or of such petition, as the case may be, who shall be thus deprived of the benefit of his diligence, shall have preference out of such funds or effects for the expense *bonâ fide* incurred by him in such diligence.

(2.) Such winding-up shall, as at the respective dates aforesaid, be equivalent to a decree of adjudication of the heritable estates of the company for payment of the whole debts of the company, principal and interest, accumulated at the said dates respectively, subject always to such preferable heritable rights and securities as existed at the said dates and are valid and unchallengeable, and the right to poind the ground hereinafter provided.

(3.) The provisions of sections one hundred and twelve to one hundred and seventeen inclusive, and also of section one hundred and twenty, of the Bankruptcy (Scotland) Act, 1856, shall, so far as consistent with the tenor of the recited Acts, apply to the realization of heritable estates affected by such heritable rights and securities as aforesaid; and for the purposes of this Act the words "sequestration" and "trustee" occurring in said sections of the Bankruptcy (Scotland) Act, 1856, shall mean respectively "liquidation" and "liquidator;" and the expression "the Lord Ordinary or the Court" shall mean "the Court" as defined by this Act.

19 & 20 Vict. c. 79.

(4.) No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the respective dates aforesaid shall, except to the extent hereinafter provided, be available in any question with the liquidator: Provided that no creditor who holds a security over the heritable estate preferable to the right of the liquidator shall be prevented from executing a poinding of the ground after the respective dates aforesaid, but such poinding shall in competition with the liquidator be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term.

Ranking of claims.

4. In the winding-up of any company under the Companies Acts, 1862 to 1886, whose registered office is in Scotland, and where the winding-up shall commence after the passing of this Act, the general and special rules in regard to voting and ranking for payment of dividends, provided by the Bankruptcy (Scotland)

Act, 1856, sections forty-nine to sixty-six inclusive, or any other rules in regard thereto which may be in force for the time being in the sequestration of the estates of bankrupts in Scotland, shall, so far as consistent with the tenor of the said recited Acts, apply to creditors of such companies voting in matters relating to the winding-up, and ranking for payments of dividends; and for this purpose sequestration shall be taken to mean liquidation, trustee to mean liquidator, and sheriff to mean the court.

Jurisdiction of the Lord Ordinary on the Bills in vacation.

5. Wherever the expression "the Court of session" occurs in the said recited Acts, or the expression "the Court" occurring therein or in this Act refers to the Court of session in Scotland, it shall mean and include either division thereof, or, in the event of a remit to a permanent Lord Ordinary, as hereinafter provided, such Lord Ordinary, during session, and in time of vacation the Lord Ordinary on the Bills; and in regard to orders or judgments pronounced by the said Lord Ordinary on the Bills in vacation, the following provisions shall have effect:—

(1.) No order or judgment pronounced by the said Lord Ordinary in vacation, under or by virtue, in whole or in part, of the following sections of the said recited Acts, shall be subject to review, reduction, suspension, or stay of execution, videlicet, of the Companies Act, 1862, sections ninety-one, one hundred and seven, one hundred and fifteen, one hundred and seventeen, and one hundred and twenty-seven, and section one hundred and forty-nine so far as it authorizes the Court to direct meetings of creditors or contributories to be held, and that portion of section two of the Joint Stock Companies Arrangement Act, 1870, which authorizes the Court to order that a meeting of creditors or class of creditors shall be summoned; and also sections one hundred and twenty-two and one hundred and twenty-three of the Companies Act, 1862, so far as they may affect the sections above enumerated.

25 & 26 Vict. c. 89.

33 & 34 Vict. c. 104.

(2.) All other orders or judgments pronounced by the said Lord Ordinary in vacation (except as after mentioned) shall be subject to review only by reclaiming note, in common form, presented (notwithstanding the terms of section one hundred and twenty-four of the Companies Act, 1862) within fourteen days from the date of such order or judgment: Provided always, that such orders or judgments pronounced by the said Lord Ordinary in vacation, under or by virtue, in whole or in part, of

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the following sections of the Companies Act, 1862, shall, from the dates of such orders or judgments, and notwithstanding any reclaiming note against the same, be carried out and receive effect till such reclaiming note be disposed of by the Court, videlicet, sections eighty-five, eighty-seven, eighty-nine, ninety-three (except in regard to the removal or remuneration of liquidators), ninety-five, ninety-six (except in regard to the power to sell), one hundred, one hundred and eighteen, first part of one hundred and forty-one, one hundred and forty-seven, one hundred and fifty (except in regard to the removal of liquidators and the filling up of vacancies caused by such removal), one hundred and ninety-seven, one hundred and ninety-eight, and two hundred and one; and also sections one hundred and twenty-two and one hundred and twenty-three of the Companies Act, 1862, so far as they may affect the sections above enumerated.

Provided that nothing in this section contained shall in any way affect the provisions of section one hundred and twenty-one of the Companies Act, 1862, in reference to decrees for payment of calls in the winding-up of companies, whether voluntarily or by or subject to the supervision of the Court.

Winding-up may be remitted to Lord Ordinary.

6. When the Court makes a winding-up or a supervision order, or at any time thereafter, it shall be lawful for the Court, in either division thereof, if it thinks fit, to direct all subsequent proceedings in the winding-up to be taken before one of the permanent Lords Ordinary, and to remit the winding-up to him accordingly; and thereupon such Lord Ordinary shall, for the purposes of the winding-up, be deemed to be "the Court," within the meaning of the recited Acts and this Act, and shall have, for the purposes of such winding-up, all the jurisdiction and powers of the Court of session: Provided always, that all orders or judgments pronounced by such Lord Ordinary shall be subject to review only by reclaiming note in common form, presented (notwithstanding the terms of section one hundred and twenty-four of the Companies Act, 1862) within fourteen days from the date of such order or judgment. But, should a reclaiming note not be presented and moved during session, the provisions of section five of this Act shall apply to such orders or judgments: Provided also, that the said Lord Ordinary may report to the division of the Court any matter which may arise in the course of the winding-up. This section and the immediately preceding section shall come into force from the passing of this Act, and shall include companies then in the course of being wound up.

PREFERENTIAL PAYMENTS IN BANKRUPTCY ACT, 1888.

51 & 52 Vict. c. 62.

An Act to amend the Law with respect to Preferential Payments in Bankruptcy, and in the winding-up of Companies.

[24th December, 1888.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Priority of debts.

1. (1.) In the distribution of the property of a bankrupt, and in the distribution of the assets of any company being wound up under the Companies Act, 1862, and the Acts amending the same, there shall be paid in priority to all other debts—

(*a.*) All parochial or other local rates due from the bankrupt or the company at the date of the receiving order, or, as the case may be, the commencement of the winding-up, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt or the company up to the fifth day of April next before the date of the receiving order, or, as the case may be, the commencement of the winding-up, and not exceeding in the whole one year's assessment;

(*b.*) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt or the company during four months before (*a*) the date of the receiving order, or, as the case may be, the commencement of the winding-up, not exceeding fifty pounds; and

(*c.*) All wages of any labourer or workman not exceeding twenty-five pounds, whether payable for time or for piece work, in respect of services rendered to the bankrupt or the company during two months before (*a*) the date of the receiving order, or, as the case may be, the commencement of the winding-up: Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court

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may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order, or, as the case may be, the commencement of the winding-up.

(2.) The foregoing debts shall rank equally between themselves and shall be paid in full, unless the property of the bankrupt is, or the assets of the company are, insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3.) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor, or the assets of the company, as the case may be, is or are sufficient to meet them.

(4.) In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt or a company being wound up within three months next before the date of the receiving order or the winding-up respectively, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof.

Provided, that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made.

(5.) This section, so far as it relates to the property of a bankrupt, shall have effect as part of section forty of the Bankruptcy Act, 1883.

(6.) This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order.

(a) *Quære:* next before. See *E. p. Fox*, 17 Q. B. D. 4.

The Preferential Payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict. c. 60), contains (s. 4) provisions applicable to Ireland similar to those of the above section.

Savings.

2. (1.) Nothing in this Act shall alter the effect of section five of the Act twenty-eight and twenty-nine Victoria, chapter eighty-six, "To amend the law of partnership," (a) or shall prejudice the provisions of the Friendly Societies Act, 1875, or shall affect the priority given to the payment of funeral and testamentary expenses by section one hundred and twenty-five of the Bankruptcy Act, 1883.

50 & 51 Vict. c. 43.

(2.) Nothing in this Act shall affect the provisions of the Stannaries Act, 1887.

(a) Repealed by 53 & 54 Vict. ch. 39, s. 48.

3. This Act shall apply only in the case of receiving orders and orders for the administration of the estates of deceased debtors according to the law of bankruptcy made and windings-up commenced after the commencement of this Act. Application of Act.

4. This Act shall not apply to Ireland. Extent of Act.

5. This Act shall commence and come into operation from and immediately after the last day of December one thousand eight hundred and eighty-eight. Commencement of Act.

6. The enactments specified in the schedule hereto are hereby repealed to the extent in the third column of that schedule mentioned. Repeal.

7. This Act may be cited as the Preferential Payments in Bankruptcy Act, 1888. Short title.

SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title.	Extent of Repeal.
46 & 47 Vict. c. 28 –	The Companies Act, 1883 –	The whole Act, except as regards its application to Ireland (*e*).
46 & 47 Vict. c. 52 – –	The Bankruptcy Act, 1883 –	Section forty, sub-sections one and two.
49 & 50 Vict. c. 28 – –	The Bankruptcy (Agricultural Labourers' Wages) Act, 1886 – – –	The whole Act.

(*e*) By 52 & 53 Vict. c. 60 the Companies Act, 1883, is repealed also as to Ireland.

THE COMPANIES (MEMORANDUM OF ASSOCIATION) ACT, 1890.

53 & 54 Vict. c. 62.

An Act to give further Powers to Companies with respect to certain Instruments under which they may be constituted or regulated.

[18th August, 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Power for company to alter objects or form of constitution subject to confirmation by Court.

1. (1.) Subject to the provisions of this Act, a company registered under the Companies Acts, 1862 to 1886, may, by special resolution, (α) alter the provisions of its memorandum of association (β) or deed of settlement (γ) with respect to the objects of the company, so far as may be required for any of the purposes hereinafter specified, or alter the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, either with or without any such alteration as aforesaid with respect to the objects of the company, but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding up the company (δ).

(2.) Before confirming any such alteration the Court must be satisfied—

(a.) That sufficient notice has been given to every holder of debentures or debenture stock of the company, and any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and

(b.) That, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court (ϵ).

Provided that the Court may, in the case of any person or class of persons, for special reasons, dispense with the notice required by this section.

(3.) An order confirming any such alteration may be made on such terms and subject to such conditions as to the Court seems

fit, and the Court may make such orders as to costs as it deems proper. Sect. 2.

(4.) The Court shall, in exercising its discretion under this Act, have regard to the rights and interests of the members of the company, or of any class of those members, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members (ζ); and the Court may give such directions and make such orders as it may think expedient for the purpose of facilitating any such arrangement or carrying the same into effect: Provided always, that it shall not be lawful to expend any part of the capital of the company in any such purchase.

(5.) The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company—

(*a.*) To carry on its business more economically or more efficiently; or

(*b.*) To attain its main purpose by new or improved means; or

(*c.*) To enlarge or change the local area of its operations; or

(*d.*) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

(*e.*) To restrict or abandon any of the objects specified in the memorandum of association or deed of settlement.

(α) Comp. Act, 1862, s. 51.
(β) Comp. Act, 1862, ss. 8, 9, 10.
(γ) Comp. Act, 1862, s. 196.
(δ) Comp. (W. Up) Act, 1890, s. 1.
(ε) *Cf.* Comp. Act, 1867, s. 11.
(ζ) *Cf.* Comp. Act, 1862, ss. 161, 162.

This Act confers upon a company registered under the Companies Acts power within limits and subject to confirmation by the Court to alter its objects as defined in its memorandum of association. Hitherto a winding-up and reconstruction was the only course by which even the most reasonable extension or modification of objects could be attained. The Act may be expected to meet a recognized commercial necessity, and also perhaps to curtail the excessive verbiage by which memoranda of association have become encumbered in the endeavour to describe every conceivable object, lest something useful should have been omitted from the unalterable.

A subsidiary but also a useful purpose is to allow of the substitution of a memorandum and articles of association for the deed of settlement in the case of companies which have been legally formed and incorporated in that way.

Registration of order together

2. (1.) Where a company has altered the provisions of its memorandum of association or deed of settlement with respect to

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with memorandum as altered or substituted memorandum and articles and consequences thereof.

the objects of the company, or has altered the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, and such alteration has been confirmed by the Court, an office copy of the order confirming such alteration, together with a printed copy of the memorandum of association or deed of settlement so altered, or together with a printed copy of the substituted memorandum and articles of association (as the case may be), shall be delivered by the company to the Registrar of Joint Stock Companies within fifteen days from the date of the order, and the registrar shall register the same, and shall certify under his hand the registration thereof, and his certificate shall be conclusive evidence that all the requisitions of this Act with respect to such alteration and the confirmation thereof have been complied with, and thenceforth (but subject to the provisions of this Act) the memorandum or deed of settlement so altered shall be the memorandum of association or deed of settlement of the company, or, as the case may be, such substituted memorandum and articles of association shall apply to the company in the same manner as if the company were a company registered under Part I. of the Companies Act, 1862, with such memorandum and articles of association, and the company's deed of settlement shall cease to apply to the company.

(2.) If a company makes default in delivering to the registrar any document required by this Act to be delivered to him the company shall be liable to a penalty not exceeding ten pounds for every day during which it is in default.

Short title and construction.

3. (1). This Act may be cited as the Companies (Memorandum of Association) Act, 1890.

(2.) This Act and the Companies Acts, 1862 to 1886, shall be construed as one Act, and may be cited collectively as the Companies Acts, 1862 to 1890.

(3.) In this Act the expression "deed of settlement" includes any contract of co-partnery or other instrument constituting or regulating the company and not being an Act of Parliament, a royal charter, or letters patent.

THE COMPANIES (WINDING-UP) ACT, 1890.

53 & 54 Vict. c. 63.

An Act to amend the Law relating to the winding up of Companies in England and Wales. [18th August, 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Jurisdiction to wind up companies.

1. (1.) The Courts having jurisdiction to wind up companies in England and Wales shall be the High Court, the Chancery Courts of the counties palatine of Lancaster and Durham (*a*), the County Courts, and the Stannaries Court.

(2.) Where the amount of the capital of a company paid up or credited as paid up exceeds ten thousand pounds, a petition to wind up the company or to continue the winding up of the company under the supervision of the Court shall be presented to the High Court, or, in the case of a company situate within the jurisdiction of either of the Palatine Courts aforesaid, either to the High Court or to the Palatine Court having jurisdiction.

(3.) Where the amount of the capital of a company paid up or credited as paid up does not exceed ten thousand pounds, and the registered office of the company is situate within the jurisdiction of a County Court having jurisdiction under this Act, a petition to wind up the company or to continue the winding up of the company under the supervision of the Court shall be presented to that County Court.

(4.) Provided that where a company is formed for working mines within the Stannaries and is not shown to be actually working mines beyond the limits of the Stannaries, or to be engaged in any other undertaking beyond those limits, or to have entered into a contract for such working or undertaking (β), a petition to wind up the company or to continue the winding up of the company under the supervision of the Court shall be presented to the Stannaries Court whatever may be the amount of the capital of the company and wherever the registered office of the company is situate.

(5.) The Lord Chancellor may by order exclude a County Court from having jurisdiction under this Act, and for the purposes of such jurisdiction may attach its district, or any part

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thereof, to the High Court or to any other County Court, and may revoke or vary any such order. In exercising his powers under this section the Lord Chancellor shall provide that a County Court shall not have jurisdiction under this Act unless it has for the time being jurisdiction in bankruptcy.

(6.) Every Court having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court, and every prescribed officer of the Court shall perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding up of a company.

(7.) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

(α) 53 & 54 Vict. c. 23, ss. 3, 4, 5. (β) *Cf.* Stannaries Act, 1887, s. 28.

This section and the whole Act which follows are addressed solely to administration. There is to be found in the Act no alteration of rights, but only an alteration of the Courts and officers and mode of selection of officers who are to administer those rights, with detailed provisions as to financial control and subsidiary matters.

The general scheme of the Act is (1) to alter the jurisdiction in which a company shall be wound up (ss. 1–3); (2) to make the official receiver provisional official liquidator and official liquidator unless application is made and cause shewn for appointing some one else (ss. 4–6); (3) to give the official receiver in every case a control through the statement of the company's affairs, report, and consequent public examination (ss. 7, 8); (4) to provide for committees of inspection (ss. 6, 9); and (5) to enlarge materially the liquidator's powers subject to a right of appeal to the Court (ss. 12–14, 23, 24). The familiar s. 165 of the Comp. Act, 1862, is repealed and re-enacted with the addition of the promoter as a party liable (s. 10), and provisions as to accounts as to the disposal of moneys of companies in liquidation and for better control over liquidators are found in the remaining sections.

Conduct of winding-up business in High Court. 36 & 37 Vict. c. 66.

2. Subject to general rules and to orders of transfer made under the authority of the Supreme Court of Judicature Act, 1873, and the Acts amending it, the jurisdiction of the High Court under this Act shall, as the Lord Chancellor may from time to time by general order direct, be exercised, either generally or in specified classes of cases, either by such judge or judges of the Chancery Division of the High Court as the Lord Chancellor may assign to exercise that jurisdiction, or by the judge who, for the time being, exercises the bankruptcy jurisdiction of the High Court.

Transfer of proceedings.

3. (1.) The winding up of a company or any proceedings therein may at any time and at any stage, and either with or without application from any of the parties thereto, be transferred from one Court to another Court, or may be retained in the Court

in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been commenced.

(2.) The powers of transfer given by the foregoing provisions of this section may, subject to and in accordance with general rules, be exercised by the Lord Chancellor or by any judge of the High Court having jurisdiction under this Act, or, as regards any case within the jurisdiction of any other Court, by the judge of that Court.

(3.) If any question arises in any winding-up proceeding in a County Court or in the Stannaries Court which all the parties to the proceeding, or which one of them and the judge of the Court, may desire to have determined in the first instance in the High Court, the judge shall state the facts in the form of a special case for the opinion of the High Court, and thereupon the special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination.

Provisions as to liquidator.

4. (1.) On an order being made by the Court for winding up a company the officer hereinafter mentioned shall, by virtue of his office, become the provisional liquidator (α) of the company, and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such.

(2.) The said officer shall be the official receiver, if any, attached to the Court for bankruptcy purposes, or if there is more than one such official receiver, then such one of them as the Board of Trade may appoint, or, if there is no such official receiver, then an officer appointed for the purpose by the Board of Trade. Any such officer shall for the purpose of his duties under this Act be styled the official receiver.

(3.) When a person other than the official receiver is appointed liquidator of a company he shall be styled liquidator and not official liquidator of the company, and the provisions of the Companies Acts relating to the official liquidator shall, in their application to him, be construed as if the word "official" were omitted therefrom. Such a person shall not be capable of acting as liquidator until he has notified his appointment to the registrar of joint stock companies and given security (β) in the manner prescribed to the satisfaction of the Board of Trade. He shall give the official receiver such information and such access to and facilities for inspecting the books and documents of the company, and generally such aid, as may be requisite for enabling that officer to perform his duties under this Act.

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(4.) If any vacancy occurs in the office of liquidator of a company, the official receiver shall, by virtue of his office, be the liquidator during the vacancy.

(5.) The official receiver may be appointed by the Court provisional liquidator (*a*) of the company at any time after the presentation of the petition and before a winding-up order has been made.

(6.) Where an application is made to the Court to appoint a receiver on behalf of the debenture-holders or other creditors of a company the official receiver may be so appointed.

(*a*) Comp. Act, 1862, ss. 85, 92, 152. (*β*) Comp. Act, 1862, s. 92. See note *ante*, p. 246.

Power to appoint special manager.

5. (1.) Where the official receiver becomes the liquidator of a company, whether provisionally or otherwise, he may, if satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributories generally, require the appointment of a special manager of the estate or business of the company other than himself, apply to the Court to, and the Court may on such application, appoint a special manager thereof during such time as the Court may direct, with such powers, including any of the powers of a receiver or manager, as may be entrusted to him by the Court.

(2.) The special manager shall give such security and account in such manner as the Board of Trade direct.

(3.) The special manager shall receive such remuneration as may be fixed by the Court.

Meeting of creditors.

6. (1.) When the Court has made an order for winding up a company the official receiver shall summon separate meetings of the creditors and contributories of the company for the purpose of—

(*a*) Determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the official receiver; and

(*b*) Determining whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of such committee if appointed.

The Court may make any appointment and order required to give effect to any such determination, and if there is a difference between the determinations of the meetings of the creditors and contributories in respect of any of the matters mentioned in the foregoing provisions the Court shall decide the difference and make such order thereon as the Court may think fit.

(2.) The provisions of the First Schedule to this Act shall,

subject to such modifications as may be made therein by general rules, apply to any meeting summoned in pursuance of this section.

(3.) In case a liquidator is not appointed by the Court the official receiver shall be the liquidator of the company.

Statement of company's affairs.

7. (1.) Where the Court has made an order for winding up a company, there shall be made out and submitted to the official receiver a statement as to the affairs of the company in the prescribed form, verified by affidavit, and shewing the particulars of the assets, debts, and liabilities of the company, the names, residences, and occupations of the creditors of the company, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require.

(2.) The statement shall be submitted and verified by one or more of the persons who are at the time of the winding-up order the directors and by the person who is at that time the secretary or other chief officer of the company, or by such of the persons being or having been directors or officers of the company or having taken part in the formation of the company at any time within one year before the order for winding up the company, as the official receiver, subject to the direction of the Court, may require to submit, and verify the same.

(3.) The statement shall be submitted within fourteen days from the date of the order, or within such extended time as the official receiver or the Court may for special reasons appoint.

(4.) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid by the official receiver, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of such statement and affidavit as the official receiver may consider reasonable, subject to an appeal to the Court.

(5.) If any person, without reasonable excuse, makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding ten pounds for every day during which the default continues.

(6.) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom. But any person untruthfully so stating himself to be a creditor or contributory shall be guilty of a contempt of Court and shall be punishable accordingly on the application of the liquidator or of the official receiver.

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Report on winding-up and proceedings thereupon.

8. (1.) Where the Court has made an order for winding up a company, the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court—

(*a*) As to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and

(*b*) If the company has failed, as to the causes of the failure; and

(*c*) Whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

(2.) The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

(3.) The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company (*a*).

(4.) The official receiver shall take part in the examination, and for that purpose may, if specially authorized by the Board of Trade in that behalf, employ a solicitor with or without counsel.

(5.) The liquidator where the official receiver is not the liquidator and any creditor or contributory of the company may also take part in the examination either personally or by solicitor or counsel.

(6.) The Court may put such questions to the person examined as to the Court may seem expedient.

(7.) The person examined shall be examined on oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. The person examined shall at his own cost, prior to such examination, be furnished with a copy of the official receiver's report (β), and shall also at his own cost be entitled to employ at such examination a solicitor with or without

counsel, who shall be at liberty to put such questions to the person examined as the Court may deem just for the purpose of enabling that person to explain or qualify any answers given by him. Provided always, that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as the Court in its discretion may think fit. Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him. They shall also be open to the inspection of any creditor or contributory of the company at all reasonable times.

(8.) The Court may, if it thinks fit, adjourn the examination from time to time.

(9.) A public examination under this section may, if the Court so directs, and subject to general rules, be held before any judge of County Courts, or before any officer of the Supreme Court, being an official referee, master, registrar in bankruptcy, or chief clerk, or before any district registrar of the High Court named for the purpose by the Lord Chancellor, or in the case of companies being wound up by a Palatine Court, before a registrar of that Court, and the powers of the Court under sub-sections six, seven, and eight of this section may (except as to costs) be exercised by the person before whom the examination is held.

(α) *Cf.* Comp. Act, 1862, ss. 115, 117. (β) *Ante*, s. 8 (1).

Committee of inspection.

9. (1.) A committee of inspection appointed in pursuance of this Act shall consist of persons being creditors or contributories of the company or persons holding general powers of attorney from such persons in such proportions as may be agreed on by the meetings of creditors and contributories or as, in case of difference, may be determined by the Court.

(2.) The committee of inspection shall meet at such times as they from time to time appoint, and, failing such appointment, at least once a month; and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(3.) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present at the meeting.

(4.) Any member of the committee may resign his office by notice in writing signed by him, and delivered to the liquidator.

(5.) If a member of the committee becomes bankrupt, or com-

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pounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members of the committee who together with himself represent the creditors or contributories as the case may be, his office shall thereupon become vacant.

(6.) Any member of the committee representing creditors may be removed by an ordinary resolution at any meeting of creditors of which seven days' notice has been given, stating the object of the meeting. Any member of the committee representing contributories may be removed by an ordinary resolution at any meeting of contributories, of which seven days' notice has been given stating the object of the meeting.

(7.) On a vacancy occurring in the office of a member of the committee, the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, for the purpose of filling the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy.

(8.) The continuing members of the committee, provided there be not less than two such continuing members, may act notwithstanding any vacancy in their body.

(9.) If there be no committee of inspection, any act or thing or any direction or permission by this Act authorized or required to be done or given by the committee may be done or given by the Board of Trade on the application of the liquidator.

Power of Court to assess damages against delinquent directors, officers, and promoters.

10. (1.) Where in the course of the winding up of [a company under the Companies Acts] it appears that [any person who has taken part in the formation or promotion of the company, or] any past or present director, manager, [ ] liquidator, or [other] officer of [the] company, has misapplied or retained [ ] or become liable or accountable for any moneys [or property] of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of [the official receiver, or of the] liquidator [of the company], or of any creditor or contributory of the company [ ], examine into the conduct of such [promoter], director, manager, [liquidator], or other officer [of the company], and compel him to repay any moneys [or restore any property] so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the Court thinks just.

(2.) The provisions of this section shall apply in the winding up of any company under the Companies Acts whether the same is being wound up by or subject to the supervision of the Court or is being wound up voluntarily, and whether the winding up commenced before or after the passing of this Act, and notwithstanding that the offence is one for which the offender may be criminally responsible.

This Act repeals sect. 165 of the Comp. Act, 1862, and here re-enacts it in substantially the identical words with two additions: (1) that promoters are included, and (2) that the words "or property" are added after "moneys."

For convenience the section is printed above with such words as are new enclosed in square brackets, and with a blank enclosed in square brackets where anything in sect. 165 has been dropped.

The law under the section is to be found in the notes to sect. 165 of the Comp. Act, 1862.

Payment of money into Bank of England.

11. (1.) An account, called the Companies Liquidation Account, shall be kept by the Board of Trade with the Bank of England, and all moneys received by the Board of Trade in respect of proceedings under this Act shall be paid to that account.

(2.) Every liquidator of a company which is being wound up by order of the Court shall, in such manner and at such times as the Board of Trade, with the concurrence of the Treasury, direct, pay the money received by him to the Companies Liquidation Account at the Bank of England, and the Board of Trade shall furnish him with a certificate of receipt of the money so paid.

(3.) Provided that, if the committee of inspection satisfy the Board of Trade that for the purpose of carrying on the business of the company or of obtaining advances, or for any other reason, it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Board of Trade shall, on the application of the committee of inspection, authorize the liquidator to make his payments into and out of such other bank as the committee may select, and thereupon those payments shall be made in the prescribed manner.

(4.) If any such liquidator at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorize him to retain, then, unless he explains the retention to the satisfaction of the Board of Trade, he shall pay interest on the amount so retained in excess at the rate of twenty pounds per centum per annum, and shall be liable to disallowance of all or such part of his remuneration as to the Board shall seem just, and to be removed from his

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office by the Board, and shall be liable to pay any expenses occasioned by reason of his default.

(5.) All payments out of money standing to the credit of the Board of Trade in the Companies Liquidation Account shall be made by the Bank of England in the prescribed manner.

(6.) No liquidator of a company which is being wound up by order of the Court shall pay any sums received by him as liquidator into his private banking account.

Powers of liquidator.

12. (1.) The liquidator of a company which is being wound up by the Court may, with the sanction either of the Court or of the committee of inspection, carry on the business of the company, or bring or defend any legal proceeding in the name and on behalf of the company, or exercise any of the powers conferred by section one hundred and fifty-nine or section one hundred and sixty of the Companies Act, 1862.

25 & 26 Vict. c. 89.

(2.) The liquidator of any such company may, without the sanction of the Court or of the committee of inspection, exercise any of the other powers conferred on the liquidator by section ninety-five of the Companies Act, 1862.

(3.) The exercise by the liquidator of the powers referred to in this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

(4.) The liquidator of a company which is being wound up by order of the Court may, with the sanction either of the Court or of the committee of inspection, employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself. The sanction aforesaid must be a sanction obtained before the employment, except in cases of urgency, and in such cases it must be shewn that no undue delay took place in obtaining the sanction.

Delegation to liquidator of certain powers of Court.

13. General rules may be made for requiring or enabling all or any of the powers and duties conferred and imposed on the Court by sections ninety-one, ninety-eight, ninety-nine, one hundred, one hundred and two, and one hundred and seven of the Companies Act, 1862, to be exercised or performed by the liquidator as an officer of the Court, and subject to the control of the Court.

Provided that the liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without either the special leave of the Court or the sanction of the committee of inspection.

Power for official receiver to

14. Where a company is being wound up voluntarily or subject to the supervision of the Court, the official receiver attached to

the Court having jurisdiction to wind up the company may present a petition that the company be wound up by the Court, and thereupon, if the Court is satisfied that the voluntary winding-up or winding-up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories, it may make an order that the company be wound up by the Court.

apply as to voluntary winding-up.

15. (1.) If the winding-up of a company is not concluded within one year after its commencement, the liquidator of the company shall, at such intervals as may be prescribed, until the winding-up is concluded, send to the registrar of joint stock companies a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation. Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof, or extract therefrom. But any person untruthfully so stating himself to be a creditor or contributory shall be guilty of a contempt of Court, and shall be punishable accordingly on the application of the liquidator or of the official receiver.

Information as to pending liquidations.

(2.) If a liquidator makes default in complying with the requirements of this section he shall be liable to a fine not exceeding fifty pounds for each day during which the default continues.

(3.) If it appears from any such statement or otherwise that any liquidator of a company has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator shall forthwith pay the same to the Companies Liquidation Account at the Bank of England. Every such liquidator shall be entitled to the prescribed certificate of receipt for the moneys so paid, and that certificate shall be an effectual discharge to him in respect thereof.

(4.) For the purpose of ascertaining and getting in any money payable into the Bank of England in pursuance of this section, the like powers may be exercised and by the like authority as are exerciseable under section one hundred and sixty-two of the Bankruptcy Act, 1883, for the purpose of ascertaining and getting in the sums, funds, and dividends referred to in that section.

(5.) Any person claiming to be entitled to any money paid into the Bank of England in pursuance of this section may apply to the Board of Trade for payment of the same, and the Board of Trade may, on a certificate by the liquidator that the person

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claiming is entitled, make an order for the payment to that person of the sum due. Any person dissatisfied with the decision of the Board of Trade in respect of any claim made in pursuance of this section may appeal to the High Court.

(6.) This section shall apply whether the winding up of the company has commenced before or after the commencement of this Act.

Investment of surplus funds on general account.

16. (1.) Whenever the cash balance standing to the credit of the Companies Liquidation Account is in excess of the amount which in the opinion of the Board of Trade is required for the time being to answer demands in respect of companies' estates, the Board of Trade shall notify the same to the Treasury, and shall pay over the same or any part thereof, as the Treasury may require, to the Treasury, to such account as the Treasury may direct, and the Treasury may invest the said sums, or any part thereof, in Government securities, to be placed to the credit of the said account.

(2.) Whenever any part of the money so invested is, in the opinion of the Board of Trade, required to answer any demands in respect of companies' estates, the Board of Trade shall notify to the Treasury the amount so required, and the Treasury shall thereupon repay to the Board of Trade such sum as may be required to the credit of the Companies Liquidation Account, and for that purpose may direct the sale of such part of the said securities as may be necessary.

(3.) The dividends on the investments under this section shall be paid to such account as the Treasury may direct, and regard shall be had to the amount thus derived in fixing the fees payable in respect of proceedings in the winding up of companies.

Separate accounts of particular estates.

17. (1.) An account shall be kept by the Board of Trade of the receipts and payments in the winding up of each company, and when the cash balance standing to the credit of the account of any company is in excess of the amount which, in the opinion of the committee of inspection, is required for the time being to answer demands in respect of that company's estate, the Board of Trade shall, on the request of the committee, invest the amount not so required in Government securities, to be placed to the credit of the said account for the benefit of the said company.

(2.) Whenever any part of the money so invested is, in the opinion of the committee of inspection, required to answer any demands in respect of the estate of the company of the assets of which the money so invested formed part, the Board of Trade shall, on the request of the committee, raise such sum as may be

required by the sale of such part of the said securities as may be necessary.

(3.) The dividends on the investments made under this section shall be paid to the credit of the company of the assets of which the money so invested formed part.

If there is no committee of inspection see s. 9 (9).

Interests on balances above two thousand pounds.

18. When the balance at the credit of any company's account in the hands of the Board of Trade exceeds two thousand pounds, and the liquidator gives notice to the Board of Trade that the excess is not required for the purposes of the liquidation, then such company shall be entitled to interest upon such excess at the rate of two per centum per annum.

Certain receipts and fees to be applied in aid of expenditure.

19. The Treasury may from time to time issue to the Board of Trade in aid of the votes of Parliament, out of the receipts arising from fees, fee stamps, and dividends on investments by the Treasury under this Act, any sums which may be necessary to meet the charges estimated by the Board of Trade in respect of salaries and expenses under this Act.

Audit of liquidators' accounts.

20. (1.) Every liquidator of a company which is being wound up by order of the Court shall, at such times as may be prescribed, but not less than twice in each year during his tenure of office, send to the Board of Trade, or as they direct, an account of his receipts and payments as such liquidator.

(2.) The account shall be in a prescribed form, shall be made in duplicate, and shall be verified by a statutory declaration in the prescribed form.

(3.) The Board of Trade shall cause the accounts so sent to be audited, and for the purpose of the audit the liquidator shall furnish the Board with such vouchers and information as the Board may require, and the Board may at any time require the production of and inspect any books or accounts kept by the liquidator.

(4.) When any such account has been audited, one copy thereof shall be filed and kept by the Board, and the other copy shall be filed with the Court, and each copy shall be open to the inspection of any creditor, or of any person interested.

(5.) The Board of Trade shall cause the account or a summary thereof when audited to be printed, and shall send a printed copy thereof by post to every creditor and contributory.

Books to be kept by liquidator.

21. Every liquidator of a company which is being wound up by order of the Court shall keep, in manner prescribed, proper books in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other

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matters as may be prescribed, and any creditor or contributory of the company may, subject to the control of the Court, personally or by his agent inspect any such books.

Release of liquidators.

22. (1.) When the liquidator of a company which is being wound up by order of the Court has realized all the property of the company, or so much thereof as can, in his opinion, be realised without needlessly protracting the liquidation, and distributed a final dividend, if any, to the creditors, and adjusted the rights of the contributories between themselves, and made a final return, if any, to the contributories, or has resigned, or has been removed from his office, the Board of Trade shall, on his application, cause a report on his accounts to be prepared, and, on his complying with all the requirements of the Board, shall take into consideration the report, and any objection which may be urged by any creditor, or contributory, or person interested against the release of the liquidator, and shall either grant or withhold the release accordingly, subject nevertheless to an appeal to the High Court.

(2.) Where the release of a liquidator is withheld the Court may, on the application of any creditor, or contributory, or person interested, make such order as it thinks just, charging the liquidator with the consequences of any act or default he may have done or made contrary to his duty.

(3.) An order of the Board releasing the liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.

(4.) Where the liquidator has not previously resigned or been removed, his release shall operate as a removal of him from his office.

Discretionary powers of liquidator and control thereof.

23. (1.) Subject to the provisions of the Companies Acts, the liquidator of a company which is being wound up by order of the Court shall, in the administration of the property of the company and in the distribution thereof amongst its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, and any directions so given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.

(2.) The liquidator may from time to time summon general meetings of the creditors or contributories for the purpose of

ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, either at the meeting appointing the liquidator or otherwise, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories as the case may be.

(3.) The liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the winding-up (*a*).

(4.) Subject to the provisions of the Companies Acts, the liquidator shall use his own discretion in the management of the estate and its distribution among the creditors.

(*a*) *Cf.* Comp. Act, 1862, s. 138.

Appeal to Court against liquidator.

24. If any person is aggrieved by any act or decision of the liquidator of a company which is being wound up by order of the Court, he may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just.

Control of Board of Trade over liquidators.

25. (1.) The Board of Trade shall take cognizance of the conduct of liquidators of companies which are being wound up by order of the Court, and in the event of any such liquidator not faithfully performing his duties and duly observing all the requirements imposed on him by statute, rules, or otherwise, with respect to the performance of his duties, or in the event of any complaint being made to the Board by any creditor or contributory in regard thereto, the Board shall inquire into the matter, and take such action thereon as may be deemed expedient.

(2.) The Board may at any time require any liquidator of a company which is being wound up by order of the Court to answer any inquiry made by them in relation to any winding-up in which the liquidator is engaged, and may, if the Board think fit, apply to the Court to examine on oath the liquidator or any other person concerning the winding-up.

(3.) The Board may also direct a local investigation to be made of the books and vouchers of the liquidator of any company which is being wound up by order of the Court.

General rules and fees.

26. (1.) The Lord Chancellor may, with the concurrence of the President of the Board of Trade, make general rules for carrying into effect the objects of this Act.

(2.) All general rules made under the foregoing provisions of this section shall be laid before Parliament within three weeks after they are made, if Parliament is then sitting, and if Parlia-

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ment is not sitting, within three weeks after the beginning of the next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act.

(3.) Any general rule made under this section shall not come into operation until the expiration of one month after the rule has been made and issued.

(4.) There shall be paid in respect of the proceedings under this Act such fees as the Lord Chancellor may, with the sanction of the Treasury, direct, and the Treasury may direct by whom and in what manner the same are to be collected and accounted for, and to what account they are to be paid.

(5.) All rules made and directions given by the Lord Chancellor under the foregoing provisions of this section shall be adopted by the authority for the time being empowered to make rules for regulating the practice or procedure in the Chancery Court of the County Palatine of Lancaster, but as so adopted shall have effect with the substitution of the words "vice-chancellor" for the word "judge," and the word "registrar" for the words "chief clerk," and of the words "chambers of the registrar" for the words "chambers of the judge" and "judge's chambers," and any directions as to the remuneration to be allowed to officers of that Court in respect of proceedings under this Act shall be subject to the sanction of the Chancellor of the Duchy and County Palatine of Lancaster.

Officers and remuneration.

27. (1.) The Board of Trade may, with the approval of the Treasury, appoint such additional officers as may be required by the Board for the execution of this Act, and may dismiss any person so appointed.

(2.) The Board of Trade, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any officer of, or person attached to, the Board of Trade, performing any duties under this Act, and may vary, increase, or diminish such remuneration as they may think fit.

(3.) The Lord Chancellor, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any person (other than an officer of the Board of Trade) performing any duties under this Act, and may vary, increase, or diminish such remuneration as he may think fit.

Annual accounts of receipts and expenditure in respect of winding-up proceedings.

28. (1.) The Treasury shall annually cause to be prepared and laid before both Houses of Parliament an account for the year ending with the thirty-first day of March, showing the receipts and expenditure during that year in respect of proceedings under this Act, whether commenced under this or any previous Act, and

the provisions of section twenty-eight of the Supreme Court of Judicature Act, 1875, shall apply to the account as if the account had been required by that section. 38 & 39 Vict. c. 77.

(2.) The accounts of the Board of Trade under this Act shall be audited in such manner as the Treasury direct, and, for the purpose of the account to be laid before Parliament, the Board of Trade shall make such returns and give such information as the Treasury direct.

Returns by officers.

29. (1). The officers of the Courts acting in the winding up of companies shall make to the Board of Trade such returns of the business of their respective courts and offices, at such times and in such manner and form as may be prescribed, and from such returns the Board of Trade shall cause books to be prepared which shall, under the regulations of the Board, be open for public information and searches.

(2.) The Board of Trade shall also cause a general annual report of all matters, judicial and financial, within this Act to be prepared and laid before both Houses of Parliament.

Proceedings of Board of Trade.

30. (1.) All documents purporting to be orders or certificates made or issued by the Board of Trade and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorized in that behalf by the President of the Board, shall be received in evidence and deemed to be such orders or certificates without further proof unless the contrary is shown.

(2.) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be conclusive evidence of the fact so certified.

Application of Act.

31. (1.) This Act shall not, except where it is expressed to have a more extended application, apply to any company which is being wound up in pursuance of an order made before the commencement of this Act.

(2.) For the purposes of this Act a company shall not be deemed to be wound up by order of the Court if the order is to continue a winding-up under the supervision of the Court.

(3.) This Act shall not apply to any company unless the registered office of the company is situate in England or Wales.

Interpretation of terms.

32. (1.) In this Act, unless the context otherwise requires,—

"The Companies Acts" means the Companies Act, 1862, and the Acts amending the same.

"General rules" means general rules made under this Act, and includes forms.

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"Prescribed" means prescribed by general rules.

"Stannaries Court" means the Court of the Vice-Warden of the Stannaries.

25 & 26 Vict. c. 89.

(2.) In Part IV. of the Companies Act, 1862, and in this Act the expression "the Court," when used in relation to a company shall, unless the contrary intention appears, mean the Court having jurisdiction under this Act to wind up the company.

(3.) For the purposes of this Act the expression "registered office of a company" shall mean the place which has been the registered office of the company for the greater part of the six months immediately preceding the presentation of the petition for winding up the company, and shall include, in the case of an unregistered company, any place which in pursuance of section one hundred and ninety-nine of the Companies Act, 1862, is to be deemed the registered office of the company for the purpose of the winding up thereof.

Repeal.

33. The enactments mentioned in the Second Schedule to this Act are hereby repealed, as to England and Wales, to the extent appearing in the third column of that schedule.

Commencement of Act.

34. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one.

Short title.

35. (1.) This Act may be cited as the Companies (Winding-up) Act, 1890.

(2.) This Act and the Companies Acts, 1862 to 1886, may be cited together as the Companies Acts, 1862 to 1890.

SCHEDULES.

FIRST SCHEDULE.

Section 6.

MEETINGS OF CREDITORS AND CONTRIBUTORIES.

(1.) The meetings of creditors and contributories shall be held within twenty-one days after the date of the winding-up order, or within such further time as the Court may approve, unless a special manager has been appointed, in which case such meetings shall be held within one month from the date of such order, or within such further time as aforesaid.

(2.) The official receiver of the company shall summon the meeting by giving not less than seven days' notice of the time and place thereof in the *London Gazette* and in a local paper. Notice of such meeting shall also be sent by post to every person appearing by the company's books to be a creditor of the company and to every member of the company.

(3.) The official receiver shall also, as soon as practicable, send to each creditor mentioned in the company's statement of affairs (*f*), and to each person appearing from the company's books, or otherwise, to be a contributory of the company, a summary of the company's statement of affairs (*f*), including the causes of its failure,

(*f*) *Ante*, s. 7.

and any observations thereon which the official receiver may think fit to make; but the proceedings at any such meeting shall not be invalidated by reason of any summary or notice required by these rules not having been sent or received before the meeting.

(4.) The meeting shall be held at such place as is in the opinion of the official receiver most convenient for the majority of the creditors and contributories.

(5.) The official receiver, or some person nominated by him, shall be the chairman at the meetings.

(6.) A person shall not be entitled to vote as a creditor unless he has duly proved a debt to be due to him from the company, and the proof has been duly lodged before the time appointed for the meeting.

(7.) A creditor shall not vote in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained.

(8.) For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.

(9.) A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the company, and against whom a receiving order in bankruptcy has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof.

(10.) It shall be competent to the official receiver, or to the liquidator, within twenty-eight days after a proof estimating the value of a security as aforesaid had been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated, with an addition thereto of twenty per centum. Provided, that where a creditor has put a value on such security, he may, at any time before he has been required to give up such security as aforesaid, correct such valuation by a new proof, and deduct such new value from his debt, but in that case such addition of twenty per centum shall not be made if the liquidator requires the security to be given up.

(11.) The chairman of the meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to, and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

(12.) A creditor or a contributory may vote either in person or by proxy.

(13.) Every instrument of proxy shall be in the prescribed form, and shall be issued by an official receiver, or by the liquidator of the company, and every written part thereof shall be in the handwriting of the person giving the proxy, or of any manager or clerk or other person in his regular employment, or of a commissioner to administer oaths in the Supreme Court of Judicature in England.

(14.) General and special forms of proxy shall be sent to the creditors and contributories with the notice summoning the meeting, and neither the name nor description of the official receiver or of any other person shall be printed or inserted in the body of any instrument of proxy before it is so sent.

(15.) A creditor or a contributory may give a general proxy to his manager or clerk, or any other person in his regular employment. In such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor or contributory.

(16.) A creditor or a contributory may give a special proxy to any person to vote at any specified meeting, or adjournment thereof—

(*a*) for or against the appointment or continuance in office of any specified person as liquidator or member of the committee of inspection, and

(*b*) on all questions relating to any matter other than those above referred to and arising at any specified meeting or adjournment thereof.

(17.) A proxy shall not be used unless it is deposited with the official receiver before the meeting at which it is to be used.

(18.) Where it appears to the satisfaction of the Court that any solicitation has been used by or on behalf of a liquidator in obtaining proxies or in procuring the appointment of liquidator, except by the direction of a meeting of creditors or contributories, the Court shall have power, if it think fit, to order that no remuneration shall be allowed to the person by whom or on whose behalf such solicitation may

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have been exercised, notwithstanding any resolution of the committee of inspection or of the creditors or contributories to the contrary.

(19.) A creditor or a contributory may appoint the official receiver to act in manner prescribed as his general or special proxy.

(20.) The chairman of the meeting may, with the consent of the meeting, adjourn the meeting from time to time and from place to place.

(21.) A meeting shall not be competent to act for any purpose except the election of a chairman, the proving of debts, and the adjournment of the meeting, unless there are present or represented thereat, at least three creditors or contributories, or all the creditors or contributories if their number does not exceed three.

(22.) If within half an hour from the time appointed for the meeting a quorum of creditors or contributories is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint, not being less than seven or more than twenty-one days.

(23.) The chairman of the meeting shall cause minutes of the proceedings at the meeting to be drawn up, and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting.

(24.) No person acting either under a general or a special proxy shall vote in favour of any resolution which would directly or indirectly place himself, his partner or employer, in a position to receive any remuneration out of the estate of the company otherwise than as a creditor rateably with the other creditors of the company: Provided that where any person holds special proxies to vote for an application to the Court in favour of the appointment of himself as liquidator he may use the said proxies and vote accordingly.

Section 31.

SECOND SCHEDULE.

ENACTMENTS REPEALED (*g*) AS TO ENGLAND AND WALES (*h*).

Session and Chapter.	Title or Short Title.	Extent of Repeal.
25 & 26 Vict. c. 89 – –	The Companies Act, 1862 –	Section eighty-one. In section ninety-two the words "The Court shall determine whether any and what security is to be given by any official liquidator on his appointment." Section ninety-seven. Section one hundred and sixty-five.
30 & 31 Vict. c. 131	The Companies Act, 1867 –	Sections forty-one to forty-six.

(*g*) *Ante*, s. 33.

(*h*) s. 31 (3).

THE DIRECTORS LIABILITY ACT, 1890.

53 & 54 VICT. c. 64.

An Act to amend the Law relating to the Liability of Directors and others for Statements in Prospectuses and other Documents soliciting applications for Shares or Debentures.

[18th August, 1890.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Directors Liability Act, 1890.

Construction.

2. This Act shall be construed as one with the Companies Acts, 1862 to 1890.

Liability for statements in prospectus.

3. (1.) Where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who having authorized such naming of him is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company either immediately or after an interval of time, and every promoter of the company, and every person who has authorized the issue of the prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(*a.*) With respect to every such untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares, debentures, or debenture stock, as the case may be, believe, that the statement was true; and

(*b.*) With respect to every such untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an

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engineer, valuer, accountant, or other expert, that it fairly represented the statement made by such engineer, valuer, accountant, or other expert, or was a correct and fair copy of or extract from the report or valuation. Provided always, that notwithstanding that such untrue statement fairly represented the statement made by such engineer, valuer, accountant, or other expert, or was a correct and fair copy of an extract from the report or valuation, such director, person named, promoter, or other person, who authorized the issue of the prospectus or notice as aforesaid, shall be liable to pay compensation as aforesaid if it be proved that he had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and

(*c.*) With respect to every such untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of such statement or copy of or extract from such document,

or unless it is proved that having consented to become a director of the company he withdrew his consent before the issue of the prospectus or notice, and that the prospectus or notice was issued without his authority or consent, or that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent, or that after the issue of such prospectus or notice and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and caused reasonable public notice of such withdrawal, and of the reason therefor, to be given.

(2.) A promoter in this section means a promoter who was a party to the preparation of the prospectus or notice, or of the portion thereof containing such untrue statement, but shall not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company.

(3.) Where any company existing at the passing of this Act, which has issued shares or debentures, shall be desirous of obtaining further capital by subscriptions for shares or debentures, and for that purpose shall issue a prospectus or notice, no director of such company shall be liable in respect of any statement therein, unless he shall have authorized the issue of such prospectus or notice, or have adopted or ratified the same.

(4.) In this section the word "expert" includes any person whose profession gives authority to a statement made by him. Sect. 3.

Liability for misrepresentation in prospectus.

Upon liability for misrepresentation in prospectus it has hitherto been necessary to have regard to two separate heads of law, viz.:

(i.) The general law (*ante*, p. 124, *et seq.*) enforced by the action for deceit, in which the defendant is made liable for untrue statement, upon which the plaintiff has acted to his damage.

(ii.) The statutory law contained in sect. 38 of the Comp. Act, 1867 (*ante*, p. 570), under which the particular persons described in that section, apart from fraud or misstatement, are guilty of a statutory fraud if they do not comply with certain statutory requirements.

(iii.) This Act adds a third head. And the first observation upon the Act is that it appears to be wholly cumulative upon the existing law. It does not modify, repeal, or affect either (i.) or (ii.), unless there be a possible case in which a person attacked under (i.) should be able to defend himself by shewing that he brings himself within some one of the provisoes in the Act.

Next consider that either one or two or all of these heads will apply according as the plaintiff has suffered damage by contracting with the company in one way or in another way. Thus:—

If he is damaged by having taken shares he may sue under either (i.) (ii.) or (iii.).

If he is damaged by having taken debentures or debenture stock he may sue under (i.) or (iii.) but not under (ii.).

If he is damaged not by having taken shares, debentures, or debenture stock, but (if such a case should ever present itself) by having otherwise advanced money to or in any way contracted with the company, he can sue under (i.) but not under (ii.) or (iii.).

Persons liable under the Act.

Next consider who can be attacked under these several heads.

(I.) Under (i.) any one who has been guilty of deceit can be attacked.

(II.) Under (ii.) the person attacked must be shown to be promoter, director, or officer of the company knowingly issuing the prospectus or notice.

(III.) Under (iii.) the persons open to attack are of four classes; viz.:

(A.) A person who is director at the time of the issue of the prospectus.

(B.) A person who authorized the naming of himself in the prospectus as a director, or as having agreed to become a director either immediately or after an interval.

(C.) A promoter.

(D.) A person who authorized the issue of the prospectus.

Each of these four classes is under the Act liable for untrue statement in the prospectus, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, subject to defences allowed by the Act, which relate to either (1) the person attacked or (2) the statement made.

Defences:—

Defences which relate to the person attacked;

Defences which relate to the Person attacked.

(A.) *The director.*

No. 1.—In the case of a company existing at the passing of the Act, which has (*quære* at the passing of the Act) issued shares or debentures, a special defence is by sect. 3 (3) open to the director, viz. that he did not authorize the issue of the prospectus, or adopt or ratify it. This is not a defence in any other case under sect. 3, except in conjunction with something further, as presently stated.

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No. 2.—It is a defence that, having consented to become a director, he withdrew his consent before the issue of the prospectus, and that the prospectus was issued without his authority or consent.

No. 3.—It is a defence that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent.

No. 4.—It is a defence that after the issue of the prospectus and before allotment he, on becoming aware of an untrue statement, withdrew his consent thereto, and caused to be given (*quære* same as "gave" in No. 3?) reasonable public notice of such withdrawal and of the reason therefor.

(B.) *The person who has authorized the naming of himself, &c.*

It is observable that the "authorized naming as a director" of the earlier part of sect. 3 is not found again in the later part of the section, but the expression used is "consented to become a director." The latter expression must probably be taken as used with the intention of including the person described under (B,) as well as the person described under (A.).

This being so, it would seem that the same four defences are open to person (B), subject as to No. 1 to a question whether "director" in sect. 3 (3) includes a person who at the date of issue was not but had authorized his being named as a director.

(C.) *The promoter.*

Sect. 3. (2) cuts down this class to the promoter who was a party to the preparation of the prospectus or of the portion containing the untrue statement, excluding persons acting professionally.

Defences Nos. 1, 2 do not avail him if not a director. No. 3 may possibly but improbably be open to him. No. 4 is open to him.

(D.) *The person who authorized the issue.*

The only defence under this head open to him is No. 4; assuming of course that he is not a director or promoter.

which relate to the statement made.

DEFENCES WHICH RELATE TO THE STATEMENT MADE.

Truth, as was pointed out in *Derry* v. *Peek* (*i*), is in the mouth of any man a thing not absolute but relative to the belief of the speaker. But an "untrue statement in the prospectus or notice" under this Act is, it is conceived, a statement untrue in fact. Now, that a statement should be absolutely true in fact is in the vast majority of cases beyond the reach of human capacity. In many, perhaps most, cases that which we are pleased to call true is only that to which human knowledge has for the time being attained. And even in matters which are capable of being stated more or less nearly with exactitude, the statement is inevitably to a large extent only approximate. Thus where a field is stated to contain fifteen acres or a town is said to be situate on a navigable river twenty miles from the sea, such a statement obviously is but approximate.

Again, if as matter of expression the language of a prospectus is to be absolutely true, the most prolix language that conveyancers ever knew would not suffice so to qualify any but the most simple statement as to make it absolutely true.

One may anticipate, therefore, that "untrue statement" as here used must be and will be largely qualified so as to descend from the lofty pedestal of absolute truth to something which approaches in material respects as nearly to truth as is reasonably possible.

Next, statements are for the purposes of this Act divisible into statements which do and statements which do not purport to be made on the authority

(*i*) 14 App. Cas. 337; and see *ante*, pp. 124, 125.

of an expert or of a public official document or statement. For convenience the former may be called "derivative statements," and the latter "original statements."

As to original statements, it is a defence, sect. 3 (1) (*a*), that the person attacked had reasonable ground to believe and did to allotment believe that the statement was true.

As to derivative statements, it is a defence that the statement fairly represented the statement of or was a fair copy of or extract from the report of an expert, unless it is shewn that the person attacked had no reasonable ground to believe that the expert was competent, sect. 3 (1) (*b*).

[Note, however, that if the competent expert was fraudulent and his report false, and the person attacked knew it to be false, he will escape so far as this Act is concerned.]

And it is a defence that the statement was a correct and fair representation of the statement of an official person, or a correct and fair copy of or extract from a public official document, sect. 3 (1) (*c*).

Indemnity where name of person has been improperly inserted as a director.

4. Where any such prospectus or notice as aforesaid contains the name of a person as a director of the company, or as having agreed to become a director thereof, and such person has not consented to become a director, or has withdrawn his consent before the issue of such prospectus or notice, and has not authorized or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus or notice was issued, and any other person who authorized the issue of such prospectus or notice shall be liable to indemnify the person named as a director of the company, or as having agreed to become a director thereof as aforesaid, against all damages, costs, charges, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus or notice, or in defending himself against any action or legal proceedings brought against him in respect thereof.

Persons entitled to indemnity.

Which of the persons made liable under sect. 3 is the person entitled to indemnity under sect. 4? A person who has not consented to become a director cannot be a director, and a person who has consented to become a director and has withdrawn his consent (meaning, it is presumed, before his consent has been acted upon by appointment) cannot be a director, so that such a one cannot fall under class (A.) of sect. 3. Neither is he within class (C.) or class (D.). He may be of class (B.), although the language used is singularly different.

It is plain that sect. 4 includes among those entitled to indemnity persons who have a good defence under sect. 3; for one of the persons described is exactly he who can under sect. 3 plead defence No. 2. And it is conceived that sect. 4 extends to persons not within sect. 3 at all. Thus if a person, who has never consented to be a director, is without authority named in the prospectus as a director and is sued, and the action against him is dismissed with costs because he is not within sect. 3, it would seem that under sect. 4 he could recover against the directors, &c., all damages, expenses, &c., *e.g.* his costs or so much of them as the plaintiff failed to pay, and his solicitor and client costs.

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Persons liable to indemnify.

Among the persons liable to indemnify under sect. 4 are not included all the persons who are primarily liable under sect. 3. Thus classes (B.) and (C.) of sect. 3 are not liable under sect. 4, and persons of class (A.), without whose knowledge or consent the prospectus was issued, escape in any case under sect. 4, but escape under sect. 3 only if they further give public notice, &c. (see defences Nos. 3 and 4 of sect. 3).

Contribution from co-directors, &c.

5. Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorized the issue of the prospectus or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment.

This section extends only to classes (A.), (B.), and (D.) of sect. 3, and not to class (C.). The Act gives no authority to the promoter to recover contribution from the other persons liable.

THE SALE AND PURCHASE OF BANK SHARES ACT.

30 VICT. c. 29.

An Act to amend the Law in respect of the Sale and Purchase of Shares in Joint Stock Banking Companies.

[17th June, 1867.]

WHEREAS it is expedient to make provision for the prevention of contracts for the sale and purchase of shares and stock in joint stock banking companies, of which the sellers are not possessed, or over which they have no control:

May it therefore please your Majesty that it may be enacted, and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

Contracts for sale, &c., of shares to be void unless the numbers by which such shares are distinguished are set forth in contract.

1. That all contracts, agreements, and tokens of sale and purchase which shall, from and after the first day of July, one thousand eight hundred and sixty-seven, be made or entered into for the sale or transfer, or purporting to be for the sale or transfer, of any share or shares, or of any stock or other interest, in any joint stock banking company in the United Kingdom of Great Britain and Ireland constituted under or regulated by the provisions of any Act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any deed or written instrument, shall be null and void to all intents and purposes whatsoever, unless such contract, agreement, or other token shall set forth and designate in writing such shares, stock, or interest by the respective numbers by which the same are distinguished at the making of such contract, agreement, or token on the register or books of such banking company as aforesaid; or where there is no such register of shares or stock by distinguishing numbers, then, unless such contract, agreement, or other token shall set forth the person or persons in whose name or names such shares, stock, or interest shall at the time of making such contract stand as the registered proprietor thereof in the books of such banking company; and every person, whether principal, broker, or agent, who shall wilfully insert in any such contract, agreement, or other token any false entry of such numbers, or any name or names

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other than that of the person or persons in whose name such shares, stock, or interest shall stand as aforesaid, shall be guilty of a misdemeanour, and be punished accordingly, and, if in Scotland, shall be guilty of an offence punishable by fine or imprisonment.

Registered shareholders may see lists.

2. Joint stock banking companies shall be bound to shew their list of shareholders to any registered shareholder during business hours, from ten of the clock to four of the clock.

Extent of Act limited.

3. This Act shall not extend to shares or stock in the Bank of England or the Bank of Ireland.

The preamble of this Act sufficiently shews what is its object, viz., to prevent speculative dealing in the shares of joint stock banking companies. To comply with this Act was not to the advantage of the Stock Exchange, and accordingly by the rules and usages of the Stock Exchange a contract which under the Act is null and void to all intents is treated as valid and binding, and its breach as between members of the Exchange would be visited by declaration as a defaulter and expulsion.

In this state of facts cases have arisen in which members of the Exchange have sought to impose upon their customers the liability to perform the illegal contract which the members' domestic jurisdiction imposes upon the members.

Upon this it has been decided that a custom to treat an invalid as a valid contract is unreasonable and illegal (*k*); that an authority to buy on the London Stock Exchange (involving no doubt an authority to the agent to buy according to the rules and usages of that market, whether the principal knows them or not) does not bind the principal by an unreasonable or illegal usage which he does not know (*l*); and that consequently where this Act is not complied with a purchaser of the shares, who is in fact ignorant of the usage of the Stock Exchange to ignore the Act, is not liable to his brokers to indemnify them against the liability to perform the contract which the Stock Exchange enforces as against the brokers (*l*).

In *Seymour* v. *Bridge* (*m*) Mathew, J., *semble* decided as a fact that the defendant knew of the usage, and that the authority he gave to the plaintiffs was to buy in the manner in which in fact they bought. If so, this case is not overruled by *Perry* v. *Barnett* (*l*), and is of complexion similar to *Read* v. *Anderson* (*n*). For the customer may no doubt instruct the broker to make for him a contract which does not comply with this Act and which is therefore not enforceable at law (*o*), and if he does so then as between himself and his agent he is bound to indemnify.

Neilson v. *James* (*p*) was an action for negligence brought by the seller against his broker for not complying with the statute. The purchaser had repudiated the shares on the ground that the contract was null and void. The defence was that the sale was according to the custom of the Exchange. The plaintiff was not shown to have known the custom, and recovered by way of damages the price at which the shares had been sold. A claim to an indemnity against calls on the shares was given up.

There may however be cases in which, assuming the contract not to be

(*k*) *Neilson* v. *James*, 9 Q. B. Div. 546.
(*l*) *Perry* v. *Barnett*, 14 Q. B. D. 467; 15 Q. B. Div. 388.
(*m*) 14 Q. B. D. 460.
(*n*) 13 Q. B. Div. 779.
(*o*) 15 Q. B. Div. 395, 397.
(*p*) 9 Q. B. Div. 546.

binding on the purchaser, it may be unnecessary to rely on the contract, for there may have been subsequent dealings in carrying the contract into effect which are binding. Thus if the transfer of the shares have been sent to and accepted by the purchaser, a contract is by implication created between the seller and the buyer (passing over the intermediate jobbers) (*q*), by which the buyer becomes the equitable owner of the shares and liable accordingly to indemnify the seller against all loss and liability in respect of them (*r*).

In *Mitchell* v. *Glasgow Bank* (*s*) the register did not distinguish the shares by numbers, and the applicable provision of this Act was therefore that which requires the name of the registered proprietor to be given. The sale was made between brokers in the usual way, the seller's name was not disclosed. The Court of Session held that there was no valid contract. The House of Lords did not decide the point; but Earl Cairns said that he was not satisfied that the decision of the Court of Session was erroneous. The argument of the appellants was in substance that the advice note sent to the seller by his own brokers formed part of the contract, or, that the contract for sale might be made verbally, and was made so soon as the offer was accepted on Exchange.

(*q*) See *ante*, p. 136.
(*r*) *Loring* v. *Davis*, 32 Ch. D. 625.
(*s*) 4 App. Cas. 624.

THE LIFE ASSURANCE COMPANIES ACT, 1870.

33 & 34 Vict. c. 61.

An Act to amend the Law relating to Life Assurance Companies.

[9th August, 1870.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as "The Life Assurance Companies Act, 1870."

Interpretation of terms.

2. In this Act—

The term "company" means any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies (*a*), who issue or are liable under policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life within the United Kingdom:

The term "chairman" means the person for the time being presiding over the court or board of directors of the company:

The term "policy-holder" means the person who for the time being is the legal holder of the policy for securing the life assurance, endowment, annuity, or other contract with the company:

The term "financial year" means each period of twelve months at the end of which the balance of the accounts of the company is struck, or if no such balance is struck, then each period of twelve months ending with the thirty-first day of December:

The term "Court" means, in the case of a company registered or having its head office in England, the High Court of Chancery; in the case of a company registered or having its head office in Ireland, the Court of Chancery in Ireland; in all cases of companies registered or having its head office in Scotland, the Court of Session, in either division thereof:

The term "registrar" means the Registrar of Joint Stock Companies in England and Scotland, and the Assistant Registrar of Joint Stock Companies in Ireland.

(*a*) 18 & 19 Vict. c. 63; 21 & 22 Vict. c. 101; 23 & 24 Vict. c. 58.

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Deposit.

3. Every company established after the passing of this Act within the United Kingdom, and every company established or to be established out of the United Kingdom which shall after the passing of this Act commence to carry on the business of life assurance within the United Kingdom, shall be required to deposit the sum of twenty thousand pounds with the Accountant-General of the Court of Chancery (*a*) to be invested by him in one of the securities usually accepted by the Court for the investment of funds placed from time to time under its administration, the company electing the particular security and receiving the income therefrom, and the registrar shall not issue a certificate of incorporation unless such deposit shall have been made, and the Accountant-General shall return such deposit to the company so soon as its life assurance fund accumulated out of the premiums shall have amounted to forty thousand pounds.

(*a*) See Life Assurance Comp. Act, 1871, s. 1; Life Assurance Comp. Act, 1872, s. 1, *infra*.

In the case of a foreign company commencing to carry on business in this country, the life assurance fund of £40,000 may consist of accumulations already existing abroad, and arising from the original foreign business of the company. The deposit of £20,000 may be paid out to the depositors although this section says "to the company" (*t*).

Where the E. Company formed in 1885 had made the deposit, and in 1889 amalgamated with the sanction of the Court with the M. Company, and the M. Company and E. Company concurred in a petition for payment out of the deposit upon the footing that although the E. Company had not made any accumulation, yet the M. Company had a life assurance fund of upwards of £100,000, the order was refused. For the meaning of the Act is that the company which made the deposit shall have carried on its business so prosperously as to have accumulated out of the profits of that business £40,000. The petition was directed to stand over, with an intimation that the order might be made when the M. Company should have accumulated a further £40,000 out of the premiums of any or all of its policies (*u*).

Life funds separate.

4. In the case of a company established after the passing of this Act (*a*), transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance;

(*t*) *Colonial Mutual Society*, 21 Ch. D. 837; 46 L. T. 282; 30 W. R. 458; *Scottish Life Assurance*, W. N. 1887, 64.

(*u*) *Scottish Economic Society*, W. N. 1890, 133.

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and in respect to all existing companies, the exemption of the life assurance fund from liability for other obligations than to its life policy-holders shall have reference only to the contracts entered into after the passing of this Act, unless by the constitution of the company such exemption already exists: Provided always, that this section shall not apply to any contracts made by any existing company by the terms of whose deed of settlement the whole of the profits of all the business are paid exclusively to the life policy-holders, and on the face of which contracts the liability of the assured distinctly appears.

(a) And also in the case of a company established before the passing of this Act, provided that the liability of the life assurance fund for contracts of the company entered into before the passing of this Act, shall not be diminished; see Life Assurance Comp. Act, 1872, s. 2, *infra*.

Statements to be made by companies.

5. From and after the passing of this Act every company shall, at the expiration of each financial year of such company, prepare a statement of its revenue account for such year, and of its balance sheet at the close of such year, in the forms respectively contained in the first and second schedules to this Act.

Statements by company doing other than life business.

6. Every company which, concurrently with the granting of policies of assurance or annuities on human life, transacts any other kind of assurance or other business shall, at the expiration of each such financial year as aforesaid, prepare statements of its revenue account for such year, and of its balance sheet at the close of such year, in the forms respectively contained in the third and fourth schedules of this Act.

Actuarial report and abstract.

7. Every company shall, once in every five years if established after the passing of this Act, and once every ten years if established before the passing of this Act, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or bye-laws, cause an investigation to be made into its financial condition by an actuary, and shall cause an abstract of the report of such actuary to be made in the form prescribed in the fifth schedule to this Act.

Statement of life and annuity business.

8. Every company shall, *on or before the thirty-first day of December, one thousand eight hundred and seventy-two, and thereafter* (a), within nine months after the date of each such investigation as aforesaid into its financial condition, prepare a statement of its life assurance and annuity business in the form contained in the sixth schedule to this Act, each of such statements to be made up as at the date of the last investigation, *whether such investigation be made previously or subsequently to the passing of this Act* (a): Provided as follows:—

(1.) *If the next financial investigation after the passing of this Act of any company fall during the year one thousand eight hundred and seventy-three, the said statement of such company shall be prepared within nine months after the date of such investigation, instead of on or before the thirty-first day of December, one thousand eight hundred and seventy-two* (a):

(2.) If such investigation be made annually by any company, such company may prepare such statement at any time, so that it be made at least once in every three years.

The expression "date" of each such investigation in this section shall mean the date to which the accounts of each company are made up for the purpose of each such investigation.

(a) Struck out by Statute Law Revision Act, 1883.

Forms may be altered.

9. The Board of Trade, upon the applications of or with the consent of a company, may alter the forms contained in the schedules of this Act, for the purpose of adapting them to the circumstances of such company, or of better carrying into effect the objects of this Act.

Statements, &c., to be signed and printed and deposited with Board of Trade.

10. Every statement or abstract hereinbefore required to be made shall be signed by the chairman and two directors of the company and by the principal officer managing the life assurance business, and, if the company has a managing director, by such managing director, and shall be printed; and the original, so signed as aforesaid, together with three printed copies thereof, shall be deposited at the Board of Trade within nine months of the dates respectively hereinbefore prescribed as the dates at which the same are to be prepared. And every annual statement so deposited after the next investigation (a) shall be accompanied by a printed copy of the abstract required to be made by section seven.

(a) *i.e.* the first after the passing of this Act; see Life Assurance Comp. Act, 1872, s. 3. *infra.*

Copies of statements to be given to shareholders, &c.

11. A printed copy of the last deposited statement, abstract, or other document by this Act required to be printed shall be forwarded by the company, by post or otherwise, on application, to every shareholder and policy-holder of the company.

List of shareholders.

12. Every company which is not registered under "The Companies Act, 1862," and which has not incorporated in its deed of settlement section ten of "The Companies Clauses Consolidation Act, 1845," shall keep a "Shareholders' Address Book," in accordance with the provisions of that section, and shall furnish,

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on application, to every shareholder and policy-holder of the company a copy of such book, on payment of a sum not exceeding sixpence for every hundred words required to be copied for such purpose.

Deed of settlement to be printed.

13. Every company which is not registered under "The Companies Act, 1862," shall cause a sufficient number of copies of its deed of settlement to be printed, and shall furnish, on application, to every shareholder and policy-holder of the company a copy of such deed of settlement on payment of a sum not exceeding two shillings and sixpence.

Amalgamation or transfer.

14. Where it is intended to amalgamate two or more companies, or to transfer the life assurance business of one company to another, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement, notice of such application being published in the *Gazette*, and the Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may confirm the same if it is satisfied that no sufficient objection to the arrangement has been established.

Before any such application is made to the Court (*a*) a statement of the nature of the amalgamation or transfer, as the case may be, together with an abstract containing the material facts embodied in the agreement or deed under which such amalgamation or transfer is proposed to be effected, and copies of the actuarial or other reports upon which such agreement or deed is founded, shall be forwarded to each policy-holder of both companies in case of amalgamation, or to each policy-holder of the transferred company in case of transfer, by the same being transmitted in manner provided by section one hundred and thirty-six of the Companies Clauses Consolidation Act, 1845, for the transmission to shareholders of notices not requiring to be served personally; and the agreement or deed under which such amalgamation or transfer is effected shall be open for the inspection of the policy-holders and shareholders at the office or offices of the company or companies for a period of fifteen days after the issuing of the abstract herein provided.

The Court shall not sanction any amalgamation or transfer in any case in which it appears to the Court that policy-holders (β) representing one-tenth or more of the total amount assured in any company which it is proposed to amalgamate or in any company the business of which it is proposed to transfer, dissent from such amalgamation or transfer.

No company shall amalgamate with another, or transfer its

business to another, unless such amalgamation or transfer is confirmed by the Court in accordance with this section.

Provided always that this section shall not apply in any case in which the business of any company which is sought to be amalgamated or transferred does not comprise the business of life assurance.

(α) *i.e.* before the hearing (not the presentation) of the petition: *Briton Life Association*, W. N. 1887, 122; 35 W. R. 803.

(β) This includes an annuitant, *v. s.* 2.

London and Southwark Corporation (*x*) is a case of petition under this section, and the cases next mentioned are others.

It will be noticed that this is not an enabling but a restrictive section. If a company has not by its constitution power to transfer its business, this Act does not give it power (*y*). But if, having under its constitution power to alter its regulations, it does alter them by taking power to transfer its business, then it has been held that a transfer will be *intra vires* (*z*).

And assuming that the company has or acquires power, then the effect of the Act is to disable it from using the power except under the provisions of the Act.

The transfer contemplated by the Act is a transfer of the whole of the assurance business as a going concern without any reduction in the policies or any fresh contracts with the policy-holders (*y*).

Statements in case of amalgamation or transfer.

15. When an amalgamation takes place between any companies, or when the business of one company is transferred to another company, the combined company or the purchasing company, as the case may be, shall, within ten days from the date of the completion of the amalgamation or transfer, deposit with the Board of Trade certified copies of statements of the assets and liabilities of the companies concerned in such amalgamation or transfer, together with a statement of the nature and terms of the amalgamation or transfer, and a certified copy of the agreement or deed under which such amalgamation or transfer is effected, and certified copies of the actuarial or other reports upon which such agreement or deed is founded; and the statement and agreement or deed of amalgamation or transfer shall be accompanied by a declaration under the hand of the chairman of each company and the principal managing officer of each company, that to the best of their belief every payment made or to be made to any person whatsoever on account of the said amalgamation or transfer is therein fully set forth, and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities, or other property by or with the knowledge of any parties to the said amalgamation or transfer.

(*x*) W. N. 1880, 65; 28 W. R. 565; 42 L. T. 247.

(*y*) *Sovereign Co.*, 42 Ch. D. 540.

(*z*) *Argus Co.*, 39 Ch. D. 571.

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Documents may be transferred from Board of Trade to registry of Joint Stock Companies.

16. The Board of Trade may direct any printed or other documents required by this Act, or certified copies thereof, to be kept by the Registrar of Joint Stock Companies, or other officer of the Board of Trade; and any person may, on payment of such fees as the Board of Trade may direct, inspect the same at his office and procure copies thereof.

Documents to be received in evidence.

17. Every statement, abstract, or other document deposited with the Board of Trade or with the Registrar of Joint Stock Companies under this Act shall be receivable in evidence; and every document purporting to be certified by one of the secretaries or assistant secretaries of the Board of Trade, or by the said registrar, to be such deposited document, and every document purporting to be similarly certified to be a copy of such deposited document, shall, if produced out of the custody of the Board of Trade or of the said registrar, be deemed to be such deposited document as aforesaid, or a copy thereof, and shall be received in evidence as if it were the original document, unless some variation between it and the original document shall be proved.

Penalty for non-compliance with Act.

18. Every company which makes default in complying with the requirements of this Act shall be liable to a penalty not exceeding fifty pounds for every day during which the default continues; and if default continue for a period of three months after notice of default by the Board of Trade, which notice shall be published in one or more newspapers as the Board of Trade may direct, and after such publication the Court may order the winding-up of the company in accordance with the Companies Act, 1862, upon the application of one or more policy-holders or shareholders.

Penalty for falsifying statements, &c.

19. If any statement, abstract, or other document required by this Act is false in any particular to the knowledge of any person who signs the name, such person shall be liable, on conviction thereof on indictment, to fine and imprisonment, or on summary conviction thereof to a penalty not exceeding fifty pounds.

Penalties how to be recovered and applied.

20. Every penalty imposed by this Act shall be recovered and applied in the same manner as penalties imposed by the Companies Act, 1862, are recoverable and applicable (a).

(a) See Comp. Act, 1862, ss. 65, 66.

Other circumstances under which company may be wound up by the Court of Chancery.

21. The Court may order the winding-up of any company, in accordance with the Companies Act, 1862, on the application of one or more policy-holders (a) or shareholders, upon it being proved to the satisfaction of the Court that the company is insolvent: and in determining whether or not the company is

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insolvent the Court shall take into account its contingent or prospective liability under policies and annuity and other existing contracts (β); but the Court shall not give a hearing to the petition until security for costs for such amount as the judge shall think reasonable shall be given, and until a *primâ facie* case shall also be established to the satisfaction of the judge; and in the case of a proprietary company having an uncalled capital of an amount sufficient, with the future premiums receivable by the company, to make up the actual invested assets equal to the amount of the estimated liabilities, the Court shall suspend further proceedings on the petition for a reasonable time (in the discretion of the Court) to enable the uncalled capital, or a sufficient part thereof, to be called up; and if at the end of the original or any extended time for which the proceedings shall have been suspended, such an amount shall not have been realized by means of calls as, with the already invested assets, to be equal to the liabilities, an order shall be made on the petition as if the company had been proved insolvent.

(α) Including the holder of a current policy and an annuitant, *v.* s. 2. This is an extension of Comp. Act, 1862, s. 82, which applies only to creditors and contributories. See further, as to the winding-up of amalgamated companies, Life Ass. Comp. Act, 1872, s. 4, *infra*.

(β) This is introduced in consequence of the decision in *In re European Life Assurance Society*, 9 Eq. 122; and see *supra*, pp. 218, 221.

Sect. 2 of this Act defines "company" in such way as to include some companies which *semble* could not have been wound up under the Companies Act, 1862. Thus a mutual insurance society in which there is no liability in any one to contribute to the payment of debts may be wound up under this Act (a).

"Any company."

When a petition is presented under this section the practice is to mark the petition with a special fiat in the following form:—

Practice.

"The Court doth order that this petition be referred to the judge in chambers to enquire whether a *primâ facie* case within the meaning of s. 21 of the Life Assurance Companies Act, 1870, is established and to consider the security for costs to be given pursuant to the same section, and the result of such enquiry is to be certified to the Court."

The matter then goes to chambers and is there heard *ex parte*. The reason why the company is not heard on the preliminary enquiry is conceived to be that the petitioner is only required to make out a *primâ facie* case, and that if the company were heard, the result would in fact be that the real matter in issue on the petition would be fought out on the preliminary enquiry. Thus, either the solvency of the company would be tried in a private proceeding, or the company would lose the benefit of the privacy, which the Act desires to maintain until a *primâ facie* case is shewn.

Upon the result of the proceedings in chambers, the petition will be answered for hearing in the usual way.

It has been held that policy-holders who had deposited their policies with the company, and who under its rules were therefore entitled to the cash

(a) *Great Britain Mutual Society*, 16 Ch. Div. 246.

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value of their policies, were not entitled to petition as creditors, but only as policy-holders. The petition having been answered for hearing in the usual way, the fiat was struck out, and a reference directed to chambers as in the special fiat above given (*b*).

The petition must be entitled under this Act (*c*).

The Court is not obliged to suspend proceedings on the petition simply because the uncalled capital is sufficient as in the section mentioned, if it is satisfied that there is not capital realizable to a sufficient amount (*d*).

If the company has passed resolutions for voluntary liquidation, *semble* the Court need not require either a *primâ facie* case to be shewn or security for costs to be given (*e*).

Provisional liquidator.

The Court will not appoint a provisional liquidator *ex parte*, before the preliminary enquiry has been answered (*f*).

Insolvency.

In the case of a company with uncalled capital it is conceived that the test of insolvency is this. Estimate the present value of the future premiums without the loading: estimate the present value of the company's liabilities and contingent liabilities. If the assets plus the uncalled capital (or such amount of it as is shewn to be realizable (*d*)) plus the present value of the premiums without the loading exceeds the present value of the liabilities, the company is not insolvent within the meaning of this section.

And *quære* whether as in *Re London and Manchester Association* (*f*), the Court can decline to go into this.

Of course if the company is unable to meet current demands, it is commercially insolvent and may be wound up apart from the special grounds of what may be called prospective insolvency, for which this section is intended to provide.

Power to Court to reduce contracts.

22. The Court, in the case of a company which has been proved to be insolvent, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the Court thinks just, in place of making a winding-up order.

As a general rule the date to be taken for ascertaining what contracts are to be reduced under the scheme is the date of the presentation of the petition. The Court has a discretion under this section, and might fix another date if there were special circumstances to take the case out of the general rule (*g*).

Claims of policy-holders and annuitants which have matured before that date must be paid in full: all subsequent claims whether they have matured before the scheme is settled or not must be reduced (*g*).

Holders of current policies, whether participating or non-participating, must be reduced *pari passu* (*g*).

All payments in arrear in respect of premiums must be paid in full (*g*).

Notices under this Act to policy-holders.

23. Any notice which is by this Act required to be sent to any policy-holder may be addressed and sent to the person to whom

(*b*) *British Imperial Assurance Co.*, W. N. 1875, 184.

(*c*) *British Alliance Corporation*, W. N. 1877, 261.

(*d*) *National Funds Assurance Co.*, W. N. 1876, 239.

(*e*) *British Alliance Corporation*, 9 Ch. D. 635.

(*f*) *London and Manchester Association*, 1 Ch. D. 466.

(*g*) *Great Britain Mutual Society*, 19 Ch. D. 39; 20 Ch. Div. 351.

notices respecting such policy are usually sent, and any notice so addressed and sent shall be deemed and taken to be notice to the holder of such policy. Sect. 24.

Statements, &c., to be laid before Parliament.

24. The Board of Trade shall lay annually before Parliament the statements and abstracts of reports deposited with them under this Act during the preceding year.

Exceptions.

25. This Act shall not affect the Commissioners for the Reduction of the National Debt nor the Postmaster-General acting under the authorities vested in them respectively by the Acts tenth George the Fourth, chapter twenty-four (*); third and fourth William the Fourth, chapter fourteen; sixteenth and seventeenth Victoria, chapter forty-five; and twenty-seventh and twenty-eighth Victoria, chapter forty-three.

*[*Altered from* forty-one, *pursuant to* 34 & 35 *Vict. c.* 58.]

FIRST SCHEDULE. (SECT. 5.)

Revenue Account of the _____ for the year ending _____

18 . (Date.)		£ s. d.	18 . (Date.)		£ s. d.
	Amount of funds at the beginning of the year			Claims under policies (after deduction of sums re-assured) – – – – –	
	Premiums – – – – – –			Surrenders – – – – –	
	Consideration for annuities granted – –			Annuities – – – – – –	
	Interest and dividends – – – –			Commission – – – – –	
	Other receipts (accounts to be specified) –			Expenses of management – – –	
				Dividends and bonuses to shareholders (if any)	
				Other payments (accounts to be specified) –	
				Amount of funds at the end of the year, as per second schedule – – – –	

Note 1.—Companies having separate accounts for annuities to return the particulars of their annuity business in a separate statement.

Note 2.—Items in this and in the accounts in the Third and Fifth Schedules should be the net amounts after deduction of the amounts paid and received in respect of re-assurances.

SECOND SCHEDULE (SECT. 5.)

Balance-sheet of the _____ on the _____ 18__.

LIABILITIES.	£ s. d.	ASSETS.	£ s. d.
Shareholders' capital paid up (if any) – – £		Mortgages on property within the United Kingdom – –	
Assurance Fund – – – – – – –		Do. do. out of the United Kingdom – –	
Annuity fund (if any) – – – – – –		Loans on the company's policies – – – – –	
Other funds, if any, to be specified – – – –		Investments:	
		In British Government securities – – – –	
Total funds as per first schedule – – – –		Indian and Colonial government securities – –	
Claims admitted but not paid * – – – – £		Foreign government securities – – – –	
Other sums owing by the company * (accounts to be specified) – – – – – – – –		Railway and other debentures and debenture stocks –	
		Railway shares (preference and ordinary) – –	
		House property – – – – – –	
		Other investments (to be specified) – – –	
		Loans upon personal security – – – – –	
		Agents' balances – – – – – –	
		Outstanding premiums – – – – – –	
		Do. Interest – – – – – –	
		Cash:	
		On deposit – – – – £	
		In hand and on current account – –	
		Other assets (to be specified) – – – – –	
		£	

* *Note.*—These items are included in the corresponding items in the First Schedule.

THIRD SCHEDULE. (SECT. 6.)

Revenue Account of the _____ for the year ending _____.

(No. 1.) LIFE ASSURANCE ACCOUNT.

(Date.)		£	(Date.)		£
	Amount of life assurance fund at the beginning of the year			Claims under life policies (after deduction of sums re-assured)	
	Premiums, after deduction of re-assurance premiums			Surrenders	
	Consideration for annuities granted			Annuities	
	Interest and dividends			Commission	
	Other receipts (accounts to be specified)			Expenses of management	
				Other payments (accounts to be specified)	
				Amount of life assurance fund at the end of the year, as per Fourth Schedule	

Note.—Companies having separate accounts for annuities to return the particulars of their annuity business in a separate statement.

(No. 2.) FIRE ACCOUNT.

	£		£
Amount of fire insurance fund at the beginning of the year		Losses by fire after deduction of re-assurances	
Premiums received, after deduction of re-assurances		Expenses of management	
Other receipts to be specified		Commission	
		Other payments to be specified	
		Amount of fire insurance fund at the end of the year, as per Fourth Schedule	

Note.—When marine or any other branch of business is carried on, the income and expenditure thereof to be in like manner stated in a separate account.

(No. 3.) PROFIT AND LOSS ACCOUNT.

	£		£
Balance of last year's account		Dividends and bonuses to shareholders	
Interest and dividends not carried to other accounts		Expenses not charged to other accounts	
Profits realized (accounts to be specified)		Loss realized (accounts to be specified)	
Other receipts		Other payments	
		Balance as per Fourth Schedule	

Note.—This account is not required if the items have been incorporated in the other accounts of this schedule.

FOURTH SCHEDULE. (SECT. 6.)

Balance-sheet of the _____ on the _____ 18__.

LIABILITIES.	£ s. d.	£ s. d.	ASSETS.	£ s. d.	£ s. d.
Shareholders' capital			Mortgages on property within the United Kingdom		
General reserve fund (if any)			Do. do. out of the United Kingdom		
Life Assurance fund *			Loans on the company's policies		
Annuity fund (if any) *			Investments:		
Fire fund			In British Government securities		
Marine fund			Indian and Colonial do.		
Profit and loss (if any)			Foreign do.		
Other funds, if any, to be specified			Railway and other debentures and debenture stocks		
			Railway shares (preference and ordinary)		
	£ s. d.		House property		
Claims under life policies admitted but not yet paid *			Other investments (to be specified)		
Outstanding fire losses			Loans upon personal security		
Do. marine do.			Agents' balances		
Other sums owing by the company (accounts to be specified			Outstanding premiums		
			Do. interest		
			Cash:		
			On deposit £		
			In hand and on current account		
	£		Other assets (to be specified)	£	

* If the life assurance fund is, in accordance with section 4 of this Act, a separate trust fund for the sole security of the life policy-holders, a separate balance-sheet for the life branch may be given in the form contained in Schedule 2. In other respects the company is to observe the above form. See also note to Second Schedule.

Sch. 5.

FIFTH SCHEDULE. (SECT. 7.)

STATEMENT respecting the VALUATION of the LIABILITIES under LIFE POLICIES and ANNUITIES of the , to be made by the ACTUARY.

(The answers should be numbered to accord with the numbers of the corresponding questions.)

1. The date up to which the valuation is made.
2. The principles upon which the valuation and distribution of profits among the policy-holders are made, and whether these principles were determined by the instrument constituting the company, or by its regulations or bye-laws, or otherwise.
3. The table or tables of mortality used in the valuation.
4. The rate or rates of interest assumed in the calculations.
5. The proportion of the annual premium income, if any, reserved as a provision for future expenses and profits. (If none, state how this provision is made.)
6. The consolidated revenue account since the last valuation, or, in case of a company which has made no valuation, since the commencement of the business. (This return should be made in the form annexed.)
7. The liabilities of the company under life policies and annuities at the date of the valuation, shewing the number of policies, the amount assured, and the amount of premiums payable annually under each class of policies, both with and without participation in profits; and also the net liabilities and assets of the company, with the amount of surplus or deficiency. (These returns should be made in the forms annexed.)
8. The time during which a policy must be in force in order to entitle it to share in the profits.
9. The results of the valuation, shewing—
   (1.) The total amount of profit made by the company.
   (2.) The amount of profit divided among the policy-holders, and the number and amount of the policies which participated.
   (3.) Specimens of bonuses allotted to policies for £100, effected at the respective ages of 20, 30, 40, and 50, and having been respectively in force for five years, ten years, and upwards, at intervals of five years respectively, together with the amounts apportioned under the various modes in which the bonus might be received.

(FORM referred to under heading No. 6, in the Fifth Schedule.)

Consolidated Revenue Account of the_____for_____years,

commencing_____and ending_____.

	£ s. d.		£ s. d.
Amount of funds on_____18__,—the beginning of – – – – – –		Claims under policies (after deduction of sums re-assured)	
Premiums (after deduction of re-assurance premiums) –		Surrenders – – – – – – –	
Consideration for annuities granted – – – –		Annuities – – – – – – –	
Interest and dividends – – – – –		Commission – – – – – – –	
Other receipts (accounts to be specified) – – –		Expenses of management – – – – –	
		Dividends and bonuses to shareholders (if any) – –	
		Other payments (accounts to be specified) – – –	
		Amount of funds on_____18__,—the end of the period, as per First (or Third) Schedule – – –	

(FORM referred to under heading No. 7, in Fifth Schedule.)

SUMMARY and VALUATION of the POLICIES of the_____as at_____18___.

Description of Transaction.	Particulars of the POLICIES for Valuation.				VALUATION.			
					Value by the	Table, Interest	per cent.	
	Number of policies.	Sums assured and bonuses.	Office yearly premiums.	Net yearly premiums, if ascertained.	Sums assured and bonuses.	Office yearly premiums.	Net yearly premiums, if computed.	Net liability.
ASSURANCES.								
I. *With participation in profits.*								
For whole term of life – – – –								
Other classes (to be specified) – – –								
Extra premiums payable – – –								
Total Assurances with profits – –								
II. *Without participation in profits.*								
For whole term of life – – – –								
Other classes (to be specified) – – –								
Extra premiums payable – – – –								
Total Assurances without profits –								
Total assurances – – – –								
Deduct re-assurances – – –								
Net amount of assurances – –								
Adjustments, if any – – –								
ANNUITIES.								
Immediate – – – – – –								
Other classes (to be specified) – – –								
Total of the results – – – – – – – – –								

The term "extra premium" in this Act shall be taken to mean the charge for any risk not provided for in the minimum contract premium. If policies are issued in or for any country at rates of premium deducted from tables other than the European mortality tables adopted by the company, separate schedules similar in form to the above must be furnished.

(Form referred to under heading No. 7, in Fifth Schedule.)

Valuation Balance Sheet of_____ as at_____ 18__.

Dr.	£	Cr.	£
To net liability under Assurance and Annuity transactions (as per summary statement provided in Schedule 5) –		By life assurance and annuity funds (as per balance sheet under Schedule 2 or 4) – – –	
To surplus, if any – – – – – – – –		By deficiency, if any – – – – – – –	

Sch. 6.

SIXTH SCHEDULE. (SECT. 8.)

STATEMENT of the LIFE ASSURANCE and ANNUITY BUSINESS OF the on the 18 .

(The answers should be numbered to accord with the numbers of the corresponding questions. Statements of re-assurances corresponding to the statements in respect of assurances, under headiogs 2, 3, 4, 5, and 6, are to be given.)

1. The published table or tables of premiums for assurances for the whole term of life which are in use at the date above mentioned.

2. The total amount assured on lives for the whole term of life, which are in existence at the date above mentioned, distinguishing the portions assured with and without profits, stating separately the total reversionary bonuses and specifying the sums assured for each year of life from the youngest to the oldest ages.

3. The amount of premiums receivable annually for each year of life, after deducting the abatements made by the application of bonuses, in respect of the respective assurances mentioned under heading No. 2, distinguishing ordinary from extra premiums.

4. The total amount assured under classes of assurance business other than for the whole term of life, distinguishing the sums assured under each class, and stating separately the amount assured with and without profits, and the total amount of reversionary bonuses.

5. The amount of premiums receivable annually in respect of each such special class of assurances mentioned under heading No. 4, distinguishing ordinary from extra premiums.

6. The total amount of premiums which has been received from the commencement upon all policies under each special class mentioned under heading 4, which are in force at the date above mentioned.

7. The total amount of immediate annuities on lives, distinguishing the amounts for each year of life.

8. The amount of all annuities other than those specified under heading No. 7, distinguishing the amount of annuities payable under each class, the amount of premiums annually receivable, and the amount of consideration money received in respect of each such class, and the total amount of premiums received from the commencement upon all deferred annuities.

9. The average rate of interest at which the life assurance fund of the company was invested at the close of each year during the period since the last investigation.

10. A table of minimum values, if any, allowed for the surrender of policies for the whole term of life and for endowments and endowment assurances, or a statement of the method pursued in calculating such surrender values, with instances of its application to policies of different standing and taken out at various interval ages from the youngest to the oldest.

Separate statements to be furnished for business at other than European rates, together with a statement of the manner in which policies on unhealthy lives are dealt with.

THE LIFE ASSURANCE COMPANIES ACT, 1871.

34 & 35 VICT. c. 58.

An Act to amend the Life Assurance Companies Act, 1870.

[24th July, 1871.]

WHEREAS by section three of the Life Assurance Companies Act, 1870, a sum of money is required in certain cases to be deposited with the Accountant-General of the Court of Chancery, to be invested and returned by him in manner therein directed, and it is expedient to make further provision in respect of the deposit, investment, and return of such sum: 33 & 34 Vict. c. 61.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Every sum required by the Life Assurance Companies Act*, 1870, *to be deposited with the Accountant-General of the Court of Chancery* (*a*), *shall be paid into the Court of Chancery, and orders with respect to the payment of such money into and out of Court, and the investment and return thereof, and the payment of the dividends and interest thereof, may be from time to time made, altered, and revoked by the like authority* (β) *and in the like manner as orders with respect to the payment into and out of Court, and the investment of other money, and the application of the dividends and interest thereof.* Payment into Court and orders as to sums deposited under 33 & 34 Vict. c. 61, s. 3.

(*a*) 33 & 34 Vict. c. 61, s. 3, *supra*.

(β) The Life Ass. Comp. Act, 1872, s. 1, *infra*, seems to clash with this.

This section is repealed by Statute Law Revision Act, 1883.

2. Section twenty-five of the Life Assurance Companies Act, 1870, shall be construed as if the words "chapter twenty-four" were and had at and from the date of the passing of such last-mentioned Act been inserted therein in place of "chapter forty-one;" and her Majesty's Printers shall in all copies of the Life Assurance Companies Act, 1870, which may be printed after the passing of this Act, insert the words "chapter twenty-four" in the place of the words "chapter forty-one" in section twenty-five of the said Life Assurance Companies Act, 1870. Amendment of s. 25 of 33 & 34 Vict. c. 61.

3. This Act shall be construed as one with the Life Assurance Companies Act, 1870, and that Act and this Act may be cited together as the Life Assurance Companies Acts, 1870 and 1871, and this Act may be cited as the Life Assurance Companies Act, 1871. Construction and short title.

THE LIFE ASSURANCE COMPANIES ACT, 1872.

35 & 36 VICT. c. 41.

An Act to amend the Life Assurance Companies Act, 1870 *and* 1871. [6th August, 1872.]

BE IT ENACTED by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Deposit by company in Court of Chancery.

1. Whereas by the provisions of "The Life Assurance Companies Acts, 1870 and 1871," a life assurance company is required to pay a sum of money into the Court of Chancery by way of deposit, and the certificate of incorporation of such company is not to be issued unless such deposit has been made, and such deposit is to be returned to the company as soon as its life assurance fund amounts to the sum therein mentioned; and doubts have arisen as to the construction of the said provisions, and it is expedient to remove such doubts; be it therefore enacted as follows:—

The said deposit may be made by the subscribers of the memorandum of association of the company, or any of them, in the name of the proposed company, and such deposit upon the incorporation of the company shall be deemed to have been made by and to be part of the assets of the company.

The said deposit shall, until returned to the company, be deemed to form part of the life assurance fund of the company, and shall be subject to the provisions of section four of the Life Assurance Companies Act, 1870, accordingly. The Board of Trade (*a*) may from time to time make, and when made revoke, alter, or add to, rules with respect to the payment and repayment of the said deposit, the investment of or dealing with the same, the deposit of stocks or securities in lieu of money, and the payment of the interest or dividends from time to time accruing due on any such investment, stocks, or securities in respect of such deposit. Any rules made in pursuance of this section shall have effect as if they were enacted in this Act, and shall be laid before Parliament within three weeks after they are made, if Parliament be then sitting, or if not, within three weeks after the beginning of the then next session of Parliament.

(*a*) The Life Ass. Comp. Act, 1871, s. 1, *supra*, seems to clash with this.

The Board of Trade, in pursuance of the powers conferred upon them by this section, made Rules dated the 28th of August, 1872, which will be found printed immediately after this Act.

Separation of life funds.

2. Whereas, by section four of the Life Assurance Companies Act, 1870, it is enacted that, "In the case of a company established after the passing of this Act transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund, to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance:" and further provisions were made by the same section, with respect to the application of the above-recited part of the said section to existing companies, and doubts have arisen with respect to the construction of the said provisions, and it is expedient to remove such doubts; be it therefore enacted,

That the portion of section four of the Life Assurance Companies Act, 1870, above recited, shall apply to every company established before the passing of that Act, provided that the Life Assurance Companies Act, 1870, and this Act shall not diminish the liability of the life assurance fund for any contracts of the company entered into before the passing of the Life Assurance Companies Act, 1870.

Deposit of statement and abstract required by 33 & 34 Vict. c. 61, s. 10.

3. Whereas by section ten of the Life Assurance Companies Act, 1870, it is provided that, "Every annual statement so deposited after the next investigation shall be accompanied by a printed copy of the abstract required to be made by section seven," be it therefore enacted that the words "next investigation" shall be construed to mean the first investigation after the passing of the said Act.

The Board of Trade shall lay before Parliament any statement or abstract of report which is deposited with them by any company, and purports to be in pursuance of Life Assurance Companies Act, 1870, although the Board are of opinion that it is not such a statement or abstract as is required to be prepared by that Act.

Winding-up of subsidiary company to be

4. Where the business or any part of the business of a life assurance company has, either before or after the passing of this

Sect. 4. ancillary to winding-up of principal company.

Act, been transferred to another company under an arrangement in pursuance of which such first-mentioned company (in this Act called the subsidiary company) or the creditors thereof has or have claims against the company to which such transfer was made (in this Act called the principal company), then, if such principal company is being wound up by or under the supervision of the Court, either at or after the passing of this Act, the Court shall (subject as hereinafter mentioned) order the subsidiary company to be wound up in conjunction with the principal company, and may by the same or any subsequent order appoint the same person to be liquidator for the two companies, and make provision for such other matters as may seem to the Court necessary, with a view to such companies being wound up as if they were one company; and the commencement of the winding-up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding-up of the subsidiary company (*a*); the Court nevertheless shall have regard, in adjusting the rights and liabilities of the members of the several companies between themselves, to the constitution of such companies, and to the arrangements entered into between the said companies, in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding-up of a single company, or as near thereto as circumstances admit.

Where any subsidiary company, or company alleged to be subsidiary, is not in process of being wound up at the same time as the principal company to which it is subsidiary, the Court shall not direct such subsidiary company to be wound up, unless, after hearing all objections (if any) that may be urged by or on behalf of such company against its being wound up, the Court is of opinion that such company is subsidiary to the principal company, and that the winding-up of such company in conjunction with the principal company is just and equitable (β).

Where any subsidiary company and principal company are being wound up by different branches of the Court, the Court to which appeals from such branches lie shall make an order directing in which branch the winding-up of such companies is to be carried on, and the necessary proceedings shall be taken for carrying such order into effect.

An application may be made in relation to the winding-up of any subsidiary company in conjunction with a principal company by any creditor of, or person interested in, such principal or subsidiary company (γ).

Where a company stands in the relation of a principal company to one company, and in the relation of a subsidiary company to some other company, or where there are several companies standing in the relation of subsidiary companies to one principal company, the Court may deal with any number of such companies together or in separate groups, as it thinks most expedient, upon the principles laid down in this section. Sect. 4.

(α) Comp. Act, 1862, s. 84. (β) Comp. Act, 1862, s. 79 (5).
(γ) Comp. Act, 1862, s. 82.

Sub-sects. 1, 2.

It is not easy to foresee the effect of the enactments contained in the first two paragraphs of this section.

It may be prefaced that the section is so worded as, in all the usual forms of amalgamation in which a transfer of business and assets is effected by the one company, and a guarantee of indemnity against liabilities given by the other company, to render unnecessary, for the purpose of making the order, the determination of any questions of novation. The section is applicable where the subsidiary company or the creditors thereof has or have claims against the principal company. If novation has been effected by the creditors of the subsidiary company, they have claims against the principal company; if no novation has been effected, the subsidiary company has, under the guarantee of indemnity, claims against the principal company. In either case, so long as any claims of creditors of the subsidiary company are in existence, the section will apply.

This being premised, it will be observed that the first paragraph is mandatory except as controlled by the second paragraph. In the case, therefore, of a subsidiary company which is in process of being wound up at the same time as the principal company—*i.e.*, which is in liquidation at the time that the application is made under this section—the section is absolutely mandatory; but in the case of a subsidiary company not so in process of being wound up, the Court is not to make a winding-up order unless it is of opinion that the company is subsidiary, and that its winding-up in conjunction with the principal company is just and equitable. In this latter case the matter appears to stand in much the same position as under the Companies Act, 1862, s. 79 (5), with this exception, that while the 79th section enacts only that the company *may* be wound up under the circumstances there specified, under this section the mandatory enactment of the first paragraph must have effect if the conditions specified in the second paragraph are satisfied.

It may be observed further that the second paragraph appears to leave the Court no discretion to order the company to be wound up independently if it is of opinion that such a winding-up will be preferable; for, assuming the company to be a subsidiary company, "the Court shall not direct such subsidiary company to be wound up" (*i.e.*, no winding-up order whatever shall be made) unless the Court is of opinion that the winding-up *in conjunction with the principal company* is just and equitable.

Commencement of winding-up.

As to the commencement of the winding-up, Lord Westbury in the European Arbitration followed the ordinary course, and would not allow the winding-up of a subsidiary company to date from that of the principal company (*g*).

(*g*) *Gardiner's Case* (Eur. Arb.), L. T. 63; 17 Sol. J. 464; *Conquest's Case* (Eur. Arb.), L. T. 121.

Sect. 5.
Sub-sect. 4.

The fourth paragraph enlarges Comp. Act, 1862, s. 82, considerably, if, as appears, it allows a creditor or contributory of the principal company to petition for the winding-up of the subsidiary company.

Valuation of annuities and policies.

5. Where a life assurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of every life annuity and life policy requiring to be valued in such winding-up shall be estimated in manner provided by the first schedule to this Act (*a*), but this section shall not apply to any company the winding-up of which has commenced before the passing of this Act, unless the Court having cognizance of the winding-up so order, which order that Court is hereby empowered to make, if it think it expedient so to do, on the application of any person interested in the winding-up of such company.

(*a*) See note to Comp. Act, 1862, s. 158, *supra*, pp. 354, 355.

This section is introduced to dispose of the difficulty created by the conflicting decisions in *Bell's Case* (*h*), *Holdich's Case* (*i*), and *Lancaster's Case* (*k*): *v. supra*, p. 354. It will be seen that the method of valuation adopted is that used by Lord Cairns in *Lancaster's Case*. It was followed by Lord Westbury in *Wallberg's Case* (*l*).

Rules in first and second schedules to be Rules of Court.

6. The Rules in the first and second schedules to this Act shall be of the same force as if they were Rules made in pursuance of the one hundred and seventieth, one hundred and seventy-first, and one hundred and seventy-third sections of "The Companies Act, 1862," as the case may be, and may be altered in manner provided by the said sections, and Rules may be made under the said sections for the purpose of carrying into effect the provisions of this Act with respect to the winding-up of companies.

Regulations as to novations by policy-holders.

7. Where a company, either before or after the passing of this Act, has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy shall by reason of any such payment made after the passing of this Act, or by reason of any other Act done after the passing of this Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized.

(*h*) 9 Eq. 706.
(*i*) 14 Eq. 72.
(*k*) 14 Eq. 72, n.; Reil. Alb. 76; 16 Sol. J. 103.
(*l*) (Eur. Arb.), Reil. 65; L. T. 50; 17 Sol. J. 69.

This section was rendered necessary by the decisions in the cases collected under Comp. Act, 1862, s. 158, *supra*, pp. 371–384.

Construction and short title.

8. This Act shall be construed as one with the Life Assurance Companies Acts, 1870 and 1871; and those Acts and this Act may be cited together as "The Life Assurance Companies Acts, 1870 to 1872;" and this Act may be cited as "The Life Assurance Companies Act, 1872."

FIRST SCHEDULE. (SECTS. 5, 6.)

Rule for valuing an Annuity.

AN annuity shall be valued according to the tables used by the company which granted such annuity at the time of granting the same, and where such tables cannot be ascertained or adopted to the satisfaction of the Court, then according to the table known as the Government Annuities Experience Table, interest being reckoned at the rate of four per centum per annum.

Rule for valuing a Policy.

The value of the policy is to be the difference between the present value (*m*) of the reversion in the sum assured on the decease of the life, including any bonus or addition thereto made before the commencement of the winding-up, and the present value of the future annual premiums.

In calculating such present values the rate of interest is to be assumed as being four per centum per annum, and the rate of mortality as that of the tables known as the Seventeen Offices' Experience Tables.

The premium to be calculated is to be such premium as according to the said rate of interest and rate of mortality is sufficient to provide for the risk incurred by the office in issuing the policy, exclusive of any addition thereto for office expenses and other charges.

This is the rule adopted by Lord Cairns in *Lancaster's Case* (*n*); it was followed by Lord Westbury in *Wallberg's Case* (*o*).

See further, s. 5, *supra*.

SECOND SCHEDULE. (SECTS. 5, 6.)

Where an assurance company is being wound up by the Court or subject to the supervision of the Court, the official liquidator in the case of all persons appearing by the books of the company to be entitled to or interested in policies granted by such company, for life assurance, endowment, annuity, or other payment, is to ascertain the value of such policies, and give notice of such value to such persons, and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in manner and within a time to be prescribed by a rule or order of the Court.

(*m*) *i.e.* at the date of the order to wind up. See Gen. Order, Nov. 1862, Rule 25, *infra*; *Wallberg's Case* (Eur. Arb.), Reil. 65; L. T. 50; 17 Sol. J. 69.

(*n*) 14 Eq. 72, n.; Reil. Alb. 76; 16 Sol. J. 103.

(*o*) (Eur. Arb.), Reil. 65; L. T. 50; 17 Sol. J. 69.

THE FRIENDLY SOCIETIES ACT, 1875.

38 & 39 Vict. c. 60.

An Act to consolidate and amend the Law relating to Friendly and other Societies.

[11th August, 1875.]

4. In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them.

* * * * * * *

"Industrial Assurance Company" means any company as defined by "The Life Assurance Companies Act, 1870," which grants assurances on any one life for a less sum than twenty pounds, and which receives premiums or contributions in Great Britain or Ireland by means of collectors at less periodical intervals than two months.

* * * * * * *

The sections of the Friendly Societies Act, 1875, relating to "Industrial Assurance Companies" are sects. 28 and 30.

"THE LIFE ASSURANCE COMPANIES ACTS, 1870 to 1872."

BOARD OF TRADE RULES.

THE BOARD OF TRADE, in pursuance of the powers conferred upon them under the first section of "The Life Assurance Companies Act, 1872," have made the following rules with respect to the payment into the Court of Chancery, and repayment of the deposit required to be made by a life assurance company, in pursuance of the provisions of the Life Assurance Companies Acts, 1870 and 1871; the investment of the deposit in securities, the deposit of stocks or securities in lieu of money, and the payment of the interest or dividends from time to time accruing due on any such stocks or securities.

1. In these Rules the term "the Court" means the High Court of Chancery in England, and the word "company" means a company as the same is defined in the second section of the Life Assurance Companies Act, 1870.

2. Where any company is required in pursuance of "The Life Assurance Companies Acts, 1870 to 1872," to deposit the sum of twenty thousand pounds with the Accountant-General of the Court of Chancery, the said company, or the subscribers of the memorandum of association of the said company, or any of them as the case may be (in these rules referred to as the promoters), may make application to the Board of Trade for a warrant, and the Board of Trade may thereupon issue their warrant to the promoters for such payment into Court, which warrant shall be a sufficient authority for the company or persons therein named to pay the money therein mentioned into the Bank of England, in the name and with the privity of the said Accountant-General, and for that officer to issue directions to such Bank to receive the same, to be placed to his account there, *ex parte* the company mentioned in such warrant, according to the method (prescribed by statute or general rules or orders of Court or otherwise), for the time being in force respecting the payment of money into the said Court, and without fee or reward.

Provided, that in lieu, wholly or in part, of the payment of money, the promoters may bring into Court, as a deposit, an equivalent sum of bank annuities, or of any stocks, funds, or

Rule 3. securities, in which cash under the control of the Court is for the time being permitted to be invested, or of Exchequer bills (the value thereof being taken at the price at which the promoters originally purchased the same, as appearing by the broker's certificate of that purchase); and in that case the Board of Trade shall vary their warrant accordingly by directing the transfer or deposit of such amount of stocks, funds, securities, or Exchequer bills by the persons therein named, into the name or to the account of the said Accountant-General in trust to attend the orders of the Court, *ex parte* the company mentioned in such warrant.

3. At any time when the office of the Accountant-General of the Court of Chancery is closed, a deposit under these Rules may nevertheless be made, in the manner and subject to the regulations provided with respect to deposits by companies by section 88 of the Lands Clauses Consolidation Act, 1845.

4. Where money is so paid into the Court of Chancery, the Court may, on the application of the company or the persons named in the warrant of the Board of Trade, or of the majority or survivors of such persons, order that the same be invested in such stocks, funds, or securities as the applicants desire, and the Court thinks fit.

The investment may under this rule be made in investments not within the existing rules relating to the investment of funds under the control of the Court (*p*).

5. In the subsequent provisions of these Rules, the term "the deposit fund" means the money deposited, or the stocks, funds, or securities in which the same is invested, or the bank annuities, stocks, funds, securities or Exchequer bills transferred or deposited, as the case may be, and the term "the depositors" means the company or persons named in the warrant of the Board of Trade authorizing the deposit, or the majority or survivors of those persons, their executors, administrators, or assigns.

6. The Court shall, on the application of the depositors, order the deposit fund to be paid, transferred, or delivered out to the applicants, or as they direct, so soon as it is proved to the satisfaction of the Court that the life assurance fund of the company in respect of which the deposit is made, accumulated out of premiums paid to the said company, amounts to the sum of forty thousand pounds.

The depositors and the company had better be co-petitioners; the petition should be signed by the depositors and their signatures proved by affidavit. The payment may be made to the company (*q*).

(*p*) *Blue Ribbon Co.*, W. N. 1889, 176.
(*q*) *Colonial Mutual Soc.*, 21 Ch. D. 837; *Scottish Life Ass.*, W. N. 1887, 64.

Rule 7.

7. The depositors shall be entitled to receive payment of the interest or dividends from time to time accruing on or in respect of the deposit while in Court. And the Court may, from time to time, on the application of the depositors, make such order as may seem fit respecting the payment of the interest or dividends accordingly.

8. The issuing in any case of any warrant or certificate relating to deposit or to the deposit fund, or any error in any such warrant or certificate, or in relation thereto, shall not make the Board of Trade, or the person signing the warrant or certificate on their behalf, in any manner liable for or in respect of the deposit fund, or the interest or dividends accruing on the same, or any part thereof respectively.

9. Any application under these Rules to the Court of Chancery shall be made in a summary way by petition.

W. R. MALCOLM.

BOARD OF TRADE,
28th August, 1872.

GENERAL ORDER AND RULES

OF THE

High Court of Chancery,

TO

REGULATE THE MODE OF PROCEEDING UNDER THE COMPANIES ACT, 1862.

ISSUED BY

THE LORD HIGH CHANCELLOR.

TUESDAY, 11TH DAY OF NOVEMBER, 1862.

ORDER OF COURT,

Tuesday, the 11th day of November, 1862.

THE RIGHT HONOURABLE RICHARD BARON WESTBURY, Lord High Chancellor of Great Britain, with the advice and consent of The Right Honourable SIR JOHN ROMILLY, Master of the Rolls, The Honourable The Vice-Chancellor SIR RICHARD TORIN KINDERSLEY, The Honourable The Vice-Chancellor SIR JOHN STUART, and The Honourable The Vice-Chancellor SIR WILLIAM PAGE WOOD, doth hereby, in pursuance and execution of the powers given by the Statute 25th and 26th Victoria, chapter 89 (*a*), and of all other powers and authorities enabling him in that behalf, order and direct in manner following:—

PETITION TO WIND UP COMPANY (*β*).

Title of petition.

1. Every petition for the winding-up of any company by the Court, or subject to the supervision of the Court, shall be intituled in the matter of "The Companies Act, 1862" (*γ*), and of the company to which such petition shall relate, describing the company by its most usual style or firm.

(*a*) Comp. Act, 1862, s. 170. (*β*) Comp. Act, 1862, ss. 82, 147.
(*γ*) See Gen. Order, March, 1868, Rule 1.

Rule 2.

By Gen. Order, March, 1868, Rule I, petitions, notices, affidavits, and other proceedings under petitions, after the 15th of April, 1868, are to be intituled in the matter of "The Companies Acts, 1862 and 1867."

And the directions of the Gen. Order ought not to be departed from, except under special circumstances. So that, where the advertisements of a winding-up petition had been headed in the matter of "The Companies Act, 1862," only, Jessel, M.R., refused, although the company consented, to make a supervision order, and directed the petition to stand over with liberty to issue fresh advertisements (*r*).

Advertisement of petition.

2. Every such petition shall be advertised seven clear days before the hearing as follows:—

(1.) In the case of a company whose registered office (*a*), or if there shall be no such office, then whose principal, or last known principal place of business is or was situate within ten miles from Lincoln's Inn Hall, once in the *London Gazette*, and once at least in two London daily morning newspapers.

(2.) In the case of any other company, once in the *London Gazette*, and once at least in two local newspapers circulating in the district where such registered office, or principal, or last known principal place of business, as the case may be, of such company is or was situate.

The advertisement (β) shall state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (if any).

(*a*) Comp. Act, 1862, s. 39. (β) See Form 1, in Sch.

Seven clear days.

The seven days may be counted in the vacation (*s*). Advertisement on a Friday for hearing on the following Friday is not sufficient; but the Court may, under special circumstances, waive the irregularity under Rule 52 (*t*).

Advertisement before presentation.

It does not invalidate the petition that the advertisements have appeared on the morning of the day on which the petition is presented, and have thus actually preceded by a few hours the presentation of the petition (*u*).

Advertisement irregular.

Where the petition had been advertised in only one London newspaper beside the *London Gazette*, the Court refused to dispense (under Rule 53, *infra*) with advertisement in a second newspaper, and directed that the petition should be duly advertised, and the order drawn up seven days after the advertisement (*x*).

The Court has a discretion, however, by virtue of Rule 53, *infra*, and where the advertisement in the *London Gazette* had not been inserted seven clear days before the day for which the petition was answered, the Court overruled the objection (*y*). So where that in the *London Gazette* was in time, but those in the other newspapers were not (*z*).

(*r*) *Marezzo Marble Co.*, 29 L. T. 720; W. N. 1874, 9; 22 W. R. 248; 43 L. J. (Ch.) 544.

(*s*) *London India Rubber Co.*, 14 W. R. 594; 14 L. T. 316.

(*t*) *City and County Bank*, 10 Ch. 470.

(*u*) *Cork and Youghal Railway Co.*, 14 L. T. 750; W. N. 1866, 279.

(*x*) *London India Rubber Co.*, 14 L. T. 316; 14 W. R. 527, 594.

(*y*) *Land and Sea Telegraph Co.*, 18 W. R. 1150.

(*z*) *MacLean & Co.*, W. N. 1881, 8.

Rule 2.

Where the advertisements had been duly published in the *London Gazette*, but, owing to the mode in which the local newspapers appeared in print, the advertisements inserted in them had not been published in accordance with the requirements of the Order, the advertisements were held sufficient (a).

If the petition cannot be heard on the day appointed by advertisement, by reason of the advertisement not having been properly inserted, the practice is to let the petition stand over for a fortnight, with liberty to insert fresh advertisements (*b*).

Where the petition had been advertised as to be heard on "Saturday, the 20th of December," the 20th being a Thursday, the Court refused, even by consent, to waive the irregularity, and directed fresh advertisements to be given (*c*).

An error in the name of the company in the advertisement renders the advertisement absolutely void, *e.g.*, where *City and County Banking Co.* was substituted for *City and County Bank* (*d*).

Re-hearing without fresh advertisement.

On motion to discharge a supervision order (on the ground of irregularity in the passing of the resolution for voluntary winding-up) the order was discharged and the petition re-heard without fresh advertisement, on service and consent of all parties entitled to be served (*e*).

Slip.

An application to rectify a slip in former proceedings, as to substitute a valid for an invalid order to wind up, being properly an *ex parte* matter, does not require advertisement (*f*).

In *Army and Navy Hotel, Limited* (*g*), the petition had been presented, advertised, and heard and an order made under the name *Army and Navy Hotel Company, Limited.* On an *ex parte* application of the petitioners the Court gave leave to amend and re-advertise the petition and to draw up the order seven days after the advertisement. The company's motion to discharge the *ex parte* order was dismissed.

So where in the name of the *Newcastle-upon-Tyne Machinists Co.* the words "upon Tyne" had been omitted, leave was given upon application made after winding-up order to amend the petition and order, but the winding-up order as amended was directed to be advertised (*h*).

Death of petitioner.

If the petitioner dies before the hearing of the petition, his legal personal representative may obtain an order to carry it on (*i*). Where after winding-up order made, passed, and entered, it appeared that the petitioner had died the day before the order was pronounced, an order of revivor was made, which went on to discharge the winding-up order, and to make a fresh winding-up order at the instance of the legal personal representative (*k*).

Priority by date of advertisement.

Until recently the advertisement, not the presentation of the petition, was taken to be the test of the priority of the proceedings, so that where two or more petitions were presented they took priority according to their dates of advertisement, not of presentation (*l*). But Chitty, J. (*m*), holds this not to be the true rule, although he adds that possibly if he had two petitions before him each properly presented he might give the carriage of the order to that which was advertised first.

(a) *Worthing Royal Sea House Hotel Co.*, W. N. 1872, 74.

(*b*) *London and Westminster Wine Co.*, 1 H. & M. 561; 12 W. R. 44.

(*c*) *Re Joint Stock Co.'s Winding-up Act*, 13 Beav. 434.

(*d*) *City and County Bank*, 10 Ch. 470, *Secus Consolidated Mineral Co.* (V.-C. H.) W. N. 1876, 234. And see *Army and Navy Hotel, Limited*, 31 Ch. D. 644.

(*e*) *Patent Floor Cloth Co.*, 8 Eq. 664.

(*f*) *Shields Marine Insurance Co.*, W. N. 1867, 296; see *supra*, p. 252.

(*g*) 31 Ch. D. 644.

(*h*) W. N. 1888, 246; 1889, 1.

(*i*) *Dynevor Collieries Co.*, W. N. 1878, 199.

(*k*) *Commercial Bank of London*, W. N. 1888, 214, 234.

(*l*) *United Ports and General Insurance Co.*, 39 L. J. (Ch.) 146.

(*m*) *Building Societies Trust*, 44 Ch. Div. 140.

Rule 2.

Where three petitions were presented and one order made on them all, Jessel, M.R., gave the carriage of the order to a petitioner whose petition had been presented before, but advertised after, one of the other two (*n*).

And *Re Trades Bank Co.* (*o*), it appears (*p*), was not an adoption by his Lordship of treating advertisement, not presentation, as the test of priority. Where, however, two petitions were advertised in the same Gazette, his Lordship gave the carriage of the order to the petitioner whose advertisement stood first on the page (*q*), and where of the two petitions advertised in the same Gazette one was presented two days before the other, the carriage was given to that first presented (*r*).

Advertisement is notice of petition.

The advertisement of the petition is notice to all the world of its presentation (*s*), that is to say, *semble*, if the parties have had such a reasonable time as that knowledge of the advertisement may be imputed to them (*t*)—and is notice to parties interested, if not properly represented, to appear (*u*).

If a petition which has been presented and advertised is subsequently withdrawn (*x*), the withdrawal should therefore also be advertised (*y*).

A petitioner who presents a petition after another petition for the same purpose has been advertised, must, unless he can shew good grounds for the presentation of a second petition (*y*), pay the costs (*z*). Where the first petition had been ordered to stand over *sine die*, a creditor who six months afterwards, in ignorance of its existence, presented another petition, was allowed his costs (a).

Publication of petition *in extenso* in newspaper—Contempt.

The publication *in extenso* in a newspaper, before the hearing, of a winding-up petition, containing charges of fraud against the directors, is a contempt of Court (*b*). And of course an argumentative comment upon the case while pending is a contempt (*c*).

But where, pending a shareholders' petition, a committee of shareholders issued to their brother shareholders, for the purpose of bringing to their attention the facts on which they relied, a printed letter, containing their accusations against the directors, and some extracts from the evidence, this did not amount to contempt (*d*).

Where, pending a creditors' petition, an advertisement, signed by the chairman on behalf of the directors, was inserted in the newspapers, reflecting upon the motives of the petitioners, and stating that they had no legal claim against the company, and that they knew it, the chairman was put upon an undertaking not to continue or repeat the advertisement, and the costs of the motion to commit were reserved until the petition was heard (*e*).

(*n*) *London and Australian Agency*, 29 L. T. 417; 22 W. R. 45.

(*o*) W. N. 1877, 268.

(*p*) See *Building Societies Trust*, 44 Ch. D. 140, 145, 146.

(*q*) *Merrybent and Darlington Railway Co.*, about June, 1878.

(*r*) *Storforth Lane Co.*, 10 Ch. D. 487.

(*s*) *Emmerson's Case*, 2 Eq. 231.

(*t*) *Oriental Bank, E. p. Guillemin*, 28 Ch. D. 634, 640; *National Bank's Case* (Eur. Arb.), L. T. 92; *Empire Assurance Corporation*, 16 L. T. 341; *Owen's Patent Wheel Co.*, 22 W. R. 151; 29 L. T. 672; W. N. 1873, 226; see *supra*, p. 344; and see *United Service Co.*, 7 Eq. 76.

(*u*) *Marlborough Club Co.*, 1 Eq. 216; *New Gas Co.*, 5 Ch. Div. 703; and see *supra*, p. 249, as to the costs of parties appearing.

(*x*) See *supra*, p. 226, as to right to withdraw petition.

(*y*) *Humber Ironworks Co.*, 2 Eq. 15; *United Service Co.*, 7 Eq. 76.

(*z*) *Accidental and Marine Insurance Co.*; *E. p. Rasch*, 36 L. J. (Ch.) 75; 15 L. T. 173; *Joint Stock Coal Co.*, 8 Eq. 146; and see *supra*, p. 228.

(a) *Marron Bank Co.*, 38 L. T. 140; W. N. 1878, 12.

(*b*) *Cheltenham and Swansea Railway Carriage Co.*, 8 Eq. 580.

(*c*) *Crown Bank, Re O'Malley*, 44 Ch. D. 649.

(*d*) *London Flour Co.*, 17 L. T. 636; 16 W. R. 474. Contrast *Bowden* v. *Russell*, 36 L. T. 177; 46 L. J. (Ch.) 414; *Sir John Moore Co.*, 37 L. T. 242.

(*e*) *General Exchange Bank*, 14 L. T. 582; 12 Jur. (N.S.) 465; 14 W. R. 826.

Rule 3.

Injunction. Libel.

The Court has jurisdiction to restrain a person by injunction from committing acts which if permitted would be contempt of Court (*f*).

In *Quartz Hill Co.* v. *Beall* (*g*) an application to restrain, on the ground of a libel, the further publication or issue of a circular which had been circulated by the solicitor of one shareholder among the other shareholders, was refused on motion. In *Hill* v. *Hart Davies* (*h*), upon a similar application, an injunction was granted.

In *Liverpool Stores* v. *Smith* (*i*) an injunction against a newspaper was refused, and a doubt was expressed whether under any circumstances an injunction ought to be granted to restrain the publication of future articles reflecting unfavourably on a company on the ground of the difficulty of granting an injunction which would not include matters which might turn out not to be libellous.

A very useful statement of the law shewing that the repeated publication, on an occasion not privileged, of matter defamatory though true may be libellous, will be found in *Salmon* v. *Isaac* (*k*).

Service of petition.

3. Every such petition shall, unless presented by the company, be served at the registered office (*α*), if any, of the company, and if no registered office, then at the principal, or last known principal place of business, of the company, if any such can be found, upon any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by being left at such registered office or principal place of business, or by being served on such member or members of the company as the Court may direct; and every petition for the winding-up of a company subject to the supervision of the Court (*β*), shall also be served upon the liquidator (if any) appointed for the purpose of winding up the affairs of the company.

(*α*) Comp. Act, 1862, s. 39. (*β*) Comp. Act, 1862, s. 148.

Rule is directory.

This rule is directory, not imperative. Where service of the petition had been accepted on behalf of the company by a solicitor duly appointed for that purpose, service at the registered office was held not to be necessary (*l*).

Service on liquidator.

The order, probably by an oversight, fails to provide for the service of a petition for a compulsory order on the liquidator acting in a voluntary winding-up, or in a winding-up under supervision. Such service, no doubt, ought to be made.

In the case for which the rule does provide the service must be, not on the liquidator only, but on the company also (*m*). But if the registered office is abandoned, service on the liquidator only may be sufficient (*n*). If the liquidator is appointed before the petition is presented, only one set of costs will be allowed (*o*).

(*f*) *Kittcat* v. *Sharp*, 31 W. R. 227; 52 L. J. (Ch.) 134; 48 L. T. 64.
(*g*) 20 Ch. Div. 501; *Harrison* v. *Marquis of Abergavenny*, W. N. 1887, 21.
(*h*) 21 Ch. D. 798.
(*i*) 37 Ch. Div. 170.
(*k*) 20 L. T. 885.
(*l*) *Regent United Service Stores*, 3 Ch. Div. 75.
(*m*) *Inventors' Association*, 13 W. R. 1015; 12 L. T. 840; 6 N. R. 349; *Petroleum Co.*, 15 L. T. 169; 15 W. R. 29.
(*n*) *Stewart & Brother*, W. N. 1880, 15.
(*o*) *Hall & Co.*, W. N. 1885, 190; 53 L. T. 633; 34 W. R. 56.

Rule 3.

If the liquidator joins in the petition, the company must be served (*p*).

No registered office.

The registered office of a company had been demolished in the course of alterations, and the business was being carried on at an unregistered office. Service on the secretary and two of the directors at the unregistered office was held sufficient (*q*).

Where the company was in course of winding-up, service of a petition was directed to be made upon the late secretary, as well as upon the liquidator (*r*).

Office closed.

The registered office of a company was closed, and the company had never commenced business. The Court, on an *ex parte* application, directed service to be made on the chairman and general manager (*s*).

The office of a company, not registered under the Act, was closed, and a notice posted on the door that the business had been transferred to another company. The Court directed service on any five of the directors (*t*).

In another case, service was directed upon the solicitor and any one of the directors of the company (*u*).

Under the Act of 1848 service on the solicitor of the company alone was held insufficient (*x*).

Again, where a company had long since become amalgamated with another company, leave was given to serve persons who, upon the affidavit of the solicitor, were members of the company at the time of the amalgamation (*y*).

Office demolished or in the tenancy of other parties.

Where an unregistered company had ceased to carry on business, service at the office which had been, but was no longer, the office of the company was held sufficient (*z*).

No office.

A company having transferred its business and been dissolved eight years before, service on a workman employed on the site where the office, now pulled down, had formerly stood, was held insufficient, although two of the directors appeared (a).

Office pulled down, and notice that company had removed to No. 13 in the same street. On calling at No. 13 the solicitor found that the company's name was not written up, and was informed that the secretary attended at the office of the company's solicitors at that address. Jessel, M.R., directed service on the secretary at that address, and on one of the firm of the company's solicitors (*b*).

No office.

Where the company had no office, the Court directed service on the nine surviving subscribers to the memorandum of association, and on three or four of the principal shareholders (*c*).

In another case service was directed to be made upon the seven subscribers to the memorandum of association who appeared to be the only persons connected with the company (*d*).

(*p*) *Panonia Leather Cloth Co.*, 13 W. R. 1015.

(*q*) *Fortune Copper Mining Co.*, 10 Eq. 330; and see *supra*, p. 158.

(*r*) *Petroleum Co.*, 15 W. R. 29; 15 L. T. 169.

(*s*) *National Credit and Exchange Co.*, 11 W. R. 161; 7 L. T. 817.

(*t*) *Unity General Assurance Association*, 11 W. R. 355; 8 L. T. 160.

(*u*) *London and Westminster Wine Co.*, 12 W. R. 6; 3 N. R. 26; 9 Jur. (N.S.) 1102; *South Essex Estuary Co.*, 18 L. T. 178.

(*x*) *Trent Valley Railway Co., E. p. Dale*, 3 De G. & Sm. 11.

(*y*) *Coghlan's Case* (Eur. Arb.), L. T. 31, 37.

(*z*) *City of London and Colonial Financial Association*, 36 L. J. (Ch.) 832; 15 W. R. 1095.

(a) *Manchester and London, &c., Association*, 9 Eq. 643.

(*b*) *Vron Slate Co.*, W. N. 1878, 70.

(*c*) *Inventors' Association*, 13 W. R. 1015; 6 N. R. 349; 12 L. T. 840.

(*d*) *Great Cwmsymlog Silver Lead Mining Co.*, 16 W. R. 270; 17 L. T. 463; *Volletri and Terracino Co.*, 18 L. T. 350.

Rule 4.

In the case of a mutual company which had no place of business and no directors, service was directed to be made on the secretary and agents of the company, the latter refusing to say who were the members of the company (*e*).

Unregistered company.

A company not registered under the Companies Act, 1862, can be served under the provisions of the Act and this Order, and a winding-up order made without serving the individual shareholders of the company (*f*).

Foreign company.

Having regard to *Newby* v. *Van Oppen* (*g*), and *Haggin* v. *Comptoir d'Escompte* (*h*), it is conceived that a foreign company capable of being wound up under the Act (*i*) may be served with the petition at their principal place of business in this country under this rule.

No service made.

Where an order had been obtained without any service having been made, and the registrar therefore refused to draw up the order, the Court directed that, upon production to the registrar of a consent brief for the persons who ought to have been served, the order should be passed (*k*).

In the case of a company under the Companies Clauses Act which had no office, judgment signed against the company in default of appearance upon a writ which had been served only on a director was set aside (*l*).

Affidavit verifying petition.

4. Every petition for the winding-up of any company by the Court, or subject to the supervision of the Court, shall be verified by an affidavit referring thereto, in the form or to the effect set forth in form 2 in the third schedule hereto; such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by the company, by some director, secretary, or other principal officer thereof; and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient *primâ facie* evidence of the statements in the petition.

This rule has been acted upon too long for the contention that it is *ultra vires* to succeed. The statutory affidavit, as it is generally called, is by the rule *primâ facie* evidence, and may be read, although as to nine-tenths of the matter sworn to, it is generally not evidence at all (*m*). In general the petitioner ought not to file any evidence beyond the statutory affidavit unless evidence is filed in opposition.

Affidavit irregularly sworn allowed to be re-sworn.

Where the affidavit was inadvertently sworn and filed *before* the petition was presented, the Court allowed it to be re-sworn and again filed, and the order which had been made on the petition to be dated subsequently (*n*).

Enlargement of time to file.

Under Rule 73 the time for filing the affidavit may, in a proper case, be enlarged.

In the following cases the time has been enlarged and a winding-up order made, notwithstanding that the affidavit was out of time:—

(*e*) *Thames Mutual Club Insurance Co.*, 15 L. T. 263.

(*f*) *City of London and Colonial Financial Association*, 15 W. R. 1095; 36 L. J. (Ch.) 832; and see other cases of unregistered companies just cited.

(*g*) L. R. 7 Q. B. 293; and see *Mackereth* v. *Glasgow and South Western Railway Co.*, L. R. 8 Ex. 149.

(*h*) 23 Q. B. Div. 519.

(*i*) See *supra*, p. 217.

(*k*) *Panonia Leather Cloth Co.*, 13 W. R. 1015.

(*l*) *Lawrenson* v. *Dublin Railway Co.*, 37 L. T. 32.

(*m*) *New Callao* (App. Ct.), W. N. 1882, 60; 30 W. R. 647; *Gold Hill Mines*, 23 Ch. Div. 210.

(*n*) *Western Benefit Building Society*, 33 Beav. 368; 33 L. J. (Ch.) 179.

Rule 5.

Affidavit sworn within the four days, and sent to be filed on the fourth day. The messenger on arriving at the office at two o'clock found it had been closed at one o'clock, it being the Easter vacation (*o*).

Affidavit not filed until nine days after petition presented (*p*).

Affidavit not filed until the fifth day (*q*).

The petition was presented on the 5th of January; the petitioner being absent in the country, the affidavit was not sworn until the 10th of January. On the 12th of January, on application for leave to file, notwithstanding time expired, leave was given, a copy of the affidavit to be sent forthwith to the respondents (*r*).

Petitioner resident abroad.

Where the petitioner was resident in Dantzig, the Court extended the time to ten days (*s*).

The petition was presented under a power of attorney executed by petitioners resident in Australia to a solicitor in this country. It being therefore impossible for the affidavit to be made by a petitioner according to this order, the Court made a winding-up order on verification of the petition by an affidavit of the solicitor, deposing of his own knowledge to the facts stated in the petition (*t*).

Corporation petitioner.

The rule does not provide for the case of a corporation, other than the liquidating company, being a petitioner. In such case an affidavit of the secretary of the petitioning company will be accepted (*u*), although it is conceived that an order ought properly to be obtained allowing the affidavit to be made by some officer of the petitioning company, for otherwise the affidavit is not within the rule (*x*). In bankruptcy the point was provided for under the Act of 1869 (*y*), and does not arise under Act 1883, ss. 7 (1) and 148, and Rr. 130, 131.

Affidavit not necessarily sufficient.

Semble, the meaning of the order is that an affidavit as in the order mentioned is always necessary, but not that it is in all cases necessarily sufficient (*z*).

In bankruptcy the allegations in the petition must be supported by further evidence than the common affidavit (a).

Copies of petition to be supplied.

5. Every contributory or creditor of the company shall be entitled to be furnished, by the solicitor to the petitioner, with a copy of the petition, within twenty-four hours after requiring the same, on paying at the rate of fourpence per folio of seventy-two words for such copy.

It is not the duty of the solicitor to furnish copies to all persons, whether strangers to the company or not, who choose to apply and pay the fee; on the contrary, it is his duty to ascertain that the applicants are either creditors or contributories (*b*).

(*o*) *East Cambrian Gold Mining Co.*, 12 L. T. 587.

(*p*) *Kentish Royal Hotel Co.*, 13 W. R. 448; 5 N. R. 423.

(*q*) *London and Westminster Co-operative Store Co.*, 17 L. T. 559.

(*r*) *Patent Screwed Boot and Shoe Co.*, 32 Beav. 142.

(*s*) *Anglo-Danish Steam Navigation Co.*, 15 L. T. 407; 15 W. R. 105.

(*t*) *Fortune Copper Mining Co.*, 10 Eq. 390.

(*u*) *Birmingham Concert Halls*, W. N. 1890, 91.

(*x*) See *Bank of Montreal* v. *Cameron*, W. N. 1877, 85; *Cakemore Causeway Co.*, W. N. 1880, 15; 28 W. R. 299.

(*y*) Bankruptcy Rules, 1870, r. 15.

(*z*) *St. David's Gold Mining Co.*, 14 W. R. 755; 14 L. T. 539.

(a) *E. p. Lindsay*, 19 Eq. 52.

(*b*) *Cheltenham and Swansea Railway Carriage Co.*, 8 Eq. 580, 583.

Rule 6.

ORDER TO WIND UP COMPANY.

Advertisement and service of Order.

6. Every order for the winding-up of a company by the Court (*a*), or subject to its supervision (*β*), shall, within twelve days after the date thereof, be advertised (*γ*) by the petitioner once in the *London Gazette*, and shall be served upon such persons (if any) and in such manner as the Court may direct.

(*a*) Comp. Act, 1862, ss. 82, 86. (*β*) Comp. Act, 1862, s. 147. (*γ*) Form 5 in Sch.

Advertisement too late.

Where the order was made on the 23rd of February, but not obtained until the 5th of March, and the advertisement was consequently out of time, the Court gave leave to post-date the order as of the 5th of March (*c*).

Re East Cambrian Gold Mining Co. (*d*) was a similar case.

The application will only be entertained in the presence of all parties (*e*).

Advertisement is notice of discharge to servants.

The advertisement of the winding-up order is notice to all the world, and operates as a notice of discharge to the servants of the company (*f*).

Proceedings on Order.

7. A copy of every order for winding-up a company, certified to be a true copy thereof as passed and entered, shall be left by the petitioner at the chambers of the judge, within ten days after the same shall have been passed and entered, and in default thereof any other person interested in the winding-up may leave the same, and the judge may, if he thinks fit, give the carriage and prosecution of the order to such person. Upon such copy being left a summons shall be taken out to proceed with the winding-up of the company, and be served upon all parties who may have appeared upon the hearing of the petition. Upon the return of such summons, a time shall, if the judge think fit, be fixed for the appointment of an official liquidator (*a*), and for the proof of debts (*β*), and for the list of contributories to be brought in (*γ*), and directions may be given as to the advertisements to be issued for all or any of such purposes, and generally as to the proceedings and the parties to attend thereon. The proceedings under the order shall be continued by adjournment, and, when necessary, by further summons, and any such direction as aforesaid may be given, added to, or varied, at any subsequent time, as may be found necessary.

(*a*) Rule 9. (*β*) Rule 20. (*γ*) Rule 29.

OFFICIAL LIQUIDATOR (*a*).

Appointment of off. liq. :—

8. The judge may appoint a person to the office of official liquidator, without previous advertisement, or notice to any

(*c*) *Doncaster Permanent Benefit Building Society*, 11 W. R. 459; *Warland Commercial Co.*, W. N. 1876, 279.

(*d*) 12 L. T. 587.

(*e*) *Disderi & Co.*, 18 L. T. 870.

(*f*) *Chapman's Case*, 1 Eq. 346; and see *supra*, p. 350.

party, or fix a time and place for the appointment of an official liquidator, and may appoint or reject any person nominated at such time and place, and appoint any person not so nominated. **Rule 9.**

(*a*) Comp. Act, 1862, ss. 85, 92, 93, 141, 150, 152.

at hearing petition.

The object of this rule was, to enable the Court, in cases where all parties had agreed to the appointment of a well-known person, to make the appointment immediately, and thus accelerate the proceedings. There was jurisdiction to entertain, at the hearing of the petition, the question of the appointment of the official liquidator (*g*); but the settled practice was to direct a reference to chambers (*h*). The reasons have been already stated (*i*).

Advertisement as to appointment.

9. When a time and place are fixed for the appointment of an official liquidator, such time and place shall be advertised in such manner as the judge shall direct, so that the first or only advertisement shall be published within fourteen days and not less than seven days before the date so fixed (*a*).

(*a*) Forms 6, 7, in Sch.

Security of off. liq.

10. Every official liquidator shall give security by entering into a recognizance with two or more sufficient sureties in such sum as the judge may approve; and the judge may, if he shall think fit, accept the security of any guarantee society established by charter or Act of Parliament in England, in lieu of the security of such sureties as aforesaid, or of any of them (*a*).

(*a*) Forms 8–11 in Sch.

When the official liquidator's account is taken the surety will, if he applies, be allowed to attend at his own expense, but the Court will not, except under special circumstances and on special terms, re-open the account on the application of the surety (*k*).

Order appointing off. liq.

11. The official liquidator shall be appointed by order (*a*); and unless he shall have given security, a time shall be fixed by such order within which he is to do so; and the order shall fix the times or periods at which the official liquidator is to leave his accounts of his receipts and payments at the judge's chambers, and shall direct that all moneys to be received shall be paid into the Bank of England, immediately after the receipt thereof, to the account of the official liquidator of the company, and an account shall be opened there accordingly (*β*); and an office copy of the order shall be lodged at the Bank of England.

(*a*) Forms 8, 9, in Sch. (*β*) Form 14 in Sch.; Rules 36–44, *infra*.

Certificate of security given.

12. When an official liquidator has given security pursuant to the directions in the order appointing him, the same shall be

(*g*) *Commercial Discount Co., Cooper's Case*, 1 N. R. 416; 32 Beav. 198.
(*h*) *General Financial Bank*, 20 Ch. Div. 276.
(*i*) See further *ante*, p. 265.
(*k*) *Birmingham Brewery Co.*, W. N. 1883, 7; 52 L. J. (Ch.) 358; 31 W. R. 415; 48 L. T. 632.

Rule 13. certified by the chief clerk as in the case of a receiver appointed in a cause, subject to giving security.

Fresh security when required.

13. The official liquidator shall, on each occasion of passing his account (*a*), and also whensoever the judge may so require, satisfy the judge that his sureties are living, and resident in Great Britain, and have not been adjudged bankrupt or become insolvent, and in default thereof he may be required to enter into fresh security within such time as shall be directed.

(*a*) Rule 19, *infra*.

Advertisement of appointment made,

14. Every appointment of an official liquidator shall be advertised (*a*), in such manner as the judge shall direct, immediately after he has been appointed, and has given security.

(*a*) Form 15 in Sch.

Provisional off. liq.

15. Where it is desired to appoint provisionally an official liquidator (*a*), an application for that purpose may, at any time after the presentation of the petition for winding-up the company, be made by summons, without advertisement or notice to any person, unless the judge shall otherwise direct; and such provisional official liquidator may, if the judge shall think fit, be appointed without security.

(*a*) Comp. Act, 1862, ss. 85, 92; Form 9 in Sch.; Rule 59, *infra*; Comp. (W. Up) Act, 1890, s. 4 (1), (5).

Security.

In order to avoid delay the Court in an urgent case appointed a provisional liquidator on his undertaking to give security, and on the undertaking of the petitioner to be responsible for moneys, &c., received by the liquidator (*l*). A provisional liquidator has been appointed without security for a limited purpose (*m*).

Vacancy in office of off. liq.

16. In case of the death, removal, or resignation of an official liquidator (*a*), another shall be appointed in his room, in the same manner as directed in the case of a first appointment, and the proceedings for that purpose may be taken by such party interested as may be authorized by the judge to take the same.

(*a*) Comp. Act, 1862, ss. 141, 150, 152; Comp. (W. Up) Act, 1890, s. 4 (4).

Accounts.

17. The official liquidator shall, with all convenient speed after he is appointed, proceed to make up, continue, complete, and rectify the books of account of the company; and shall provide and keep such books of account as shall be necessary, or as the judge may direct, for the purposes aforesaid, and for shewing the debts and credits of the company, including a ledger which shall contain the separate accounts of the contributories, and in which

(*l*) *Marseilles Extension Railway Co.*, W. N. 1867, 68.

(*m*) *Langham Skating Rink Co.*, 6 Ch. D. 102, *ante*, p. 265.

every contributory shall be debited from time to time with the amount payable by him in respect of any call to be made as provided by the said Act and these Rules. **Rule 18.**

A liquidator is not justified in resisting a summons simply calling upon him to bring in an account. Any contributory, however small his interest, is entitled to have the account brought in (*n*).

Remuneration.

18. The official liquidator shall be allowed in his accounts, or otherwise paid, such salary or remuneration as the judge may from time to time direct (*a*), including any necessary employment of assistants or clerks by the official liquidator, to which regard shall be had; and such salary or remuneration may either be fixed at the time of his appointment, or at any time thereafter, as the judge may think fit. Every allowance of such salary or remuneration, unless made at the time of his appointment, or upon passing an account, shall be made upon application for that purpose by the official liquidator, on notice to such persons (if any), and supported by such evidence as the judge shall require: nevertheless, the judge may from time to time allow any sum he may think fit to the official liquidator, on account of the salary or remuneration to be thereafter allowed.

(*a*) Comp. Act, 1862, s. 93, and note thereto.

Passing accounts.

19. The accounts of the official liquidator shall be left at the judge's chambers at the times directed by the order appointing him (*a*), and at such other times as may from time to time be required by the judge, and such accounts shall, upon notice to such parties (if any) as the judge shall direct, be passed and verified in the same manner as receivers' accounts.

(*a*) Forms 8, 9, in Sch.; Rule 11, *supra*.

PROOF OF DEBTS (*a*).

Advertisement for creditors.

20. For the purpose of ascertaining the debts and claims due from the company, and of requiring the creditors to come in and prove their debts or claims, an advertisement (*β*) shall be issued at such time as the judge shall direct; and such advertisement shall fix a time for the creditors to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any), to the official liquidator, and appoint a day for adjudicating thereon (*γ*).

(*a*) Comp. Act, 1862, s. 158. (*β*) Form 16 in Sch.
(*γ*) Comp. Act, 1862, s. 107.

Creditor must produce documents.

A creditor coming in to prove his debt must produce all documents which he would have to produce under sect. 18 of the Chancery Amendment Act

(*n*) *Wright's Case*, 5 Ch. 437.

Rule 21. (15 & 16 Vict. c. 86), or he will not be allowed to proceed in establishing his claim (*o*).

What amounts to a claim.

The mere presentment by a notary of a letter of guarantee and demand for payment, which was refused, was not putting in a claim within this Rule and the meaning of the Rule in *Kellock's Case* (*p*).

Attendance of creditors.

21. The creditors need not attend upon the jurisdiction, nor prove their debts or claims, unless they are required to do so by notice from the official liquidator; but upon such notice being given, they are to come in and prove their debts or claims within a time to be therein specified.

List of debts.

22. The official liquidator shall investigate the debts and claims sent in to him, and ascertain, so far as he is able, which of such debts and claims are justly due from the company; and he shall make out and leave at the chambers of the judge a list of all the debts and claims sent in to him, distinguishing which of the debts and claims, or parts of debts and claims so claimed, are, in his opinion, justly due and proper to be allowed without further evidence, and which of them, in his opinion, ought to be proved by the creditors; and he shall make and file, prior to the time appointed for adjudication, an affidavit (*a*) setting forth which of the debts and claims in his opinion are justly due and proper to be allowed without further evidence, and stating his belief that such debts and claims are justly due and proper to be allowed, and the reasons for such belief.

(*a*) Forms 17, 18, in Sch.

Allowance of debts.

23. At the time appointed for adjudicating upon the debts and claims, or at any adjournment thereof, the judge may either allow the debts and claims upon the affidavit of the official liquidator, or may require the same, or any of them, to be proved by the claimants, and adjourn the adjudication thereon to a time to be then fixed; and the official liquidator shall give notice to the creditors whose debts or claims have been so allowed, of such allowance (*a*).

(*a*) Form 19 in Sch.

Proof of debts.

24. The official liquidator shall give notice (*a*) to the creditors whose debts or claims have not been allowed upon his affidavit, that they are required to come in and prove (β) the same by a day to be therein named, being not less than four days after such notice, and to attend at a time to be therein named, being the time appointed by the advertisement, or by adjourn-

(*o*) *Constantinople and Alexandria Hotels Co.*, 35 Beav. 349; 14 W. R. 553.

(*p*) 3 Ch. 769; *Forwood's Claim*, 5 Ch. 18; and see *supra*, p. 364.

ment (as the case may be) for adjudicating upon such debts and claims. **Rule 25.**

(α) Form 20 in Sch. (β) Form 21 in Sch.

The official liquidator is entitled to interrogate a creditor who brings in a claim, and supports his claim by evidence (*q*).

25. The value of such debts and claims as are made admissible to proof by the 158th section of the said Act, shall, so far as is possible, be estimated according to the value thereof at the date of the order to wind up the company. Date of valuation of debts.

Although this Rule prescribes the date of the order to wind up as the date at which debts and claims are to be estimated, yet in determining the period at which the line is to be drawn for the purpose of discriminating debts provable from debts payable in full, the date to be taken is that of the presentation of the petition to wind-up. Where, therefore, of a current quarter's rent one apportioned part is provable and another payable, the apportionment is to be made as at the date of the petition (*r*).

And for the purpose of a scheme for reduction of contracts under Life Assurance Comp. Act, 1870, s. 22, the date of the petition is that at which the calculation is to be made for the purposes of the scheme (*s*).

But on the other hand, claims which were contingent at the date of the petition or the order, and which during the winding-up became claims of ascertained amount (*e.g.*, a claim on a fire policy on which a loss is incurred after winding-up order (*t*)), are by virtue of Judic. Act, 1875, s. 10, to be admitted as proofs for the ascertained amount, but not disturbing, of course, previous dividends.

Some further observations upon this Rule will be found under Comp. Act, 1862, s. 158, *supra*, p. 356. The Rule cannot in any way qualify the effect of that section; for if it did qualify it, the question would arise whether this Rule was not open to the observation which has been made upon the 26th Rule, that it is *ultra vires*.

It is unnecessary to repeat here the observations which have been already cited under sect. 158 (*u*). It will be there seen that, notwithstanding this Rule, damages running after the winding-up may be recovered (*x*); facts subsequent to the winding-up may be given in evidence for the purpose of shewing what was the real value of the claim at the date of the order (*y*); and a claim may be made for the *estimated* value of a surety's right to indemnity in respect of a demand for interest, accruing after the order, upon payments made by the surety for the company (*z*).

The rule that the date of the winding-up order is to be the date of the valuation was approved by Lord Westbury in *Wallberg's Case* (a).

As to secured creditors, see *supra*, p. 363.

26. Interest on such debts and claims as shall be allowed shall be computed, as to such of them as carry interest, after the rate Interest on debts.

(*q*) *Alexandra Palace Co.*, 16 Ch. D. 58.
(*r*) *South Kensington Stores*, 17 Ch. D. 161.
(*s*) *Great Britain Mutual Society*, 19 Ch. D. 39; 20 Ch. Div. 351.
(*t*) *Macfarlane's Claim*, 17 Ch. D. 337; and see *Hill* v. *Bridges*, Ibid. 342.
(*u*) *v. supra*, p. 356.
(*x*) *Trent and Humber Co., E. p. Cambrian Steam Co.*, 6 Eq. 396; 4 Ch. 112.
(*y*) *Holdich's Case*, 14 Eq. 72, 80; and see 6 Eq. 400.
(*z*) *Hughes' Claim*, 13 Eq. 623; and *v. supra*, p. 370.
(a) (Eur. Arb.), Reil. 65; L. T. 50; 17 Sol. J. 69.

Rule 27. they respectively carry; any creditor whose debt or claim so allowed does not carry interest, shall be entitled to interest, after the rate of £4 per centum per annum, from the date of the order to wind up the company, out of any assets which may remain after satisfying the costs of the winding-up, the debts and claims established, and the interest of such debts and claims as by law carry interest.

This Rule is *ultra vires* and unauthorized by the Act (*b*).

No calls can be made for payment of interest on debts which do not carry interest (*b*).

But interest will be allowed upon all claims in respect of which it would have been recoverable at law as damages (*c*).

As regards the payment of interest to creditors whose debts carry interest, see note to Comp. Act, 1862, s. 158, *supra*, p. 368.

Costs of proof.

27. Such creditors as come in and prove their debts or claims pursuant to notice from the official liquidator, shall be allowed their costs of proof, in the same manner as in the case of debts proved in a cause.

The costs of proof will, therefore, be added to the debt (R. S. C. 1883. Ord. 55, R. 58).

But if the company dispute the debt, and, being unsuccessful in litigation in respect of the claim, become liable to pay the costs thereof to the creditor, such costs must be paid in full (*d*).

Where a claim is adjourned into Court and allowed with costs out of the estate, only the costs of the adjournment into Court are to be paid, and the costs incurred in chambers are to be added to the debt (*e*).

Chief Clerk's certificate of debts.

28. The result of the adjudication upon debts and claims shall be stated in a certificate (*a*) to be made by the chief clerk, and certificates as to any of such debts and claims may be made from time to time. All such certificates shall state whether the debts or claims are allowed or disallowed, and whether allowed as against any particular assets, or in any other qualified or special manner.

(*a*) Form 22 in Sch.; Form 23, notice to creditor to attend to receive debt.

Moneys in the hands of the liquidator available for payment of a debt can be attached under a garnishee order to answer a judgment against the creditor (*f*).

Notice to the liquidator of the assignment of a debt is sufficient to perfect the assignment without application by the assignee to have his name placed on the list of creditors (*g*).

(*b*) *Hatfield Cask Co.*, 2 N. R. 502; 8 L. T. 846; 9 Jur. (N.S.) 997; 11 W. R. 971; *Herefordshire Banking Co.*, 4 Eq. 250; *East of England Banking Co.*, 6 Eq. 368; 4 Ch. 14.

(*c*) *State Fire Insurance Co., Times Assurance Co.'s Case*, 2 H. & M. 722.

(*d*) *E. p. Smith, Re Bank of Hindustan*, 3 Ch. 125; *Bailey and Leetham's Case*, 8 Eq. 94; and see *supra*, p. 243.

(*e*) *E. p. Wright and Gamble*, 8 Eq. 123; *Henry Holden's Case*, 8 Eq. 444.

(*f*) *Prichard's Claim*, 2 D. F. & J. 354.

(*g*) *Wragge's Case*, 5 Eq. 284.

LIST OF CONTRIBUTORIES (*a*).

List of contributories.

29. The official liquidator shall, with all convenient speed after his appointment, or at such time as the judge shall direct, make out and leave at the chambers of the judge, a list of the contributories of the company (β); and such list shall be verified by the affidavit (γ) of the official liquidator, and shall, so far as is practicable, state the respective addresses of, and the number of shares or extent of interest to be attributed to each such contributory, and distinguish the several classes of contributories. And such list may from time to time, by leave of the judge, be varied or added to by the official liquidator (δ).

(*a*) Comp. Act, 1862, ss. 38, 98, 99.
(β) Form 25 in Sch.
(γ) Form 24.
(δ) Forms 29, 30, 32.

Notice of appointment to settle.

30. Upon the list of contributories being left at the chambers of the judge, the official liquidator shall obtain an appointment for the judge to settle the same, and shall give notice (*a*) in writing of such appointment to every person included in such list, and stating in what character, and for what number of shares, or interest, such person is included in the list; and, in case any variation or addition to such list shall at any time be made by the official liquidator, a similar notice in writing shall be given to every person to whom such variation or addition applies. All such notices shall be served four clear days before the day appointed to settle such list or such variation or addition.

(*a*) Form 26; and affidavit of service, Forms 27, 28, in Sch.

The notice under this Rule may be served out of the jurisdiction (*h*).

An alleged contributory may be summoned to be sworn and examined in chambers (*i*).

In voluntary winding-up.

In the case of a voluntary winding-up it is no defence to an action for calls that the defendant had no notice that his name was on the list of contributories. There is a very great distinction between the settling the list and the making calls in a compulsory and in a voluntary winding-up. It may be very desirable that a voluntary liquidator should give notice when there is any fair and reasonable doubt, but he is not bound to do so (*k*).

Chief Clerk's certificate.

31. The result of the settlement of the list of contributories shall be stated in a certificate (*a*) by the chief clerk; and certificates may be made from time to time for the purpose of stating the result of such settlement down to any particular time, or as to any particular person, or stating any variation of the list.

(*a*) Form 31 in Sch.

(*h*) *Nathan, Newman, & Co.*, 35 Ch. Div. 1; *Liebig's Cocoa Works*, W. N. 1888, 120; and see *ante*, p. 309.
(*i*) *Esgair Mwyn Mining Co.*, 8 W. R. 660.
(*k*) *Brighton Arcade Co.* v. *Dowling*, L. R. 3 C. P. 175, 187; *London Bank of Scotland*, W. N. 1867, 114; see *supra*, p. 325.

Rule 32.

SALES OF PROPERTY (α).

Sales of property.

32. Any real or personal property belonging to the company may be sold with the approbation of the judge, in the same manner as in the case of a sale under a decree or order of the Court in a suit, or, if the judge shall so direct, by the official liquidator; and upon any such sale by the official liquidator, the conditions or contracts of sale shall be settled and approved of by the judge, unless he shall otherwise direct; and the judge may, if he thinks fit, direct such conditions and contracts, and the abstract of the title to the property, to be submitted to one of the conveyancing counsel of the Court, under the 2nd of the Consolidated General Orders, and may, on any sale by public auction, fix a reserved bidding; and, unless on account of the small amount of the purchase moneys or other cause it shall, having regard to the amount of the security given by the official liquidator, be thought proper that the purchase moneys shall be paid to him, all conditions and contracts of sale shall provide that the purchase moneys shall be paid by the respective purchasers into the Bank of England, to the account of the official liquidator of the company (β).

(α) Comp. Act, 1862, s. 95.
(β) Comp. Act, 1862, s. 103; Form 14 in Sch. to this Order.

CALLS (α).

Summons for call.

33. Every application to the judge to make any call on the contributories or any of them, for any purpose authorized by the said Act, shall be made by summons (β), stating the proposed amount of such call; and such summons shall be served four clear days at the least before the day appointed for making the call, on every contributory proposed to be included in such call; or if the judge shall so direct, notice of such intended call may be given by advertisement (γ).

(α) Comp. Act, 1862, s. 102. Affidavit of official liquidator in support, Form 33 in Sch. to this Order.
(β) Form 34.
(γ) Form 35.

As to service on a contributory out of the jurisdiction, see Rule 63, *infra*.

Service of Order.

34. When any order (α) for a call has been made, a copy thereof shall be forthwith served upon each of the contributories included in such call, together with a notice (β) from the official liquidator specifying the amount or balance due from such contributory (having regard to the provisions of the said Act) in respect of such call; but such order need not be advertised unless, for any special reason, the judge shall so direct.

(α) From 36 in Sch.
(β) Form 37.

No notice of a call had been given to a shareholder resident in Ireland except by a letter sent by post to his registered address. *Quære*, whether such service on a person out of the jurisdiction was good (*l*). On application for a balance order to enforce payment, Romilly, M.R., made the order subject to any objection which the shareholder might make (*m*).

Proceedings under Order.

35. At the time of making an order for a call, the further proceedings relating thereto shall be adjourned to a time subsequent to the day appointed for the payment thereof, and afterwards from time to time so long as may be necessary; and at the time appointed by any such adjournment, or upon a summons to enforce payment of the call, duly served, and upon proof of the service of the order and notice of the amount due, and non-payment (*α*), an order (*β*) may be made for such of the contributories who have made default, or of such of them against whom it shall be thought proper to make such order, to pay the sum which by such former order and notice they were respectively required to pay, or any less sum which may appear to be due from them respectively.

(*α*) Form 38 in Sch. (*β*) Form 39; and affidavit of service, Form 42.

An order may be made under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, for payment by instalments (*n*).

An order for payment will not be made in the winding-up against a bankrupt contributory. Payment must be enforced in the Court of Bankruptcy (*o*).

The balance order for payment is an enforcement of the former order, and requires no notice of it to be previously served. Service of the circular giving notice of a call by post is tantamount to personal service (*p*).

Process under the balance order requires personal service, but where that is impossible substituted service may be made (*p*).

A balance order is not a judgment (*q*), and is not a good cause of action (*r*). A bankruptcy notice cannot be issued in respect of it (*s*).

PAYMENT IN OF MONEYS AND DEPOSIT OF SECURITIES (*α*).

Default of payment into Bk. of Eng.

36. If any official liquidator shall not pay all the moneys received by him into the Bank of England, to the account of the official liquidator of the company, within seven days next after the receipt thereof, unless the judge shall have otherwise directed, such official liquidator shall be charged in his account with ten shillings for every £100, and a proportionate sum for any larger amount, retained in his hands beyond such periods, for every seven days during which the same shall have been so retained,

(*l*) See Rule 63, *infra*.
(*m*) *Land Credit Co. of Ireland*, 39 L. J. (Ch.) 389.
(*n*) *Lewis' Case*, 28 L. T. 396.
(*o*) *Mitchell's Case*, 5 Ch. 400.
(*p*) *De Beauvoir's Case*, 11 W. R. 321; 32 L. J. (Ch.) 453; under the Act of 1848. See also Rule 63, *infra*.
(*q*) *International Marine Co.* v. *Hawes*, 29 Ch. Div. 934.
(*r*) *Chalk, Webb, & Co.* v. *Tennent*, W. N. 1887, 159; 57 L. T. 598.
(*s*) *E. p. Whinney*, 13 Q. B. D. 476.

Rule 37. and the judge may, for any such retention, disallow the salary or remuneration of such official liquidator.

(*a*) Comp. Act, 1862, s. 104; and see Rule 11, *supra*, and Form 14 in Sch.

Bills, &c., to be deposited in Bk. of Eng.

37. All bills, notes, and other securities payable to the company or to the official liquidator thereof shall, as soon as they shall come to the hands of such official liquidator, be deposited by him in the Bank of England for the purpose of being presented by the Bank for acceptance and payment, or for payment only, as the case may be.

Call, &c., to be paid into Bk. of Eng.

38. All orders for payment of calls, balances, or other moneys due from any contributory or other person, shall direct the same to be paid into the Bank of England, to the account of the official liquidator of the company, unless on account of the smallness of the amount or other cause, it shall, having regard to the amount of the security given by the official liquidator, be thought proper to direct payment thereof to the official liquidator: Provided that where any such order has been made directing payment of a specific sum into the Bank of England, in case it shall be thought proper for the purpose of enabling the official liquidator to issue execution or take other proceedings to enforce (*a*) the payment thereof, or for any other reason, an order may, either before service of such former order, or after the time thereby fixed for payment, be made, without notice, for payment of the same sum to the official liquidator.

(*a*) Comp. Act, 1862, ss. 103, 120.

When an order has been made on a contributory to pay money into the Bank to the account of the official liquidator, and it is desired to enforce the order by writ of *fi. fa.*, the official liquidator must follow the course here prescribed, and obtain an order for payment of the sum in question to himself, notwithstanding the 103rd section of the Comp. Act, 1862. There seems no reason why, if before any order has been made for payment into the Bank, the Court is satisfied that the issuing of a writ of *fi. fa.* must eventually be resorted to, the Court should not at once and in the first instance make an order for payment to the official liquidator (*t*).

As to the right of the official liquidator to take proceedings in bankruptcy upon an order directing calls to be paid to him, see *Williams* v. *Harding* (*u*).

Notice as to payment into Bk. of Eng.

39. At the time of the service of any order for payment into the Bank of England the official liquidator shall give to the party served a notice, to the purport or effect set forth in Form No. 40 in the third schedule hereto, for the purpose of informing him how the payment is to be made; and before the time fixed for

(*t*) *Leeds Banking Co.*, 1 Ch. 150; 2 Ch. Div. 22; *E. p. Harris*, 2 Ch. D. 423; *Waterloo Life, &c., Co.*, 4 N. R. 207. *E. p. Whinney*, 13 Q. B. D. 476.

(*u*) L. R. 1 H. L. 9. *Cf. E. p. Muirhead*,

such payment, the official liquidator shall furnish the cashier of the Bank of England with a certificate, to the purport or effect set forth in Form No. 41 in the third schedule hereto, to be signed by such cashier, and delivered to the party paying in the money therein mentioned. **Rule 40.**

Affidavit of non-payment.

40. For the purpose of enforcing any order for payment of money into the Bank of England, an affidavit of the official liquidator, to the purport or effect set forth in Form No. 43 in the third schedule hereto, shall be sufficient evidence of the non-payment thereof.

Title of account at Bk. of Eng.

41. All moneys, bills, notes, and other securities paid and delivered into the Bank of England, shall be placed to the credit of the account of the official liquidator of the company; and orders for any such payment and delivery shall direct the same accordingly.

DELIVERY OUT OF SECURITIES, AND PAYMENT OUT AND INVESTMENT OF MONEYS (*a*).

Cheques and requests.

42. All bills, notes, and other securities delivered into the Bank of England, shall be delivered out upon a request signed by the official liquidator, and countersigned by the chief clerk of the judge; and moneys placed to the account of the official liquidator shall be paid out upon cheques or orders signed by the official liquidator and countersigned by the chief clerk of the judge.

(*a*) Comp. Act, 1862, s. 104; Form 14 in Sch. to this Order.

When the chambers of the judge are closed for any vacation the chief clerk of another judge may countersign any cheque or order, request or direction required by this or the following rule to be countersigned (*x*).

Investment.

43. All or any part of the money for the time being standing to the credit of the account of the official liquidator at the Bank of England, and not immediately required for the purposes of the winding-up, may be invested in the purchase of Bank £3 per Cent. Annuities, Reduced £3 per Cent. Annuities, New £3 per Cent. Annuities, or New £2 10*s.* per Cent. Annuities, in the name of the official liquidator, or in the purchase of Exchequer bills. All such investments shall be made by the Bank of England, upon a request (*a*) signed by the official liquidator, and countersigned by the chief clerk of the judge, and which request shall be a sufficient authority for debiting the account with the purchase money; and such exchequer bills, and in case of an exchange thereof any new exchequer bills, shall be retained by

(*x*) See Order of 19 July, 1866, 1 Ch. xvii.

Rule 44. or deposited with the Bank of England, in the name and on behalf of the official liquidator; and such annuities or exchequer bills shall not afterwards be sold or transferred or otherwise dealt with except upon a direction for that purpose, signed by the official liquidator, and countersigned by the chief clerk of the judge, or under an order to be made by the judge.

(*a*) Form 44 in Sch.

As to vacation, see note to Rule 42.

Receipt of dividends.

44. All dividends and interest to accrue due upon any such annuities, shall from time to time be received by the Bank of England, under a power of attorney to be executed by the official liquidator, and placed to the credit of the account of such official liquidator; and such of the exchequer bills as shall from time to time be in course of payment shall be delivered by the Bank of England to one of their cashiers, who is to receive the interest due thereon, and exchange the same for new bills, in case such new bills are issued, or otherwise to receive the principal and interest due on such of the said bills, so in course of payment, as cannot be exchanged, and pay the said interest, or principal and interest, as the case may be, into the Bank of England to the credit of the account of the official liquidator of the company.

MEETINGS OF CREDITORS OR CONTRIBUTORIES.

Notice.

45. When the judge shall direct a meeting of the creditors or contributories of the company to be summoned under the 91st or 149th section of the said Act, the official liquidator shall give notice (*a*) in writing seven clear days before the day appointed for such meeting, to every creditor or contributory, of the time and place appointed for such meeting, and of the matter upon which the judge desires to ascertain the wishes of the creditors or contributories; or, if the judge shall so direct, such notice may be given by advertisement (*a*), in which case the object of the meeting need not be stated, and it shall not be necessary to insert such advertisement in the *London Gazette*.

(*a*) Form 45 in Sch.

Votes.

46. The votes of the creditors or contributories of the company at any meeting summoned by the direction of the judge, may be given either personally or by proxy (*a*); but no creditor shall appoint a proxy who is not a creditor of the company whose

debt or claim has been allowed, and no contributory shall appoint a proxy who is not a contributory of the company. Rule 47.

(α) Form 46 in Sch.

Even in cases where this rule does not apply a proxy cannot be given to one who is not a member of the class of which a meeting is convened. Where, at a meeting convened under an order of the Court, proxies were given to the liquidator, the resolution arrived at was ignored and another meeting directed (*y*).

47. The direction of the judge for any meeting of creditors or contributories under the 91st or 149th section of the said Act, and the appointment of a person to act as chairman of any such meeting, shall be testified by a memorandum (α) signed by the chief clerk of the judge. Memorandum as to calling meeting.

(α) Form 47 in Sch.; Chairman's Report, Form 48.

DIRECTION OR SANCTION OF THE JUDGE.

48. The sanction of the judge to the drawing, accepting, making and indorsing of any bill of exchange or promissory note by any official liquidator (α), shall be testified by a memorandum (β) on such bill of exchange or promissory note, signed by the chief clerk of the judge. Bill of exchange or promissory note.

(α) Comp. Act, 1862, s. 95. (β) Form 49 in Sch. to this Order.

49. Every application for the sanction of the judge to a compromise with any contributory or other person indebted to the company (α), shall be supported by the affidavit of the official liquidator that he has investigated the affairs of such contributory or person, and stating his belief that the proposed compromise will be beneficial to the company, and his reasons for such belief; and the sanction of the judge thereto shall be testified by a memorandum (β), signed by the chief clerk of the judge, on the agreement of compromise (γ), unless any party shall desire to appeal from the decision of the judge, in which case an order shall be drawn up for that purpose. Compromise.

(α) Comp. Act, 1862, s. 160. (β) Form 51 in Sch. to this Order.
(γ) Form 50.

50. The direction or sanction of the judge for any other proceeding or act to be taken or done by the official liquidator (α) shall be obtained upon summons, and an order (β) shall be drawn up thereon, unless the judge shall otherwise direct. Other cases.

(α) Comp. Act, 1862, ss. 95, 97, 159. (β) Form 52 in Sch. to this Order.
As to s. 168, see Rule 51.

(*y*) *Madras Irrigation Co.*, W. N. 1881, 120.

Rule 51.

APPLICATIONS TO THE COURT OR JUDGE UNDER SS. 137, 138, 141, 167, AND 168, OF THE ACT.

Application how made.

51. Every application under the 137th, 138th, or 141st section of the said Act shall be made by petition or motion, or, if the judge shall so direct, by summons at chambers; and every application under the 167th or 168th section of the said Act shall be made by petition.

The judge may, when the summons comes on, direct that the application be heard upon summons (*z*).

ORDERS.

Drawing up orders.

52. All orders made in chambers shall be drawn up in chambers, unless specially directed to be drawn up by the registrar, and shall be entered in the same manner, and in the same office, as other orders made in chambers.

ADVERTISEMENTS.

Insertion of advertisements.

53. When an advertisement is required for any purpose except where otherwise directed by these Rules, the advertisement shall be inserted once in the *London Gazette*, and in such other newspaper or newspapers, and for such number of times as may be directed. The judge may, in such cases as he shall think fit, dispense with any advertisement required by these Rules.

Rule 2, *supra*, as to advertisement, may be relaxed by virtue of this rule (a). Special circumstances must be shewn (*b*).

ADMISSION OF DOCUMENTS.

Notice to admit.

54. Any party to any proceeding in Court or chambers relating to the winding-up of a company may, by notice in writing in the Form No. 6, in Schedule N. to the Consolidated General Orders, or to the like effect, call on any other party thereto competent to admit the same, to admit any document saving all just exceptions; and in case of refusal or neglect so to admit, the costs of proving such document shall be paid by the party so refusing or neglecting, unless the judge shall be of opinion that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice shall have been given, except in cases where the omission to give such notice has been, in the opinion of the taxing-master, a saving expense.

(*z*) *British Envelope Co.*, W. N. 1885, 84.
(*a*) *Land and Sea Telegraph Co.*, 18 W. R. 1150; and see Rule 2, *supra*.
(*b*) *City and County Bank*, 10 Ch. 470; *Army and Navy Hotel*, 31 Ch. D. 644.

AFFIDAVITS.

55. Where an order shall have been made for the winding-up of any company, any person intending to use any affidavit in any proceeding under such order, shall file the same in the Record and Writ Clerk's Office, and give notice thereof to the official liquidator. The person, other than the official liquidator, filing the affidavit shall not be required to take an office copy thereof, but an office copy thereof shall be taken by the official liquidator, and he shall produce the same at the hearing of any application or proceeding upon which it is intended to be used, unless the judge shall otherwise direct. Filing and office copies of affidavits.

CERTIFICATE OF CHIEF CLERK.

56. The 48th, 49th, 50th, 51st, 52nd, and 55th Rules of the 35th of the Consolidated General Orders, shall apply to all certificates of the chief clerk in the matter of the winding-up of any company; nevertheless, certificates on passing the official liquidator's accounts may be approved and signed by the judge without delay, and upon being so signed, shall be filed and forthwith acted upon. Chief Clerk's certificates.

REGISTER AND FILE OF PROCEEDINGS.

57. A register shall be kept of all proceedings in the judge's chambers, in each matter, in the same manner as required by the 57th Rule of the 35th of the Consolidated General Orders, and no documents or proceedings are to be filed in the judge's chambers, unless the judge shall otherwise direct. Register of proceedings.

58. All orders, exhibits, admissions, memorandums, and office copies of affidavits, examinations, depositions, and certificates, and all other documents relating to the winding-up of any company, shall be filed by the official liquidator, as far as may be, in one continuous file, and such file shall be kept by him or otherwise, as the judge may from time to time direct. Every contributory of the company, and every creditor thereof whose debt or claim has been allowed, shall be entitled, at all reasonable times, to inspect such file free of charge, and, at his own expense, to take copies or extracts from any of the documents comprised therein, or to be furnished with such copies or extracts at a rate not exceeding three-halfpence per folio of seventy-two words; and such file shall be produced in Court, or before the judge, and otherwise, as occasion may require. File of proceedings.

Rule 59. Solicitor's lien.

The solicitor to the official liquidator has no lien for his costs on the file of proceedings in the winding-up and the documents relating thereto (*c*).

PROVISIONAL OFFICIAL LIQUIDATORS (*a*).

Provisional off. liq.

59. All the above Rules relating to official liquidators shall, as far as the same are applicable, and subject to the directions of the judge in each case, apply to provisional liquidators.

(*a*) Comp. Act, 1862, ss. 85, 92; Form 9 in Sch. to this Order.

ATTENDANCE AND APPEARANCE OF PARTIES.

Attendance of parties.

60. Every person for the time being, on the list of contributories of the company (*a*), left at the chambers of the judge by the official liquidator, and every person having a debt or claim against the company, allowed by the judge, shall be at liberty, at his own expense, to attend the proceedings before the judge, and shall be entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he shall by written request desire to have notice of; but if the judge shall be of opinion that the attendance of any such person upon any proceeding has occasioned any additional costs which ought not to be borne by the funds of the company, he may direct such costs, or a gross sum in lieu thereof, to be paid by such person; and such person shall not be entitled to attend any further proceedings until he has paid the same.

(*a*) Rule 29, *supra*.

A contributory is entitled, under the liberty given by this rule, not only to attend the cross-examination by the official liquidator of a person claiming to be a creditor of the company, but also to cross-examine such claimant on his affidavit filed in support of the claim, such cross-examination to be limited to the matters referred to in such affidavit (*d*).

But an examination under the Companies Act, 1862, s. 115, is of a private character, and not one which parties are entitled to attend under this Rule (*e*).

In the European Arbitration Lord Westbury would not allow any absorbed company to appear separately (*f*).

Appointment of representative party.

61. The judge may from time to time appoint any one or more of the contributories, or creditors, as he thinks fit, to represent before him, at the expense of the company, all or any class of the contributories or creditors, upon any question as to a compromise with any of the contributories or creditors, or in and about any other proceedings before him relating to the winding-up of the

(*c*) *Union Cement Co., E. p. Pulbrook*, 4 Ch. 627. See further, *ante*, p. 296.

(*d*) *Brompton and Longtown Railway Co.*, 11 Eq. 428. See *Bates* v. *Eley*, 1 Ch. D. 473.

(*e*) *Grey's Brewery Co.*, 25 Ch. D. 400; *Norwich Equitable Co.*, 27 Ch. Div. 575; *ante*, p. 304.

(*f*) *India and London Co., E. p. Dyke* (Eur. Arb.), L. T. 10.

company, and may remove the person or persons so appointed. In case more than one person shall be so appointed, they shall unite in employing the same solicitor to represent them. Rule 62.

Unless appointed under this rule contributories or creditors who appear on proceedings in the winding-up will, even if heard (*g*), be treated as appearing at their own expense (*h*).

And the costs of the appearance of a creditor's representative will not be allowed except in special cases (*i*).

62. No contributory or creditor shall be entitled to attend any proceedings at the chambers of the judge, unless and until he has entered in a book (*a*) to be kept there for that purpose his name and address, and the name and address of his solicitor (if any), and upon any change of his address or of his solicitor, his new address, and the name and address of his new solicitor. Particulars to be given before attendance.

(*a*) Form 53 in Sch.

SERVICES OF SUMMONSES, NOTICES, &C. (*a*).

63. Services upon contributories and creditors shall be effected (except when personal service is required) by sending the notice, or a copy of the summons or order or other proceeding, through the post in a pre-paid letter, addressed to the solicitor of the party to be served (if any) or otherwise to the party himself at the address entered or last entered pursuant to the preceding Rule; or if no such entry has been made, then, if a contributory, to his last known address or place of abode; and if a creditor, to the address given by him, pursuant to the foregoing Rule 20; and such notice, or copy, summons, order, or other proceeding, shall be considered as served at the time the same ought to be delivered in the due course of delivery by the post-office, and notwithstanding the same may be returned by the post-office. Service how effected.

(*a*) As to service on the company, see Comp. Act, 1862, ss. 62, 63.

Contributory out of the jurisdiction.

The Winding-up Act, 1848 (11 & 12 Vict. c. 45), s. 138, provided that service by post should be sufficient upon a party, whether within or out of the jurisdiction. The Companies Act, 1862, contains no similar provision: but it has been held that service of notice of intention to make a call (Rules 33, 34, *supra*) may be made through the post on a contributory out of the jurisdiction, so far as to warrant the mere making of the call, inasmuch as upon any proceedings in the foreign Court to enforce payment of the call, it would be open to the contributory to raise the question of the validity of that mode of service (*k*). So notice of an appointment to settle the list of contributories may be served out of the jurisdiction (*l*).

(*g*) See *supra*, p. 247.
(*h*) *E. p. Oakes and Peck*, 3 Eq. at p. 634.
(*i*) *MacIver's Claim*, 5 Ch. 424.
(*k*) *General International Agency Co.*, 15 W. R. 973; 16 L. T. 725.
(*l*) *Nathan, Newman, & Co.*, 35 Ch. Div. 1; *Liebig's Cocoa Works*, W. N. 1888, 120.

Rule 64. But there is no power to give leave to serve out of the jurisdiction orders and proceedings which require to be enforced (*m*).

A balance order to enforce payment of a call by a shareholder resident in Ireland, to whom notice (*n*) of the call had been given only by a letter sent by post to his registered address, was made subject to any objection which the shareholder might make (*o*).

Leave was in an early case given to serve a summons taken out under Companies Act, 1862, s. 165, upon officers of the company resident in Scotland (*p*).

See further, as to service by post under the old Winding-up Acts, *De Beauvoir's Case* (*q*).

Companies in the Stannaries.

As to the service of notices on shareholders in mining companies in the Stannaries, see 32 & 33 Vict. c. 19, s. 8.

Name of person incomplete.

64. No service under these Rules shall be deemed invalid by reason that the Christian name, or any of the Christian names of the person on whom service is sought to be made, has been omitted, or designated by initial letters, in the list of contributories, or in the summons, order, notice, or other document wherein the name of such contributory or creditor is contained, provided the judge is satisfied that such service is in other respects sufficient.

TERMINATION OF WINDING-UP.

Proceedings on termination.

65. Upon the termination of the proceedings in chambers for the winding-up of any company, a balance-sheet shall be brought in by the official liquidator of his receipts and payments, and verified by his affidavit; and the official liquidator shall pass his final account, and the balance (if any) due thereon shall be certified. And upon payment of such balance in such manner as the Court or judge shall direct, the recognizance entered into by the official liquidator and his sureties may be vacated.

Dissolution of company.

66. When the official liquidator has passed his final account, and the balance (if any) certified to be due thereon has been paid in such manner as the judge shall direct, a certificate (*α*) shall be made by the chief clerk that the affairs of the company have been completely wound up; and in case the company has not been already dissolved, the official liquidator shall, immediately after such certificate has become binding, apply to the judge for an order (*β*) that the company be dissolved from the date of such order.

(*α*) Form 55 in Sch. to this Order.
(*β*) Comp. Act, 1862, s. 111; Form 56 in Sch. to this Order.

(*m*) *Anglo-African Steamship Co.*, 32 Ch. Div. 348; *cf. Re Jellard*, 39 Ch. Div. 424.
(*n*) See Rule 34, *supra*.
(*o*) *Land Credit Co. of Ireland*, 39 L. J. (Ch.) 389.
(*p*) *British Imperial Corporation*, 5 Ch. D. 749; *Household Insurance Co.*, W. N. 1878, 26, *ante*, p. 309.
(*q*) 32 L. J. (Ch.) 453; 11 W. R. 321; *supra*, p. 689.

67. When the proceedings for winding up any company have been completed, the file of proceedings (*a*) and the book containing the official liquidator's account, shall be deposited in the Record and Writ Clerk's office. **Rule 67.** Deposit of file of proceedings.

(*a*) Rule 58, *supra*.

DUTIES OF SOLICITOR OF OFFICIAL LIQUIDATOR (*a*).

68. The solicitor of the official liquidator shall conduct all such proceedings as are ordinarily conducted by solicitors of the Court; and where the attendance of his solicitor is required on any proceeding in Court or chambers, the official liquidator need not attend in person, except in cases where his presence is necessary in addition to that of his solicitor, or the judge shall direct him to attend. Duties of solicitor.

(*a*) Comp. Act, 1862, s. 97.

FORMS.

69. The forms set forth or referred to in the third schedule to these Orders, with such variations as the circumstances of each case may require, may be used for the respective purposes mentioned in such schedule. Forms.

FEES.

70. Solicitors shall be entitled to charge, and be allowed the fees set forth and referred to in the first schedule hereto unless the Court or judge shall otherwise specially direct. Solicitors' fees.

71. The fees of Court set forth and referred to in the second schedule hereto, shall be paid in relation to proceedings in the Court of Chancery under the Companies Act, 1862, and shall be collected by means of stamps, in the manner prescribed by the 39th of the Consolidated General Orders. Court fees.

TAXATION OF COSTS.

72. Where an order is made in Court or chambers for payment of any costs, the order shall direct the taxation thereof by the taxing-master; except in cases where a gross sum in lieu of taxed costs is fixed by the order, in accordance with the 37th Rule of the 40th of the Consolidated General Orders. Taxation of costs.

POWER OF JUDGE.

73. The power of the Court, and of the judge sitting in chambers, to enlarge or abridge the time for doing any act, or taking any proceeding, to adjourn, or review any proceeding General power of judge.

Rule 74. and to give any direction as to the course of proceeding, is unaffected by these Rules.

See Rule 4, *supra*, as to onlargement of time; *E. p. Clarke* (*r*) as to rescission of compromise obtained by misrepresentation.

GENERAL DIRECTIONS.

General practice to apply.

74. The general practice of the Court (*a*), including the course of proceeding and practice of the judges' chambers, as provided by the statute 15th and 16th Victoria, chapter 80, and the General Orders of the Court relative thereto, shall, in cases not provided for by the Companies Act, 1862, or these Rules, and so far as the same are applicable, and not inconsistent with the said Act, or these Rules, apply to all proceedings for winding-up a company.

(*a*) Comp. Act, 1862, s. 170.

See *In re English Joint Stock Bank* (*s*) and *E. p. Kintrea* (*t*).

APPLICATION OF RULES.

Application of Rules.

75. These Rules apply only to proceedings under the Companies Act, 1862.

COMMENCEMENT OF RULES.

Commencement of Rules.

76. These Rules shall take effect and come into operation on and after the 25th day of November, 1862.

INTERPRETATION.

Interpretation.

77. The 1st Rule of the 23rd of the Consolidated General Orders (*a*), and the general interpretation clause therein, shall be deemed to extend and apply to the Rules of this Order; and such Rules shall have the effect of, and be deemed to be General Orders of the Court.

(*a*) Meaning of the words, "The Judge," "The Taxing-Master," "The Clerk of Records and Writs," in a decree or order.

WESTBURY, C.
JOHN ROMILLY, M.R.
RICHD. T. KINDERSLEY, V.C.
JOHN STUART, V.C.
W. P. WOOD, V.C.

(*r*) 14 W. R. 856; 14 L. T. 789; and Comp. Act, 1862, s. 160.

(*s*) 3 Eq. 203.
(*t*) 5 Ch. 95.

THE FIRST SCHEDULE.

FEES AND CHARGES TO BE ALLOWED TO SOLICITORS.

	£	s.	d
For preparing and drawing up every order made at chambers, and attending for same, and at the registrars' office to get same entered . .	0	13	4
For engrossing every order, in addition to the above fee, per folio . .	0	0	4

For other duties performed, such of the fees on the higher scale authorized by the 2nd Rule of the 38th of the Consolidated General Orders, and the regulations as to solicitors' fees subjoined thereto, as are applicable; except that the special fee allowed on creditors' claims is not to apply.

Where under such regulations a fee of three guineas may be allowed for attending any summons or other appointment at the judge's chambers, the same may be increased to any sum not exceeding five guineas.

The fee of 2*s.* 6*d.* allowed by such regulations for notices and services shall be reduced to 1*s.* 6*d.*, where the service may be effected as provided by the above Rule 63.

The usual charges relating to printing shall be allowed in lieu of copies for service where the fee for copies would exceed the charges for printing, and amount to more than £3.

THE SECOND SCHEDULE.

FEES TO BE COLLECTED BY MEANS OF STAMPS.

In the Judges' Chambers.

For every summons	0	3	0
For every order drawn up by the chief clerk	0	5	0
For every advertisement	1	0	0
For every certificate	0	5	0
For every oath, affirmation, declaration, or attestation upon honour .	0	1	6

In the Registrars' Office.

For every order made in Court	1	0	0
For every order made in Chambers	0	5	0
For every office copy of an order	0	5	0

In the Examiners' Office.

The same fees as those directed to be paid and collected in such office by the 2nd Rule of the 39th of the Consolidated General Orders, and the Regulations subjoined thereto.

In the Record and Writ Clerks' Office, and Report Office.

Such of the fees directed to be paid and collected in such office by the 2nd Rule of the 39th of the Consolidated General Orders, and the Regulations subjoined thereto, as are applicable.

In the Taxing Masters' Office.

The same fees as those directed to be paid and collected by the 2nd Rule of the 39th of the Consolidated General Orders, and the Regulations subjoined thereto.

In the Office of the Lord Chancellor's Principal Secretary.

For every petition	1	0	0

In the Office of the Secretary at the Rolls.

For every petition	1	0	0

Form 1.

THE THIRD SCHEDULE.

FORMS.

No. 1. *Advertisement of Petition.* [Rule 2.]

In the Matter of the Companies Act, 1862 [and 1867: See Gen. Order, March, 1868, R. 1]; and of the company.

Notice is hereby given that a petition for the winding up of the above-named company by the Court [*or*, subject to the supervision of the Court] of Chancery was, on the day of 18 , presented to the Lord Chancellor [*or*, the Master of the Rolls] by the said company [*or*, by A. B., of , a creditor [*or*, contributory] of the said company [*or, as the case may be*]. And that the said petition is directed to be heard before the Vice-Chancellor [*or*, Master of the Rolls] on the day of 18 ; and any creditor or contributory of the said company desirous to oppose the making of an order for the winding up of the said company under the above Act [Acts] should appear at the time of hearing by himself or his counsel for that purpose; and a copy of the petition will be furnished to any creditor or contributory of the said company requiring the same by the undersigned on payment of the regulated charge for the same.

C. & D., of &c. [agents for E. & F., of, &c.]
Solicitors for the petitioner.

No. 2. *Affidavit verifying Petition.* [Rule 4.]

In Chancery.
In the Matter, &c.

I, A. B., of, &c., make oath and say, that such of the statements in the petition now produced and shewn to me, and marked with the letter A., as relate to my own acts and deeds are true, and such of the said statements as relate to the acts and deeds of any other person or persons, I believe to be true.

Sworn, &c.

No. 3. *Order for Winding-up by the Court.* [25 & 26 Vict. c. 89, ss. 81, 82.]

The Master of the Rolls [*or*, Vice-Chancellor]. } day, the day of 18 .
In the Matter, &c.

Upon the petition of the above-named company [*or*, A. B., of &c., a creditor [*or*, contributory] of the above-named company] on the day of 18 , preferred unto the Right Honourable the Lord High Chancellor of Great Britain [*or*, Master of the Rolls], and upon hearing counsel for the petitioner, and for , and upon reading the said petition, an affidavit of (the said petitioner) filed, &c., verifying the said petition, an affidavit of L. M. filed the day of 18 , the *London Gazette* of the day of , the *Times* newspaper of the day of [*enter any other papers*], each containing an advertisement of the said petition [*enter any other evidence*], His Honour [*or*, this Court] doth order that the said company be wound up by this Court under the provisions of the Companies Act, 1862.

No. 4. *Order for Winding-up, subject to Supervision.* 25 & 26 Vict. c. 89, ss. 147, 148.]

The Master of the Rolls [*or*, Vice-Chancellor]. } day, the day of 18 .
In the Matter, &c.

Upon the petition, &c., His Honour [*or*, this Court] doth Order, that the voluntary winding-up of the said company be continued, but subject to the supervision of this Court: and any of the proceedings under the said voluntary winding-up may be adopted as the judge shall think fit. And the creditors, contributories, and liquidators of the said company, and all other persons interested, are to be at liberty to apply to the judge at chambers as there may be occasion.

No. 5. *Advertisement of Order to Wind up.* [Rule 6.] **Form 5.**

In the Matter, &c.

By an Order made by the Master of the Rolls [*or*, the Vice-Chancellor] in the above matter dated the day of 18, on the petition of the above-named company [*or*, A. B., of], It was Ordered that, &c. [*as in Order*].

C. & D. of, &c.,
Solicitors for the said
Petitioner.

No. 6. *Advertisement of Time and Place fixed for the Appointment of Official Liquidator.* [Rule 9.]

In the Matter, &c.

Notice is hereby given, that the Master of the Rolls [*or*, the Vice-Chancellor] has fixed the day of 18 , at o'clock in the noon, at his chambers in the Rolls Yard, Chancery Lane [*or*, at No. Lincoln's Inn], in the County of Middlesex, as the time and place for the appointment of an official liquidator of the above-named company.

G. H.,
Chief Clerk.

No. 7. *Proposal for Appointment of Official Liquidator (and Sureties) where Form No.* 6 *has been issued.*

In the Matter, &c.

We, the undersigned contributories of the above-named company for the number of shares placed opposite our respective names, hereby propose Mr. W. T., of &c., public accountant, to be the official liquidator of the said company and H. N., of &c., and J. P., of &c., to be his sureties].

Name.	Address.	Number of Shares held.

No. 8. *Order appointing an Official Liquidator.* [Rules 10, 11.]

Master of the Rolls [*or*, Vice-Chancellor] at chambers. , the day of 18 .

In the Matter, &c.

Upon the application, &c., and upon reading, &c., the judge doth hereby appoint R. P. H., of &c., official liquidator of the above-named company. [*If security has not been given, add*, And it is Ordered that the said R. P. H. do, on or before the day of next, give security to be approved of by the judge.] And it is Ordered that the said R. P. H. do, on the day of , and day of 18 , and the same days in each succeeding year, leave his accounts at the chambers of the said judge. And it is Ordered that all moneys to be received by the said R. P. H. be paid by him into the Bank of England to the credit of the account of the official liquidator of the said company, within seven days after the receipt thereof. [*In case two or more official liquidators are appointed, add*, And the said judge doth declare that the following acts, required or authorized by the above statute to be done by the official liquidator, may be done by either [*or*, any one, *or* two] of the official liquidators hereby appointed, that is to say [*describe the acts*]; and that all other acts so required or authorized to be done be done by both [*or*, all] the official liquidators hereby appointed.]

Form 9.

No. 9. *Order appointing a Provisional Official Liquidator.*
[Rules 10, 11, 15, 59.]

Master of the Rolls [*or*, Vice-Chancellor] , the day of 18 .

at chambers. In the Matter, &c.

Upon the application, &c., and upon reading, &c., the judge doth hereby appoint R. P. H., of &c., provisionally, official liquidator of the above-named company. [*If security dispensed with, add,* without security; *or, if security is to be given, add directions as to security, accounts, and payment into the bank, as in Form No.* 8.] And the said judge doth hereby limit and restrict the powers of the said R. P. H., as such provisional official liquidator, to the following acts, that is to say [*describe the acts which the provisional official liquidator is to be authorized to do.*]

No. 10. *Recognizance of the Official Liquidator and Sureties.* [Rule 10.]

In the Matter, &c.
The Master of the Rolls [*or*, Vice-Chancellor has approved of and allowed this recognizance.
G. H., Chief Clerk.
18 .

R. P. H., of &c., W. B., of &c., and T. P., of &c., before our Sovereign Lady the Queen in her High Court of Chancery personally appearing, do acknowledge themselves, and every of them doth acknowledge himself, to owe to the Right Honourable Sir John Romilly, Knight, the Master of the Rolls, and the Honourable Sir Richard Torin Kindersley, Knight, the senior Vice-Chancellor for the said Court, the respective sums of lawful money of Great Britain set opposite to their respective names in the schedule hereto, to be paid to the said Sir John Romilly and Sir Richard Torin Kindersley, or one of them, or the executors or administrators of them, or one of them; and in default of payment of the said sums, the said R. P. H., W. B., and T. P., are willieg and do agree, and every of them is willing, and doth agree, for himself, his heirs, executors, and administraters, by these presents, that the said sums shall be levied, recovered, and received of and from them and every of them, and of and from all and singular the manors, messuages, lands, tenements, and hereditaments, goods, and chattels, of them and every of them, wheresoever the same shall be found. Witness our Sovereigu Lady Victoria, by the grace of God of the United Kiugdem of Great Britain and Ireland Queen, Defender of the Faith, and so ferth, at Westminster, the day of , 18 .

Whereas, in the matter of &c. [*take title from Order to wind up*], the Master of the Rolls [*or*, Vice-Chancellor] has by an order dated the day of , 18 , appointed the said R. P. H. official liquidator of the said company, and has thereby directed him to give security to be approved of by the said judge [*or, in case the security precedes the Order appointing,* has approved of the said R. P. H. as a proper person to be appointed official liquidator of the said company, upon his giving security]. And whereas the said judge has approved of the said W. B. and T. P. to be sureties for the said R. P. H. in the amounts set opposite to their respective names in the schedule hereto, and has also approved of the above-written recognizance, with the under-written condition, as a proper security to be entered into by the said R. P. H., W. B., and T. P., pursuant to the said Order and [*or*, pursuant to] the General Order of the said Court in that behalf; and in testimony of such approbation the chief clerk of the said judge hath signed an allowance in the margin hereof. Now the condition of the above-written recognizance is such that if the said R. P. H., his executors, or administrators, or any of them, do and shall duly account for what the said R. P. H. shall receive, or become liable to pay, as official liquidator of the said company, at such periods and in such manner as the said judge shall appoint, and pay the same as the said judge hath [by the said Order] directed, or shall hereafter direct, then the above recognizance to be void, otherwise to remain in full force and virtue.

THE SCHEDULE ABOVE REFERRED TO.

R. P. H.	———	Thousand pounds.
W. B.	———	Thousand pounds.
T. P.	———	Thousand pounds.

Taken and acknowledged by the above-named R. P. H., &c., &c.

No. 11. *Affidavit of Sureties.* [Rule 10.]

In Chancery.

In the Matter, &c.

We, W. B., of &c., and T. P., of &c., severally make oath, and say as follows:—

1. I, the said W. B., for myself, say that I am worth the sum of £ , of lawful

money of Great Britain, over and above what is sufficient for the payment of all my just debts and liabilities. **Form 12.**

2. And I, the said T. P., for myself, say that I am worth the sum of £ , of &c. [*as above*].

Sworn, &c.

No. 12. *Sanction of Appointment of Solicitor to Official Liquidator, and Appointment.* [25 & 26 Vict. c. 89, s. 97.]

In the Matter, &c.

The Master of the Rolls [*or*, Vice-Chancellor] sanctions the official liquidator appointing a solicitor to assist him in the performance of his duties.

G. H.,
Chief Clerk.

I hereby appoint Messrs. C. and D., of &c., to be my solicitors in this matter.
Dated this day of , 18 .

R. P. H., Official Liquidator.

No. 13. *Order for payment of Money or delivery of Books, &c., to Official Liquidator.* [25 & 26 Vict. c. 89, ss. 100, 101.]

The Master of the Rolls [*or*, Vice-Chancellor] at chambers. } day, the day of , 18 . In the Matter, &c.

Upon the application of, &c., and on reading, &c., It is ordered, that A. B., of &c., do, within four days after service hereof, pay to [*or*, deliver, convey, surrender, or transfer to or into the hands of] R. P. H., the official liquidator of the said company, at the office of the said R. P. H., situate at &c., the sum of £ being the amount of debt appearing to be due from the said A. B. on his account with the said company [*or*, any sum or balance, books, papers, estate, or effects], [*or specifically describe the property*] now being in the hands of the said A. B., and to which the said company is *primâ facie* entitled, [*or, otherwise, as the case may be.*]

No. 14. *Direction to open Account at the Bank of England.* [Rules 11, 32, 36–44.]

The Master of the Rolls [*or*, Vice-Chancellor] at chambers. } day of , 18 . In the Matter, &c.

To the Governor and Company of the Bank of England.

Gentlemen,

An Order, dated the day of , 18 , having been made in the above matter by the Master of the Rolls [*or*, the Vice-Chancellor] for winding up the above-named company by the Court of Chancery, under the provisions of the said Act, and R. P. H., of , having by order dated the day of 18 , been appointed the official liquidator of the said company, you are requested to open an account, to be entitled "The Account of the Official Liquidator of the Company," in your books, pursuant to the said Act.

All cheques drawn upon such account must be signed by the official liquidator, whose signature is attached hereto, and countersigned by one of the chief clerks of the said judge, whose signatures are also attached hereto.

I am, Gentlemen,
Your most obedt. Servt.,
G. H.,
Chief Clerk.

Signatures.

R. P. H., Official Liquidator.

G. W. } Chief Clerks of the Master of the
G. H. } Rolls [*or*, Vice-Chancellor].

Form 15.

No. 15. *Advertisement of Appointment of Official Liquidator.*

[Rule 14.]

In the Matter, &c.

The Master of the Rolls [*or*, the Vice-Chancellor], has, by an Order dated the day of , 18 , appointed R. P. H., of , to be official liquidator of the above-named company.

Dated this day of , 18 .

G. H.,
Chief Clerk.

No. 16. *Advertisement for Creditors.* [Rule 20.]

In the Matter of, &c.

The creditors of the above-named company are required, on or before the day of 18 , to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors, if any, to R. P. H., of , the official liquidator of the said company, and, if so required by notice in writing from the said official liquidator, are by their solicitors to come in and prove their said debts or claims, at the chambers of the Master of the Rolls, [*or*, the Vice-Chancellor], in the Rolls Yard, Chancery Lane] *or*, at No. Lincoln's Inn], in the county of Middlesex, at such time as shall be specified in such notice, or in default thereof they will be excluded from the benefit of any distribution made before such debts are proved.

day, the day of 18 , at o'clock in the noon, at the said chambers, is appointed for hearing and adjudicating upon the debts and claims.

Dated this day of 18 .

G. H.,
Chief Clerk.

No. 17. *Affidavit of Official Liquidator as to Debts and Claims.*

[Rule 22.]

In Chancery.

In the Matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows:—

1. I have in the paper writing now produced and shewn to me, and marked with the letter A., set forth a list of all the debts and claims the particulars of which have been sent in to me by persons making claims upon, or claiming to be creditors of the said company, pursuant to the advertisement issued in that behalf, dated the 18 ; and the names and addresses of the persons by whom such claims are made.

2. I have investigated the said debts and claims, and examined the same with the books and documents of the said company, in order to ascertain, so far as I am able, which of such debts and claims are justly due from the said company : and I have, in the first part of the said list, set forth such of the said debts and claims, or parts thereof, as, in my opiuion, are justly due from the said company, and proper to be allowed without further evidence; and I have, in the sixth column of the said first part of the said list, set forth the amounts proper to be allowed in respect of such debts and claims ; and I believe that such amounts respectively are justly due and proper to be allowed : and I have, in the seventh column of the said first part of the said list, stated my reasons for such belief.

3. I have, in the second part of the said list, set forth such of the said debts and claims as in my opinion ought to be proved by the respective creditors.

Sworn, &c.

No. 18. *Exhibit referred to in Affidavit* No. 17.

A.

In the Matter, &c.

List of debts and claims of which the particulars have been sent in to the official liquidator.

This paper writing, marked A., was produced and shewn to R. P. H., and is the same as is referred to in his affidavit, sworn before me this day of 18 .

W. B., &c.

First Part.—Debts and Claims proper to be allowed without further Evidence. **Form 19.**

Serial No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt or Claim.	Amount claimed.	Amount proper to be allowed.	Reasons for belief that amounts are proper to be allowed.
				£ s. d.	£ s. d.	

Second Part.—Debts and Claims which ought to be proved by the Creditors.

Serial No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt or Claim.	Amount claimed.
				£ s. d.

No. 19. *Notice to Creditor of Allowance of Debt.* [Rule 23.]

In the Matter, &c. [Place and date.]

Sir,

The debt claimed by you in this matter has been allowed by the judge at the sum of £ . [*If part only allowed, add,* If you claim to have a larger sum allowed, you are hereby required to come in and prove the further amount claimed, *&c., as in next Form.*]

I am, &c.,

R. P. H., Official Liquidator.

To Mr. P. R.

No. 20. *Notice to Creditors to come and prove their debts.* [Rule 24.]

In the Matter, &c.

You are hereby required to come in and prove the debt claimed by you against the above-named company, by filing your affidavit, and giving notice thereof to me, on or before the day of next; and you are to attend by your solicitor at the chambers of the Master of the Rolls, in the Rolls Yard, Chancery Lane [*or* of the Vice-Chancellor , at No. , Lincoln's Inn], in the county of Middlesex, on the day of 18 , at o'clock in the noon, being the time appointed for hearing and adjudicating upon the claim.

Dated this day of 18 .

R. P. H., Official Liquidator.

To Mr. S. T.

No. 21. *Affidavit of Creditor, in Proof of Debt.* [Rule 24.]

In Chancery.

In the Matter, &c.

I, S. T., of &c., make oath and say as follows:—

1. The above-named company was, on the day of 18 , the date of the order for winding up the same, and still is justly and truly indebted to me in the sum

Form 22. of £ , for, &c., [*Describe shortly the nature of the debt, and exhibit any security for it; and in the case of a trade debt exhibit a bill of parcels, and verify the reasonableness of the charges, as in proving a debt in a suit.*]

2. I have not, nor hath nor have any person or persons by my order, or to my knowledge or belief, for my use received the said sum of £ or any part thereof, or any security or satisfaction for the same or any part thereof, [*if any security add*], except the said [*describe the security*] hereinbefore mentioned or referred to.

Sworn, &c.

No. 22. *Certificate of Chief Clerk, as to Debts and Claims.*
[Rule 28.]

In the Matter, &c.

In pursuance of the directions given to me by the Master of the Rolls [*or*, Vice-Chancellor], I hereby certify that the result of the adjudication upon debts and claims against the above-named company, brought in pursuant to the advertisement issued in that behalf, dated the day of 18 , so far as such adjudication has up to the date of this certificate been proceeded with, is as follows:—

The debts and claims which have been allowed are set forth in the first schedule hereto, and, with the interest thereon and costs mentioned in the said schedule, are due to the persons therein named, and amount altogether to £ .

I have in the first part of the said schedule set forth such of the said debts and claims as carry interest, and the interest thereon has been computed after the rate they respectively carry down to the date of this certificate.

I have in the second part of the said schedule set forth such of the said debts and claims as do not carry interest, and the interest thereon has been computed at the rate of £4 per cent. per annum, from the day of 18 , being the date of the said order to wind up the company, down to the date of this certificate (*u*).

The claims set forth in the second schedule hereto have been brought in by the persons therein named, and have been disallowed.

The evidence produced, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

First Part.—Debts and Claims which carry Interest.

No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt.	Total due.
				£ s. d.
I	J. L.	29 Street, Lendon, Stationer	On Bill of Exchange, dated &c.	
		Principal	£	
		Interest at £ per cent. per annum (less Property Tax) from 18 to the date of this certificate	£	
		Costs of Proof . .	£	
			Total first Part £	

(*u*) See Rule 26, and note thereto.

Second Part.—Debts and Claims which do not carry Interest. **Form 23.**

No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt.	Interest on Principal (less Property Tax).	Total due.
				£ s. d.	£ s. d.
40	W. P.	15 Street, London.			
		Coal Merchant	Goods sold		
		Principal . . .	£50 0 0	2 0 0	54 0 0
		Costs of Proof .	2 0 0		
			Totals £		
			Add total first Part £		
		Total first and second Parts £			

THE SECOND SCHEDULE ABOVE REFERRED TO.

No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Claim.	Amount Claimed.
				£ s. d.

Dated this day of 18 .

G. H., Chief Clerk.

Approved the day of 18 . }

No. 23. *Notice to Creditor to attend to receive Debt.* [Rule 28.]

In the Matter, &c.

Sir,

Upon application at my office, No. Street, Middlesex, on or after the instant, between the hours of ten and four o'clock, you may receive a cheque for the amount of your debt, allowed in this matter as under:—

Principal . . . . . £
Interest . . . . . £
Costs of Proof . . . . . £

Total £

If you cannot attend personally, the cheque will be delivered to your order, upon your filling up and signing the subjoined form.

The bills or securities (if any) held by you must be produced at the time of such application.

Dated this day of 18 .

I am, &c.,
R. P. H., Official Liquidator.

To Mr. S. T.

Form 24.

[*Form of Order.*]

Sir,

Please to deliver to W. R. the cheque for £ referred to in the above letter as payable to me.

S. T.,
Creditor.

To Mr. R. P. H., Official Liquidator of the Company.

No. 24. *Affidavit in support of List of Contributories.*

In Chancery. [Rule 29.]

In the Matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows:—

1. The paper writing now produced and shewn to me, and marked with the letter A., contains a list of the contributories of the said company, made out by me from the books and papers of the said company, together with their respective addresses, and the number of shares [*or*, extent of interest] to be attributed to each; and such list is, to the best of my knowledge, information, and belief, a true and accurate list of the contributories of the said company so far as I have been able to make out and ascertain the same.

2. I have, in the first part of the said list, marked A, distinguished the persons who are contributories in their own right.

3. I have in the second part of the said list marked A, distinguished the persons who are contributories as being representatives of, or being liable to the debts of, others.

Sworn, &c.

No. 25. *List of Contributories referred to in Form No.* 24.

A.

In the Matter, &c.

This list of contributories, marked A, was produced and shewn to R. P. H., and is the same list of contributories as is referred to in his affidavit, sworn before me this day of 18 .

W. B., &c.

First Part.—Contributories in their own Right.

Serial No.	Name.	Address.	Description.	In what Character included.	Number of Shares [*or*, extent of Interest].

Second Part.—Contributories as being Representatives of, or liable to the Debts of Others.

Serial No.	Name.	Address.	Description.	In what Character included.	Number of Shares [*or*, extent of Interest].

No. 26. *Notice to Contributories of Appointment to settle List of Contributories.* [Rule 30.] **Form 26.**

In the Matter, &c.

The Master of the Rolls [*or*, Vice-Chancellor] has appointed the day of 18 , at of the clock in the noon, at his chambers in the Rolls Yard, Chancery Lane [*or*, at No. , Lincoln's Inn], in the county of Middlesex, to settle the list of the contributories of the above-named company, made out and left at the chambers of the said judge by the official liquidator of the said company, and you are included in such list in the character and for the number of shares [*or*, extent of interest] stated below; and if no sufficient cause is shewn by you to the contrary at the time and place aforesaid, the list will be settled by the said judge, including you therein.

Dated this day of 18 . R. P. H., Official Liquidator.

To Mr. A. B. [and to Mr. C. D., his solicitor].

No. on List.	Name.	Address.	Description.	In what Character included.	Number of Shares [*or*, extent of Interest].

No. 27. *Affidavit of Service of Notice.* [Rule 30.]

In Chancery.

In the Matter, &c.

I, W. S., of &c., clerk to Messrs. C. D., of &c., the solicitors of the official liquidator of the above-named company, make oath and say as follows:—

1. The first six columns of the schedule now produced and shewn to me, and marked with the letter A, contain a true copy of the list of contributories of the said company, made out and left at the chambers of the Master of the Rolls [*or*, Vice-Chancellor], by the said official liquidator, on the day of 18 , and now on the file of proceedings of the said company, as I know from having, on the day of 18 , examined and compared the said schedule with the said list; and I have, in the seventh column of the said schedule marked A, set forth the names and addresses of the solicitors who have entered appearances for any of the contributories named in the said list.

2. I did, on the day of 18 , in the manner hereinafter mentioned, serve a true copy of the notice now produced and shewn to me, and marked B, upon each of the respective persons whose names, addresses, and descriptions appear in the second, third, and fourth columns of the said schedule marked A, except that in the tabular form at the foot of such copies respectively I inserted the number on list, name, address, description, in what character included, and number of shares [*or*, extent of interest] of the person on whom such copy of the said notice was served, in the same words and figures as the same particulars are set forth in the said schedule marked A.

3. I served the said respective copies of the said notice, by putting such copies respectively, duly addressed to such persons respectively or their solicitors, according to their respective names and addresses appearing in the said schedule marked A, and, with the proper postage stamps affixed thereto as prepaid letters, into the post-office receiving-house, No. in Street, in the county of between the hours of and of the clock in the noon of the said day of .

Sworn, &c.

No. 28. *The Schedule referred to in Form No.* 27.

A.

In the Matter, &c.

This schedule marked A was produced and shewn to W. S., and is the same

Form 29.

schedule as is referred to in his affidavit, sworn before me this day of 18 .
W. B., &c.

1. Number on List.	2. Name.	3. Address.	4. Description.	5. In what Character included.	6. Number of Shares [*or*, extent of Interest].	7. Names and Addresses of Solicitors who have entered appearances, and been served with a copy of the notice referred to in the Affidavit of W. S., to which this Schedule is an exhibit.

No. 29. *Supplemental List of Contributories and Affidavit in Support.*
[Rule 29.]

In Chancery.

In the Matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows:—

1. Since leaving at the chambers of the judge the list of the contributories in this matter, on the day of 18 , it has come to my knowledge that the several persons whose names are set forth in the supplemental list of contributories now produced and shewn to me, and marked with the letter B, are, or have been, holders of shares in [*or*, members of] the said company, and to the best of my judgment, information, and belief, such persons are contributories of the said company.

2. The said supplemental list, marked B, contains the names of such persons, together with their respective addresses, and the number of shares [*or*, extent of interest] to be attributed to each; and such list is, to the best of my knowledge, information, and belief, true and accurate.

3. I have, in the first part of the said list marked B, distinguished such of the said persons as are contributories in their own right.

4. I have, in the second part of the said list marked B, distinguished such of the said persons as are contributories as being representatives of, or being liable to the debts of, others.

Sworn, &c.

No. 30. *Supplemental List of Contributories referred to in Form No.* 29. B.

In the Matter, &c.

This supplemental list of contributories, marked B, was produced and shewn to R. P. H., and is the same supplemental list of contributories as is referred to in his affidavit sworn before me this day of 18 .
W. B., &c.

Note.—The supplemental list is to be made out in the same form as the original list, Form No. 25.

No. 31. *Certificate of Chief Clerk of Settlement of the List of Contributories.*
[Rule 31.]

In the Matter, &c.

In pursuance of the directions given to me by the Master of the Rolls [*or*, Vice-Chancellor], I hereby certify that the result of the settlement of the list of contributories of the above-named company, made out and left at the chambers of the said judge by the official liquidator of the said company on the day of 18 ; pursuant to the above statute and the general order of this Court in that

behalf, so far as the said list has been settled up to the date of this certificate, is as follows:— **Form 31.**

1. The several persons whose names are set forth in the second column of the first schedule hereto have been included in the said list of contributories as contributories of the said company in respect of the number of shares [*or*, extent of interest] set opposite the names of such contributories respectively in the said schedule.

I have in the first part of the said schedule distinguished such of the said several persons included in the said list as are contributories in their own right.

I have in the second part of the said schedule distinguished such of the said several persons included in the said list as are contributories as being representatives of, or being liable to the debts of, others.

2. The several persons whose names are set forth in the second column of the second schedule hereto have been excluded from the said list of contributories.

3. I have in the seventh column of the said first and second schedules set forth opposite the name of each of the said several persons respectively the date when such person was included in or excluded from the said list of contributories.

The evidence produced, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

First Part.—Contributories in their own Right.

Serial No. in List.	Name.	Address.	Description.	In what Character included.	Number of Shares [*or*, extent of Interest].	Date when included in the List.

Second Part.—Contributories as being Representatives of or liable to the Debts of Others.

Serial No. in List.	Name.	Address.	Description.	In what Character included.	Number of Shares [*or*, extent of Interest.]	Date when included in the List.

THE SECOND SCHEDULE ABOVE REFERRED TO.

Serial No. in List.	Name.	Address.	Description.	In what Character proposed to be included.	Number of Shares [*or*, extent of Interest].	Date when excluded from the List.

Dated this day of 18 .

Approved the day of 18 . }

G. H.,
Chief Clerk.

Form 32.

No. 32. *Order on Application to vary List.* [Rule 29.]

Master of the Rolls [*or*, Vice-Chancellor] day, the day of 18 .

at chambers. In the Matter, &c.

Upon the application of W. N. to review the list of contributories of the said company, in respect of the inclusion of the said W. N. therein, and that his name may be excluded therefrom, and upon hearing counsel, &c., and upon reading, &c., it is Ordered, That the name of the said W. N. be excluded from the said list of contributories [*or*, the judge doth not think fit to make any Order on the said application, except that the said W. N. do pay to R. P. H., the official liquidator of the said company, his costs of this application, to be taxed by the taxing-master in case the parties differ.]

No. 33. *Affidavit of Official Liquidator in support of Proposal for Call.* [Rule 33.]

In Chancery.

In the Matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows:—

1. I have, in the schedule now produced and shewn to me, and marked with the letter A, set forth a statement, shewing the amount due in respect of the debts allowed against the said company, and the estimated amount of the costs, charges, and expenses of and incidental to the winding-up the affairs thereof, and which several amounts form in the aggregate the sum of £ or thereabonts.

2. I have also in the said schedule set forth a statement of the assets in hand belonging to the said company, amounting to the sum of £ and no more. There are no other assets belonging to the said company, except the amounts due from certain of the contributories of the said company, and, to the best of my information and belief, it will be impossible to realize in respect of the said amounts, more than the sum of £ or thereabouts.

3. It appears by the Chief Clerk's certificate, dated the day of 18 , that persons have been settled on the list of contributories of the said company in respect of the total number of shares.

4. For the purpose of satisfying the several debts and liabilities of the said company, and of paying the costs, charges, and expenses of and incidental to the winding-up the affairs thereof, I believe the sum of £ will be required, in addition to the amount of the assets of the said company mentioned in the said Schedule A, and the said sum of £ .

5. In order to provide the said sum of £ it is necessary to make a call upon the several persons who have been settled on the list of contributories as before mentioned, and having regard to the probability that some of such contributories will partly or wholly fail to pay the amount of such call, I believe that for the purpose of realising the amount required as before mentioned, it is necessary that a call of £ per share should be made.

Sworn, &c.

No. 34. *Summons for Intended Call.* [Rule 33.]

In the Matter, &c.

Let all parties concerned attend at my Chambers in the Rolls Yard, Chancery Lane [*or*, at No. , Lincoln's Inn], in the county of Middlesex, on day, the day of 18 , at of the clock in the noon, on the hearing of an application on the part of the official liquidator of the above-named company, that a call to the amount of £ per share may be made on all the contrib [*or*, *if upon any particular class, specify the same*] of the said company.

John Romilly, Master of the Rolls,

or

X. Y., Vice-Chancellor.

This summons was taken out by A. & B., of , in the county of , solicitors for the said official liquidator.

To Mr. A. B., of &c., a contributory of the said company proposed to be included in the said call.

No. 35. *Advertisement of Intended Call.* [Rule 33.]

In the Matter, &c.

By direction of the Master of the Rolls [*or*, Vice-Chancellor] Notice is

hereby given that the said judge has appointed the day of 18 , at o'clock in the noon, at his Chambers in the Rolls Yard, &c., to make a call on all the contributories of the said company [*or, as the case may be*], and that the official liquidator of the said company proposes that such call shall be for £ per share. All persons interested are entitled to attend at such day, hour, and place, to offer objections to such call. **Form 36.**

Dated this day of 18 .

G. H.,
Chief Clerk.

No. 36. *General Order for a Call.* [Rule 34.]

Master of the Rolls [*or*, Vice-Chancellor] at chambers. } the day of 18 .

In the Matter, &c.

Upon the application of the official liquidator of the above-named company, and upon reading two Orders, dated the day of 18 , and the day of 18 , the chief clerk's certificate, dated the day of 18 , affidavit of the said official liquidator, filed 18 , and the exhibit marked A therein referred to, and an affidavit of filed 18 , It is ordered that a call of £ per share be made on all the contributories of the said company [*or, as the case may be*]. And it is Ordered, that each such contributory do on or before the day of 18 , pay into the Bank of England, to the account of the official liquidator of the company, the amount which will be due from him or her in respect of such call.

No. 37. *Notice to be served with the General Order for a Call.* [Rule 34.]

In the Matter, &c.

The amount due from you, A. B., in respect of the call made by the above [*or*, within] Order, is the sum of £ , which sum is to be paid by you into the Bank of England, to the account mentioned in the said Order. You can pay the same in person, or through a banker or other agent; but this notice and copy Order must be produced at the Bank upon such payment, and the cashier of the Bank will, upon receiving the same, deliver to you a certificate of the payment in, numbered , signed by the said cashier. In order to prevent proceedings being taken against you for non-payment, you must, immediately upon such payment in, cause written notice of the payment, and of the date thereof to be given to me as the official liquidator of the said company, at my office, No. Street, in the county of Middlesex.

Dated this day of 18 .

R. P. H., Official Liquidator.

To Mr. A. B.

No. 38. *Affidavit in support of Application for Order for Payment of Call due from Contributories.* [Rule 35.]

In Chancery.

In the Matter, &c.

I, R. P. H , of &c., the official liquidator of the above-named company, make oath, and say as follows:—

1. None of the contributories of the said company, whose names are set forth in the schedule hereunto annexed, marked A, have paid, or caused to be paid, the respective sums set opposite their respective names in the said schedule, and which sums are the respective amounts now due from them respectively in respect of the call of £ per share, in pursuance of the Order of the judge in that behalf, dated the day of 18 .

2. The respective amounts or sums set opposite the names of such contributories respectively in such schedule, are the true amounts due and owing by such contributories respectively in respect of the said call.

Sworn, &c.

Form 39.

A.

THE SCHEDULE ABOVE REFERRED TO.

No. on List.	Name.	Address.	Description.	In what Character included.	Amount Due.
					£ s. d.

Note.—In addition to the above Affidavit, an Affidavit of the service of the Order and Notice (Nos. 36 and 37) will be required.

No. 39. *Order for Payment of Call due from a Contributory.* [Rule 35.]

The Master of the Rolls [*or,* Vice-Chancellor] at chambers. day, the day of 18 .

In the Matter, &c.

Upon the application of the official liquidator of the above-named company and upon reading the Order, dated the day of 18 , an affidavit of filed the day of 18 , and an affidavit of the said official liquidator, filed the day of 18 , It is Ordered, that C. D., of &c. [*or,* E. F., of &c., the legal personal representative of L. M., late of &c., deceased], one of the contributories of the said company [*or if against several contributories,* the several persons named in the second column of the schedule to this Order being respectively contributories of the said company], do, on or before the day of 18 , or within four days after service of this Order, pay into the Bank of England, to the account of the official liquidator of the company [*or,* to A. B., the official liquidator of the said company, at his office, No. Street, in the county of Middlesex], the sum of £ [*if against a legal personal representative, add,* out of the assets of the said L. M., deceased, in his hands as such legal personal representative as aforesaid, to be administered in a due course of administration (*x*) if the said E. F. has in his hands so much to be administered; *or if against several contributories,* the several sums of money set opposite to their respective names in the sixth column of the said Schedule hereto], such sum [*or* sums] being the amount [*or* amounts] due from the said C. D. [*or* L. M.] [*or* the said several persons respectively] in respect of the call of £ per share made by the said Order, dated the day of 18 .

THE SCHEDULE REFERRED TO IN THE FOREGOING ORDER.

No. on List.	Name.	Address.	Description.	In what Character included.	Amount Due.
					£ s. d.

Note.—The copy for service of the above Order must be indorsed, as required by the 23rd Consol. Order, Rule 10 (*y*).

(*x*) This does not constitute the official liquidator a judgment creditor: *International Marine Co.* v. *Hawes*, 29 Ch. Div. 934.

(*y*) The indorsement must now be in the form given in Order XLI. R. 5.

No. 40. *Notice to be indorsed on, or served with every order directing Payment of Money into the Bank of England.* [Rule 39.] **Form 40.**

You can make the payment directed by the within [*or* above] Order at the Bank of England in person, &c. [*as in the Form No.* 37.]

R. P. H., Official Liquidator.

To Mr.

No. 41. *Certificate of Payment of Money into the Bank of England.* [Rule 39.]

In the Matter, &c.

No.

day of , 18 .

I hereby certify that C. D., of &c., has this day paid into the Bank of England the sum of , to be placed to the credit of the official liquidator of the company, pursuant to an Order dated the day of , 18

For the Governor and Company of the Bank of England,

H. M.,

Cashier.

£ : : .

No. 42. *Affidavit of Service of Order for Payment of Call.* [Rule 35.]

In Chancery.

In the Matter, &c.

I, J. B., of &c., make oath, and say as follows:

1. I did, on the day of 18 , personally serve G. F., of in the county of , &c., with an Order made in this matter by His Honour the Master of the Rolls [*or,* Vice-Chancellor], dated the day of 18 , whereby it was ordered [*set out the Order in the past tense*] by delivering to and leaving with the said G. F. at , in the county of , a true copy of the said Order, and at the same time producing and shewing unto him, the said G. F., the said original Order duly entered.

2. There was indorsed on the said copy, when so served, the following words, that is to say, "If you, the within-named G. F., neglect to obey this order by the time therein limited, you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery, or by the serjeant-at-arms attending the same Court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same Order."

Sworn, &c.

No. 43. *Affidavit of Non-Payment of Money by Order directed to be paid into the Bank of England.* [Rule 40.]

In Chancery.

In the Matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows:—

1. G. F., the person named in an order made in this matter by His Honour the Master of the Rolls [*or,* Vice-Chancellor], dated day of 18 , has not paid into the Bank of England to the account of the official liquidator of the company, the whole or any part of the sum of £ as by the said Order directed.

[*Or in case of several parties.*]

1. None of the several persons whose names and addresses are set forth in the schedule hereunder written, and who have respectively been duly served with Orders made in this matter by His Honour the Master of the Rolls [*or,* Vice-Chancellor], of the respective dates set opposite to their respective names in the said schedule, have paid into the Bank of England to the account of the official liquidator of the company, the whole or any part of the several sums of money set opposite to their respective names in the said schedule hereunder written, as by the said Orders respectively directed.

2. I am enabled to depose to such non-payment, by reason of my having this day ascertained, by inquiry at the said Bank, that such payment [*or* payments] has

Form 44. [*or*, have] not been made, and seen the certificate of payment in, numbered [*or*, several certificates of payment in, the numbers whereof respectively are set forth in the sixth column of the said schedule, opposite the names of the said respective persons, being certificates], furnished by me to the cashier of the said Bank for delivery to the said G. F. [*or*, several persons respectively] upon such payment [*or*, payments] being made, still in the hands of the cashier of the said Bank. No notice [*or*, notices] of such payment [*or*, payments] having been made has [*or*, have] been given to me by the said G. F. [*or*, several persons respectively].

THE SCHEDULE ABOVE REFERRED TO.

Name.	Address.	Description.	Amount.	Date of Balance Order.	Number of Certificate.
			£ s. d.		

No. 44. *Request to invest Cash in Government Stock or Exchequer Bills.*
[Rule 43.]

In the Matter, &c.

To the Governor and Company of the Bank of England.

Gentlemen,

It appearing that the sum of £ cash is standing to the credit of the account of the official liquidator of the above-named company, you are hereby requested to invest the sum of £ , part thereof, in the purchase of Bank £3 per Cent. Annuities [*or*, Reduced £3 per Cent. Annuities, *or* New £3 per Cent. Annuities, *or*, New £2 10*s.* per Cent. Annuities] in the name of R. P. H., of &c., the official liquidator of the said company [*or*, in the purchase of exchequer bills, and to deposit such exchequer bills in the Bank of England, in the name and behalf of the said official liquidator]. The said annuities [*or*, exchequer bills] are not to be sold, transferred, or otherwise dealt with, except upon a direction for that purpose signed by the official liquidator of the said company, and countersigned by the chief clerk of the Master of the Rolls [*or*, Vice-Chancellor], or under an order to be made by the said Judge.

Dated this day of 18 .

I am, Gentlemen,
Your most obedient Servant,
R. P. H., Official Liquidator.

Countersigned,
G. H., Chief Clerk of the Master
of the Rolls [*or*, Vice-Chancellor
].

No. 45. *Notice* [*or Advertisement*] *of Meeting of Creditors or Contributories.*
[Rules 45, 46.]

In the Matter, &c.

Notice is hereby given that the Master of the Rolls [*or*, Vice-Chancellor] has directed a meeting of the creditors [*or*, contributories] of the above-named company to be summoned pursuant to the above statute, for the purpose of ascertaining their wishes as to [*state the object for which meeting called, unless notice is by advertisement, in which case say*, certain matters relating to the winding-up of the said company] and that such meeting will be held on day, the day of

18 , at o'clock in the noon, at in the county of , at which time and place all the creditors [*or*, contributories] of the said company are requested to attend. [The said judge has appointed H. T., of &c., to act as chairman of such meeting.] **Form 46.**

Dated this day of 18 .

R. P. H., Official Liquidator.

No. 46. *Appointment of Proxy to vote at Meeting of Creditors or Contributories.* [Rule 46.]

In the Matter, &c.

I, W. S., of in the county of being a creditor [*or*, contributory] of the above-named company, hereby appoint of as my proxy to vote for me, and on my behalf, at the meeting of the creditors [*or*, contributories] of the said company, summoned by direction of the Master of the Rolls [*or*, Vice-Chancellor], to be held on the day of 18 .

As witness my hand this day of 18 .

W. S.

Signed by the said W. S. in the presence of J. M., of &c.

No. 47. *Memorandum of Appointment of a Person to act as Chairman at Meeting of Creditors or Contributories.* [Rule 47.]

In the Matter, &c.

The Master of the Rolls [*or*, Vice-Chancellor] has appointed Mr. H. T., of &c., one of the creditors [*or*, contributories] of the above-named company, to act as chairman of a meeting of the creditors [*or*, contributories] of the said company, summoned by direction of the said judge, pursuant to the above statute, to be held on day, the day of 18 , at o'clock in the noon, at in the county of , and to report the result of such meeting to the said judge.

The said meeting is summoned for the purpose of ascertaining the wishes of the creditors [*or*, contributories] of the said company as to [*state the object for which meeting called*]; and at such meeting the votes of the creditors [*or*, contributories] may be given either personally or by proxy.

Dated this day of 18 .

G. H., Chief Clerk.

No. 48. *Chairman's Report of Result of Meeting of Creditors or Contributories.* [Rules 45, 46, 47.]

In the Matter, &c.

I, H. T., the person appointed by the Master of the Rolls [*or*, Vice-Chancellor] to act as chairman of a meeting of the creditors [*or* contributories] of the above-named company, summoned by advertisement [*or*, notice], dated the day of 18 , and held on the day of 18 , at in the county of , do hereby report to the said judge the result of such meeting as follows:

The said meeting was attended, either personally or by proxy, by creditors to whom debts against the said company have been allowed amounting in the whole to the value of £ [*or*, by contributories, holding in the whole shares in the said company, and entitled respectively, by the regulations of the company, to the number of votes hereinafter mentioned.]

The question submitted to the said meeting was, whether the creditors [*or*, contributories] of the said company approved of the proposal of the official liquidator of the said company, that, &c. [*as the case may be*], and wished that such proposal should be adopted and carried into effect.

The said meeting was unanimously of opinion that the said proposal should [*or* should not] be adopted and carried into effect. [*or*, The result of the voting upon such question was as follows:

Form 49. The undermentioned creditors [*or*, contributories] voted in favour of the said proposal being adopted and carried into effect:—

Name of Creditor [*or*, Contributory.]	Address.	Value of Debt [*or*, Number of Shares].	Number of Votes conferred on each Contributory by the Regulations of the Company.

The undermentioned creditors [*or*, contributories] voted against the said proposal being adopted and carried into effect:—

Name of Creditor [*or*, Contributory].	Address.	Value of Debt [*or*, Number of Shares].	Number of Votes conferred on each Contributory by the Regulations of the Company.

Dated this day of 18 .

(Signed) H. T.,
Chairman.

No. 49. *Memorandum of Sanction of Judge to accepting Bill of Exchange.*
[Rule 48.]

In the Matter, &c.

The Master of the Rolls [*or*, Vice-Chancellor] has sanctioned the acceptance of this bill of exchange by the official liquidator on behalf of the said company.

G. H.,
Chief Clerk.

No. 50. *Memorandum of Agreement of Compromise with a Contributory* (*z*).
[Rule 49.]

In the Matter, &c.

Memorandum of agreement entered into this day of 18 , between R. P. H., of &c., the official liquidator of the above-named company of the one part, and S. B., of &c., one of the contributories of the said company, of the other part.

Whereas the said S. B. has been settled on the list of contributories of the said company, as a contributory in respect of shares in the said company. And

(*z*) As to the results of such compromise see *ante*, pp. 144, 298, 387, 388.

Form 51.

whereas, by an Order made by the Master of the Rolls [or, Vice-Chancellor], dated the day of 18 , a call of £ per share was made on all the contributories of the said company, and there is now due from the said S. B. to the said company the sum of £ in respect of the said call. And whereas the said S. B. has proposed to pay to the said official liquidator the sum of £ by way of compromise, and in satisfaction and discharge of the said sum of £ , and of all liability whatsoever, as a contributory of the said company. And whereas the said official liquidator, having investigated the affairs of the said S. B., and believing that such compromise will be beneficial to the said company, hath, in exercise of the power for that purpose given to him by the above statute, agreed to accept the same, subject to the sanction of the said judge and to the conditions and agreements hereinafter contained. Now it is hereby agreed by and between the said parties hereto:

1st. That the said official liquidator shall, before the day of next, apply to the said judge at chambers to sanction this agreement of compromise.

2nd. That upon this agreement being sanctioned by the said judge the said S. B. shall within days next after such sanction, pay to the said official liquidator the sum of £ , and when thereto required, shall do and execute all such acts and deeds as may be necessary for transferring, or surrendering and releasing to the said official liquidator on behalf of the said company, or in such manner as the said judge may direct, the said shares held by the said S. B. in the said company, and all claim and demand whatsoever which the said S. B. has, or may have, against the said company in respect of the said shares, or the distribution of the assets of the said company, or otherwise howsoever.

3rd. That the said sum of £ , and the transfer or surrender and release of the said shares and interest of the said S. B., as aforesaid, shall be accepted by the said official liquidator as, and be deemed and taken to give to the said S. B. a full and complete discharge from all calls and liabilities, claims and demands whatsoever, which the said company, or the official liquidator thereof, now has or may hereafter have, or be entitled to against the said S. B., in respect of his being or having been the holder of the said shares, or otherwise, as a contributory of the said company.

4th. That in case this agreement shall not be sanctioned by the said judge it shall cease and determine, and the said official liquidator and the said S. B. shall be remitted to their original rights with respect to each other, as if this agreement had not been entered into.

5th. That in case this agreement shall be sanctioned by the said judge, and the said S. B. shall not in all respects perform the same on his part, the official liquidator shall be at liberty, with the sanction of the said judge, and without notice to the said S. B., to enforce the performance thereof, or with the like sanction, to give notice to the said S. B. that he abandons this agreement, whereupon the same shall cease and determine (a), and the said official liquidator shall be entitled to proceed against the said S. B. to enforce payment of the said sum of £ , or so much thereof as shall then remain due and unpaid, as if this agreement had not been entered into (b).

R. P. H., Official Liquidator.
S. B.

Witnesses to the signatures of the said R. P. H. and S. B.
C. D., of &c.

No. 51. *Memorandum of Sanction of Judge to Agreement of Compromise.*
[Rule 49.]

In the Matter, &c.

The Master of the Rolls [*or*, Vice-Chancellor] has sanctioned this agreement of compromise.

G. H.,
Chief Clerk.

(a) See *Legal, &c., Co-operative Society*, W. N., 1873, 135, *supra*, p. 388.

(b) The following words are sometimes added:—Provided always that nothing herein contained shall prejudice or affect the rights of the said company, or of the said official liquidator or of the creditors of the company against any other contributories of the said company whether as present or past members thereof or otherwise, and that the liability of such members to contribute to the assets of the company shall remain the same as if this agreement of compromise had not been made except only to the extent of the said sum of £ so to be paid as aforesaid.

Form 52. No. 52. *Order or Memorandum of the Sanction of the Judge for certain Acts to be done by the Official Liquidator.* [Rule 50.]

The Master of the Rolls [*or*, Vice-Chancellor] at Chambers. } day of 18 . In the Matter, &c.

The Master of the Rolls [*or*, Vice-Chancellor] doth hereby sanction [*or*, has sanctioned] the following proceedings being taken [*or*, acts being done], by the official liquidator of the above-named company, namely, [*state the proceedings to be taken or acts to be done as*,] the bringing [*or*, instituting] and prosecuting an action at law [*or*, suit in equity], in the name and on behalf of the said company, against [*or*, defending an action at law, *or*, suit in equity] brought [*or*, instituted] against the said company by K. M., of &c., to recover a debt or sum of £ alleged to be due from [*or*, to] the said K. M. to [*or*, from] the said company, &c.

G. H.,
Chief Clerk.

No. 53. *Appearance Book.* [Rule 62.]

In the Matter, &c.

Appearance Book.

Date when Appearance entered.	Party's Name.	Whether Creditor or Contributory.	If he appears in person, his Address for service.	If he appears by a Solicitor, his Solicitor's Name.	Solicitor's Address.	Amount of Debt [*or*, Number of Shares].

No. 54. *Summons for Persons to attend at Chambers to be examined.* [25 & 26 Vict. c. 89, s. 115.]

In Chancery.

In the Matter, &c.

A. B., of &c., and E. F., of &c., are hereby severally summoned to attend at the Chambers of the Master of the Rolls [*or*, Vice-Chancellor], in the Rolls Yard, Chancery Lane [*or*, No. Lincoln's Inn,] in the county of Middlesex, on the day of 18 , at of the clock in the noon to be examined on the part of the official liquidator [*or*, of W. D., of &c.], for the purpose of proceedings directed by the Master of the Rolls [*or*, the said Vice-Chancellor] to be taken before me in the above matter. [And the said A. B. is hereby required to bring with him and produce, at the time and place aforesaid, a certain indenture [*describe documents*] and all other books, papers, deeds, writings, and other documents in his custody or power in anywise relating to the above-named company.]

Dated this day of 18 .

G. H.,
Chief Clerk.

This summons was taken out by Messrs. C. & D. of , in the county of , Solicitors for the Official Liquidator [*or*, for the said W. D.].

No. 55. *Certificate of the Company being completely wound up, and of the Official Liquidator having passed his final Account.* [Rule 66.]

In the Matter, &c.

In pursuance of the directions given to me by the Master of the Rolls [*or*, Vice-Chancellor], I hereby certify that R. P. H., the official liquidator of the above-named company, has passed his final account as such official liquidator, and that the balance of £ thereby certified to be due to [*or*, from] the said official

liquidator has been paid in the manner directed by the order dated the day of 18 . And that the affairs of the said company have been completely wound up. **Form 56.**

The evidence produced, &c.

Dated this day of 18 .

G. H.,
Chief Clerk.

Approved the day of 18 .

No. 56. *Order to dissolve the Company.* [Rule 66.]

The Master of the Rolls, [*or*, Vice-Chancellor] at Chambers. , the day of 18 .

In the Matter, &c.

Upon the application of the official liquidator of the above-named company, and upon reading an order dated the day of , and the Chief Clerk's certificate, dated the day of whereby it appears that the affairs of the said company have been completely wound up, and that the balance of £ due from [*or*, to] the official liquidator has been paid in manner directed by the said Order, It is Ordered that the said company be dissolved, as from this day of 18 , And that the recognizance, dated the day of 18 , entered into by the said official liquidator, together with W. B. and T. P., his sureties, be vacated.

WESTBURY, C.
JOHN ROMILLY, M.R.
RICHD. T. KINDERSLEY, V.C.
JOHN STUART, V.C.
W. P. WOOD, V.C.

GENERAL ORDER AND RULES

OF THE

High Court of Chancery,

TO

REGULATE THE MODE OF PROCEEDING UNDER THE COMPANIES ACT, 1867.

ISSUED BY

THE LORD HIGH CHANCELLOR,

SATURDAY, THE 21ST DAY OF MARCH, 1868.

ORDER OF COURT,

Saturday, the 21st day of March, 1868.

THE RIGHT HONOURABLE HUGH MCCALMONT BARON CAIRNS, Lord High Chancellor of Great Britain, with the advice and consent of The Right Honourable JOHN LORD ROMILLY, Master of the Rolls, the Honourable the Vice-Chancellor SIR JOHN STUART, and the Honourable the Vice-Chancellor SIR RICHARD MALINS, doth hereby in pursuance and execution of the powers given to him by "The Companies Act, 1867" (*a*), and of all other powers and authorities enabling him in that behalf, order and direct in manner following:—

(*a*) Comp. Act, 1867, s. 20.

PETITIONS FOR WINDING-UP (*a*).

Title of winding-up petition.

1. Every petition which shall after this order comes into operation be presented for the winding-up of any company by the Court, or subject to the supervision of the Court, and all notices, affidavits, and other proceedings under such petition, shall be intituled in the matter of "The Companies Acts, 1862 and 1867," and of the company to which such petition shall relate.

(*a*) Gen. Order, Nov. 1862, Rules 1–5.

A petition wrongly intituled in the matter of "The Companies Act, 1862," only was directed to be re-advertised (*c*), **Rule 2.**

PETITION TO REDUCE CAPITAL (*a*).

Title of petition to reduce capital.

2. Every petition for an order confirming a special resolution for reducing the capital of a company, and all notices, affidavits, and other proceedings under such petition, shall be intituled in the matter of "The Companies Act, 1867," and of the company in question.

(*a*) Comp. Act, 1867, s. 11.

This General Order is applicable to reduction of capital under Comp. Act, 1877, including cases within sect. 4 of that Act, except so far as the General Order requires something to be done inconsistent with the later Act (*d*). The question how far the order is to be complied with is discussed in the note to sect. 15 of the Companies Act, 1867.

Certificate before petition placed in list.

3. No such petition as mentioned in the 2nd Rule of this Order shall be placed in the list of petitions by the secretary of the Lord Chancellor or of the Master of the Rolls, as the case may be, until after the expiration of eight clear days from the filing of such certificate as is mentioned in the 14th Rule of this Order.

Proceedings after petition presented.

4. When any such petition as last aforesaid has been presented, application may be made, *ex parte* by summons in chambers, to the judge to whose Court the petition is attached, for directions as to the proceedings to be taken for settling the list of creditors entitled to object to the proposed reduction, and the judge may thereupon fix the date with reference to which the list of such creditors is to be made out, pursuant to the 13th section of the Companies Act, 1867; and may, either at the same time or afterwards, as he shall think fit, give such directions as are mentioned in the 5th and 6th Rules of this Order. The order upon such summons may be in the Form No. 1 in the schedule hereto, with such variations as the circumstances of the case may require.

Advertisement of petition.

5. Notice of the presentation of the petition shall be published at such times, and in such newspapers as the judge shall direct, so that the first insertion of such notice be made not less than one calendar month before the day of the date fixed, as mentioned in the 4th Rule of this Order. Such notice may be in the Form No. 2 in the schedule hereto, with such variations as the circumstances of the case may require.

See the note to Comp. Act, 1867, s. 15.

As to these advertisements, see *In re Crédit Foncier of England* (*e*).

(*c*) *Marezzo Marble Co.*, 29 L. T. 720; 22 W. R. 248; 43 L. J. (Ch.) 544; W. N. 1874, 9; *supra*, p. 673.

(*d*) *Tambracherry Estates Co.*, 29 Ch. Div. 683.

(*e*) 11 Eq. 356, 357.

Rule 6.

Affidavit as to creditors.

6. The company shall, within such time as the judge shall direct, file in the office of the Clerks of Records and Writs an affidavit made by some officer or officers of the company competent to make the same, verifying a list containing the names and addresses of the creditors of the company at the date fixed as mentioned in the 4th Rule of this Order, and the amounts due to them respectively, and leave the said list and an office copy of such affidavit at the chambers of the judge.

As to debenture-holders whose names are not known, see note to Companies Act, 1867, s. 13.

Form of affidavit.

7. The person making such affidavit shall state therein his belief that such list is correct, and that there was not at the date so fixed as aforesaid any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, except the debts set forth in such list, and shall state his means of knowledge of the matters deposed to in such affidavit. Such affidavit may be in the Form No. 3 in the schedule hereto, with such variations as the circumstances of the case may require.

Inspection of list of creditors

8. Copies of such list containing the names and addresses of the creditors, and the total amount due to them, but omitting the amounts due to them respectively, or (as the judge shall think fit) complete copies of such list, shall be kept at the registered office of the company and at the offices of their solicitors and London agents (if any), and any person desirous of inspecting the same may at any time during the ordinary hours of business, inspect and take extracts from the same on payment of the sum of one shilling.

This Rule is printed as altered by Order of the 2nd of March, 1869. The alteration consists in the insertion of the words from "containing" to "complete copies of such list," inclusive.

Notice to creditors.

9. The company shall, within seven days after the filing of such affidavit, or such further time as the judge may allow, send to each creditor whose name is entered in the said list a notice stating the amount of the proposed reduction of capital, and the amount of the debt for which such creditor is entered in the said list, and the time (such time to be fixed by the judge) within which, if he claims to be a creditor for a larger amount, he must send in his name and address, and the particulars of his debt or claim, and the name and address of his solicitor (if any) to the solicitor of the company; and such notice shall be sent through the post in a prepaid letter addressed to each creditor at his last

known address or place of abode, and may be in the form or to the effect of the Form No. 4, set forth in the schedule hereto, with such variations as the circumstances of the case may require. **Rule 10.**

As to creditors residing abroad, and debenture-holders whose names are not known, see *supra*, p. 546.

10. Notice of the list of creditors shall, after the filing of the affidavit mentioned in the 6th of these Rules, be published at such times, and in such newspapers, as the judge shall direct. Every such notice shall state the amount of the proposed reduction of capital, and the places where the aforesaid list of creditors may be inspected, and the time within which creditors of the company who are not entered on the said list, and are desirous of being entered therein, must send in their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any) to the solicitor of the company; and such notice may be in the Form No. 5, set forth in the said schedule hereto, with such variations as the circumstances of the case may require. Advertisement as to list of creditors.

See the note to Comp. Act, 1867, s. 15.

11. The company shall, within such time as the judge shall direct, file in the office of the Clerks of Records and Writs an affidavit made by the person to whom the particulars of debts or claims are, by such notices as are mentioned in the 9th and 10th Rules of this Order, required to be sent in, stating the result of such notices respectively, and verifying a list containing the names and addresses of the persons (if any), who shall have sent in the particulars of their debts or claims in pursuance of such notices respectively, and the amounts of such debts or claims, and some competent officer or officers of the company shall join in such affidavit, and shall in such list distinguish which (if any) of such debts and claims are wholly, or as to any and what part thereof, admitted by the company, and which (if any) of such debts and claims are wholly, or as to any and what part thereof, disputed by the company. Such affidavit may be in the Form No. 6 in the schedule hereto, with such variations as the circumstances of the case may require; and such list and an office copy of such affidavit shall, within such time as the judge shall direct, be left at the chambers of the judge. Affidavit as to result of Rules 9, 10.

12. If any debt or claim, the particulars of which are so sent in, shall not be admitted by the company at its full amount, then and in every such case, unless the company are willing to set apart and appropriate in such manner as the judge shall direct the full Proceedings where claim not admitted.

Rule 13. amount of such debt or claim, the company shall, if the judge think fit so to direct, send to the creditor a notice that he is required to come in and prove such debt or claim, or such part thereof as is not admitted by the company, by a day to be therein named, being not less than four clear days after such notice, and being the time appointed by the judge for adjudicating upon such debts and claims, and such notice shall be sent in the manner mentioned in the 9th Rule of this Order, and may be in the Form No. 7 in the schedule hereto, with such variations as the circumstances of the case may require.

Costs of proof.

13. Such creditors as come in to prove their debts or claims in pursuance of any such notice as is mentioned in the 12th of these Rules, shall be allowed their costs of proof against the company, and be answerable for costs, in the same manner as in the case of persons coming in to prove debts under a decree in a cause.

See the note to Gen. Order, Nov. 1862, Rule 27.

Chief Clerk's certificate as to creditors.

14. The result of the settlement of the list of creditors shall be stated in a certificate by the chief clerk, and such certificate shall state what debts or claims (if any) have been disallowed, and shall distinguish the debts or claims the full amount of which the company are willing to set apart and appropriate, and the debts or claims (if any) the amount of which has been fixed by inquiry and adjudication in manner provided by section 14 of the said Act, and the debts or claims (if any) the full amount of which is not admitted by the company, nor such as the company are willing to set apart and appropriate, and the amount of which has not been fixed by inquiry and adjudication as aforesaid; and shall shew which of the creditors have consented in writing to the proposed reduction, and the total amount of the debts due to them, and the total amount of the debts or claims the payment of which has been secured in manner provided by the said 14th section, and the persons to or by whom the same are due or claimed; but it shall not be necessary to show in such certificate the several amounts of the debts or claims of any persons who have consented in writing to the proposed reduction or the payment of whose debts or claims has been secured as aforesaid.

This rule is printed as altered by Order of the 2nd of March, 1869. The alteration is in the latter part of the Rule, from the words "and the total amount of the debts" to the end.

Placing petition in list.

15. After the expiration of eight clear days from the filing of such last-mentioned certificate, the petition may be placed in the list of petitions upon a note from the chief clerk to the secretary

of the Lord Chancellor or of the Master of the Rolls, as the case may be, stating that the certificate has been filed and become binding. Rule 16.

16. Before the hearing of the petition, notices stating the day on which the same is appointed to be heard shall be published at such times and in such newspapers as the judge shall direct. Such notices may be in the Form No. 8 in the schedule hereto, with such variations as the circumstances of the case may require. Advertisement of hearing.

See the note to Comp. Act, 1867, s. 15.

17. Any creditor settled on the said list whose debt or claim has not, before the hearing of the petition, been discharged or determined, or been secured in manner provided by the 14th section of the said Act, and who has not before the hearing signed a consent to the proposed reduction of capital, may, if he think fit, upon giving two clear days' notice to the solicitor of the company of his intention so to do, appear at the hearing of the petition and oppose the application. Who may appear.

18. Where a creditor who appears at the hearing under the last preceding Rule is a creditor the full amount of whose debt or claim is not admitted by the company, and the validity of such debt or claim has not been inquired into and adjudicated upon under section 14 of the said Act, the costs of and occasioned by his appearance shall be dealt with as to the Court shall seem just, but in all other cases a creditor appearing under the last preceding Rule shall be entitled to the costs of such appearance, unless the Court shall be of opinion that in the circumstances of the particular case his costs ought not to be allowed. Costs of appearance.

19. When the petition comes on to be heard, the Court may, if it shall so think fit, give such directions as may seem proper with reference to the securing in manner mentioned in section 14 of the said Act the payment of the debts or claims of any creditors who do not consent to the proposed reduction; and the further hearing of the petition may, if the Court shall think fit, be adjourned for the purpose of allowing any steps to be taken with reference to the securing in manner aforesaid the payment of such debts or claims. Directions at the hearing.

20. Where the Court makes an order confirming a reduction, such order shall give directions in what manner and in what newspapers, and at what times, notice of the registration of the order and of such minute as mentioned in the 15th section of "The Companies Act, 1867," is to be published; and shall fix the date until which the words "and Reduced" are to be deemed part of Order confirming reduction.

Rule 21. the name of the company as mentioned in the 10th section of the same Act.

See the note to Comp. Act, 1867, s. 15.

Having regard to this Rule it is well that the prayer of the petition should ask that it may be referred to chambers to give directions as to advertisement (for it is a matter of detail which ought not to detain the judge in Court), and should also ask that the period for which "and Reduced" is to be used should be fixed.

See the cases cited under Companies Act, 1867, ss. 10, 11, 15, for Forms of Order, directions as to advertisements, and disuse of the words "and Reduced."

FEES.

Solicitors' fees. 21. Solicitors shall be entitled to charge and be allowed for duties performed under "The Companies Act, 1867," the same fees as they shall for the time being be entitled to charge and be allowed for the like duties performed under "The Companies Act, 1862," unless the Court or judge shall otherwise specially direct.

See Gen. Order, Nov. 1862, Rule 70 and Sch. I. thereto.

Court fees. 22. The same fees of Court shall be paid in relation to proceedings in Chancery under "The Companies Act, 1867," as shall for the time being be payable in relation to like proceedings in Chancery under "The Companies Act, 1862," and shall be collected by stamps in manner provided by the General Orders of the Court.

See Gen. Order, Nov. 1862, Rule 71 and Sch. II. thereto.

GENERAL DIRECTIONS.

General practice to apply. 23. The General Orders and practice of the Court, including the course of proceeding and practice in the judges' chambers, shall, in cases not provided for by "The Companies Act, 1867," or these Rules, so far as such Orders and practice are applicable and not inconsistent with the said Act or with these Rules, apply to all proceedings in the Court of Chancery under the said Act.

Conf. Gen. Order, Nov. 1862, Rule 74.

General power of judge. 24. The power of the Court and of the judge sitting in chambers to enlarge or abridge the time for doing any act or taking any proceeding, to adjourn or review any proceeding, and to give any direction as to the course of proceeding, shall be the same in proceedings under "The Companies Act, 1867," as in proceedings under the ordinary jurisdiction of the Court.

Conf. Gen. Order, Nov. 1862, Rule 73.

COMMENCEMENT OF ORDER. Rule 25.

25. This Order shall take effect and come into operation on the 15th day of April, 1868, and shall apply to all proceedings in Chancery under the said Act, whether commenced before or after that day, but every proceeding taken under the said Act before that day shall have the same validity as it would have had if this Order had not been made. Commencement.

INTERPRETATION.

26. The general interpretation clause of the Consolidated General Orders shall be deemed to extend and apply to the Rules of this Order, and this Order shall be deemed a General Order of this Court. Interpretation.

CAIRNS, C.
ROMILLY, M.R.
JOHN STUART, V.C.
RICHARD MALINS, V.C.

THE SCHEDULE.

Form 1.

No. 1. *Form of Order.* [Rule 4.]

The Master of the Rolls, [*or*, Vice-Chancellor Sir] at Chambers. } In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

Upon the application of the petitioners by summons, dated , and upon hearing the solicitor for the petitioners, and on reading the petition on the day of preferred unto the Right Honourable the Lord High Chancellor of Great Britian [*or*, Master of the Rolls], it is Ordered, that an enquiry be made what are the debts, claims, and liabilities of or affecting the said company on the day of 18 , and that notice of the presentation of the said petition be inserted in [the newspapers] on the day of and [other times of insertion], and that a list of the persons who are creditors of the company on the said day of , and an office copy of the affidavit verifying the same be left at the chambers of the judge on or before the day of .

No. 2. [See Rule 5.]

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

Notice is hereby given that a petition for confirming a resolution reducing the capital of the above company from £ to £ was on the day of presented to [the Lord Chancellor, *or* the Master of the Rolls], and is now pending; and that the list of creditors of the company is to be made out as for the day of 18 .

C. & D. of [agents for A. & B., of],
Solicitors to the company.

No. 3. *Affidavit verifying List of Creditors.* [Rule 7.]

In Chancery.

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

I, A. B., of &c., make oath and say as follows:—

1. The paper writing now produced and shewn to me, and marked with the letter A., contains a list of the creditors of and persons having claims upon the said company on the day of , 18 (the date fixed by the Order in this matter dated), together with their respective addresses, and the nature and amount of their respective debts or claims, and such list is, to the best of my knowledge, information, and belief, a true and accurate list of such creditors and persons having claims on the day aforesaid.

2. To the best of my knowledge and belief there was not, at the date aforesaid, any debt or claim which, if such date were the commencement of the winding-up of the said company, would be admissible in proof against the said company other than and except the debts set forth in the said list. I am enabled to make this statement from facts within my knowledge as the of the said company, and from information derived upon investigation of the affairs and the books, documents, and papers of the said company.

Sworn, &c.

List of Creditors referred to in the last Form.

A.

In the Matter, &c.

This list of creditors marked A. was produced and shewn to A. B., and is the

same list of creditors as is referred to in his affidavit sworn before me this day of 18 . X. Y., &c. **Form 4.**

Names, Addresses, and Description of the Creditors.	Nature of Debt or Claim.	Amount of Debt or Claim.

No. 4. [See Rule 9.]

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

To Mr.

You are requested to take notice that a petition has been presented to the Court of Chancery, to confirm a special resolution of the above company, for reducing its capital to £ , and that in the list of persons admitted by the company to have been on the day of creditors of the company your name is entered as a creditor [*here state the amount of the debt or nature of the claim*].

If you claim to have been on the last-mentioned day a creditor to a larger amount than is stated above, you must on or before the day of send the particulars of your claim and the name and address of your solicitor (if any) to the undersigned at . In default of your so doing the above entry in the list of creditors will in all the proceedings under the above application to reduce the capital of the company be treated as correct.

Dated this day of 18 .

A. B.,
Solicitor for the said company.

No. 5. [See Rule 10.]

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

Notice is hereby given that a petition has been presented to the Court of Chancery for confirming a resolution of the above company for reducing its capital from £ to £ . A list of the persons admitted to have been creditors of the company on the day of 18 , may be inspected at the offices of the company at , or at the office of , at any time during usual business hours, on payment of the charge of one shilling.

Any person who claims to have been on the last-mentioned day and still to be a creditor of the company, and who is not entered on the said list and claims to be so entered, must on or before the day of send in his name and address, and the particulars of his claim, and the name and address of his solicitor (if any) to the undersigned at , or in default thereof he will be precluded from objecting to the proposed reduction of capital.

Dated this day of 18 .

A. B.,
Solicitor for the said company.

No. 6. [Rule 11.]

In Chancery.

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

We, C. D., of &c. [the secretary of the said company], E. F., of &c. [the solicitor of the said company], and A. B., of &c. [the managing director of the said company], severally make oath and say as follows:—

I, the said C. D., for myself, say as follows:—

1. I did, on the day of 18 , in the manner hereinafter mentioned, [Rule 9.]

Form 6.

serve a true copy of the notice now produced and shewn to me, and marked B., upon each of the respective persons whose names, addresses, and descriptions appear in the first column of the list of creditors marked A., referred to in the affidavit of filed on the day of 18 .

2. I served the said respective copies of the said notice by putting such copies respectively duly addressed to such persons respectively, according to their respective names and addresses appearing in the said list (being the last known addresses or places of abode of such persons respectively), and with the proper postage stamps affixed thereto as prepaid letters, into the post-office receiving house, No. , in Street, in the county of , between the hours of and of the clock in the noon of the said day of .

And I, the said E. F., for myself, say as follows:—

If notice issued under Rule 10.

3. A true copy of the notice now produced and shewn to me, and marked C., has appeared in the of the day of 18 , the of the day of 18 , &c.

[Rule 11.]

4. I have, in the paper writing now produced and shewn to me, and marked D., set forth a list of all claims, the particulars of which have been sent in to me pursuant to the said notice B. now produced and shewn to me by persons claiming to be creditors of the said company for larger amounts than are stated in the list of creditors marked A., referred to in the affidavit of , filed on the day of 18 .

If notice issued under Rule 10.

5. I have, in the paper writing now produced and shewn to me, marked E., set forth a list of all claims, the particulars of which have been sent in to me pursuant to the notice referred to in the third paragraph of this affidavit by persons claiming to be creditors of the said company on the day of 18 , not appearing on the said list of creditors marked A., and who claimed to be entered thereon.

And we, C. D. and A. B., for ourselves, say as follows:—

[Rule 11.]

6. We have, in the first part of the said paper writing, marked D. (now produced and shewn to us), and also in the first part of the said paper writing, marked E. (also produced and shewn to us), respectively set forth such of the said debts and claims as are admitted by the said company to be due wholly or in part, and how much is admitted to be due in respect of such of the same debts and claims respectively as are not wholly admitted.

[Rule 11.]

7. We have, in the second part of each of the said paper writings, marked D. and E., set forth such of the said debts and claims as are wholly disputed by the said company.

8. In the said exhibits D. and E., are distinguished such of the debts the full amounts whereof are proposed to be set apart and appropriated in such manner as the judge shall direct.

Sworn, &c.

Exhibit D., referred to in the last-mentioned Affidavit.

D.

In the Matter, &c.

List of debts and claims of which the particulars have been sent in to by persons claiming to be creditors of the said company for *larger amounts* than are stated in list of creditors made out by the company.

This paper writing, marked D., was produced and shewn to C. D., E. F., and A. B., respectively, and is the same as is referred to in their affidavit sworn before me this day of 18 .

X. Y., &c.

FIRST PART.

Debts and Claims wholly or partly admitted by the Company.

Names, Addresses, and Descriptions of Creditors.	Particulars of Debt or Claim.	Amount claimed.	Amount admitted by the Company to be owing to Creditor.	Debts proposed to be set apart and appropriated in full, although disputed.

Form 7.

SECOND PART.

Debts and Claims wholly disputed by the Company.

Names, Addresses, and Descriptions of Claimants.	Particulars of Claim.	Amount claimed.	Debts proposed to be set apart and appropriated in full, although disputed.

Exhibit E., referred to in the last Affidavit.

E.

In the Matter, &c.

List of debts and claims of which the particulars have been sent in to Mr. by persons claiming to be creditors of the company, and to be entered on the list of the creditors made out by the company.

This paper writing marked E. was produced and shewn to C. D., E. F., and A. B., respectively, and is the same as is referred to in their affidavit sworn before me this day of 18 .

X, Y., &c.

FIRST PART.

[Same as in Exhibit D.]

SECOND PART.

[Same as in Exhibit D.]

NOTE.—The names are to be inserted alphabetically.

No. 7. [See Rule 12.]

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

To Mr.

You are hereby required to come in and prove the debt claimed by you against the above company, by filing your affidavit and giving notice thereof to Mr. the solicitor of the company, on or before the day of next; and you are to attend by your solicitor at the Chambers of [the Master of the Rolls, in the Rolls Yard, Chancery Lane, *or* the Vice-Chancellor at No. , Lincoln's Inn], in the county of Middlesex, on the day of 18 , at o'clock in the noon, being the time appointed for hearing and adjudicating upon the claim, and produce any securities or documents relating to your claim.

In default of your complying with the above directions, you will [be precluded from objecting to the proposed reduction of the capital of the company], *or* [in all proceedings relative to the proposed reduction of the capital of the company be treated as a creditor for such amount only as is set against your name in the list of creditors].

Dated this day of 18 .

A. B.,
Solicitor for the said company.

Form 8.

No. 8. [See Rule 16.]

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

Notice is hereby given, that a petition presented to the [Lord Chancellor] *or* [the Master of the Rolls], on the day of , for confirming a resolution reducing the capital of the above company from £ to £ , is directed to be heard before [the Vice-Chancellor] *or* [the Master of the Rolls], on the day of 18 .

C. & D. of [agents for E. & F. of].
Solicitors for the company.

CAIRNS, C.
ROMILLY, M.R.
JOHN STUART, V.C.
RICHARD MALINS, V.C.

GENERAL RULES

MADE PURSUANT TO SECTION 26 OF THE

COMPANIES (WINDING-UP) ACT, 1890.

Preliminary.

1. These Rules may be cited as "The Companies Winding-up Rules, 1890." They shall come into operation on the first day of January one thousand eight hundred and ninety-one. Short title and commencement.

2. In these Rules, unless the context or subject matter otherwise requires,— Interpretation of terms.

(*a.*) "The Acts" means the Companies Acts, 1862 to 1890.

"The Company" means a company which is being wound up, or against which proceedings to have it wound up have been commenced.

"The Court" includes a Judge of the Court, and a chief clerk of the Chancery Division of the High Court or other officer of the Court when exercising the powers of the Court pursuant to the Acts or these Rules, or the practice of the Court.

"Creditor" includes a corporation, and a firm of creditors in partnership.

"Gazetted" means published in the *London Gazette*.

"Judge" means in the High Court the Judge to whom the petition to wind up the company is assigned, and in any other Court the Judge thereof or officer who exercises the powers of the Judge thereof.

"Proceedings" means the proceedings in the winding up of a company under the Acts.

"Official Receiver" includes any officer appointed by the Board of Trade to discharge the duties of Official Receiver under the Acts.

"Registrar," as applied to a County Court, includes, where there are joint Registrars, either of such Registrars, or a Deputy Registrar, and as applied to any Court other than the High Court, means and includes the officer of the Court whose duty it is to exercise in relation to a winding up the functions which in the High Court are exercised by a Registrar or Chief Clerk.

"Sealed" means sealed with the seal of the Court.

"Taxing Officer" means the officer of the Court whose duty it is to tax costs in the proceedings of the Court under its ordinary jurisdiction.

"Liquidator" includes an Official Receiver when acting as Liquidator.

(*b.*) In the application of these Rules to any Court other than the High Court, the Registrar may, under the general or special directions of the Judge, hear and determine any application or matter which under the Acts and these Rules may be determined in Chambers.

3.—(1.) The forms in the Appendix, where applicable, and where they are not applicable forms of the like character, with such variations as circumstances may require, shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same, unless the Court shall otherwise direct. Use of forms in Appendix.

(2.) Provided that the Board of Trade may from time to time alter any forms which relate to matters of an administrative and not of a judicial character, or substitute new forms in lieu thereof. Where the Board of Trade alters any form, or substitutes any new form in lieu of a form prescribed by these Rules, such altered or substituted form shall be published in the *London Gazette*.

Rule 4.

COURT AND CHAMBERS.

Proceedings in High Court.

4. In the High Court—

(1.) All matters and applications to the Court or a Judge in the winding up of a company as to which the procedure and practice is not altered by the Companies (Winding-up) Act, 1890, and these Rules, and which according to the practice of the Court or the directions of the Judge have been heard in Court or in Chambers, shall continue to be so heard.

(2.) Subject to the provisions of the Companies (Winding-up) Act, 1890, and these Rules, applications to the Court under the said Act and these Rules shall be heard in Court or in Chambers according as the Judge shall by any general or special directions order. Provided that appeals to the Court from the Official Receiver and Board of Trade and Liquidator shall be brought by notice of motion to the Court pursuant to the Rules of the Supreme Court with reference to motions.

Proceedings in Courts other than High Court.

5. In Courts other than the High Court the following matters and applications to the Court shall be heard in open Court:—

(*a.*) Petitions.
(*b.*) Public examinations.
(*c.*) Applications under section 167 of the Companies Act, 1862.
(*d.*) Applications to rectify the Register.
(*e.*) Appeals from the Official Receiver and Board of Trade.
(*f.*) Appeals from any decision or act of the Liquidator.
(*g.*) Applications relating to the admission or rejection of proofs.
(*h.*) Proceedings under section 10 of the Companies (Winding-up) Act, 1890.

Adjournment from Chambers to Court and *vice versâ*.

6. Subject to the provisions of the Acts and Rules, any matter or application in a Court other than the High Court may at any time, if the Judge thinks fit, be adjourned from Chambers to Court or from Court to Chambers; and if all the contending parties require any matter or application to be adjourned from Chambers into Court it shall be so adjourned.

PROCEEDINGS.

Proceedings, how intituled. Forms 1 and 2.

7.—(1.) Every proceeding in Court or in Chambers under the Acts shall be dated, and shall be intituled "In the matter of the Companies Acts, 1862 to 1890," with the name of the Court in which it is taken, and of the Company to which it relates. Numbers and dates may be denoted by figures.

(2.) The first proceeding in every winding-up matter shall have a distinctive number assigned to it by the proper officer, and all subsequent proceedings in the same matter shall bear the same number.

Transfer by Judge of High Court. [s. 3 of Act of 1890.] Form 3.

8. A Judge of the High Court to whom the exercise of the jurisdiction to wind up companies is assigned may at any time, for good cause shewn, order the proceedings in any Court other than the High Court to be transferred to the High Court, or any proceedings in the High Court to be transferred from the High Court to any other Court. Where the transfer is to the High Court, the winding up shall be assigned to the Judge who made the order of transfer.

Transfer by Judge of Court other than High Court. Form 3.

9. The Judge of any Court having jurisdiction to order the winding up of a company other than the High Court or a Palatine Court may at any time, for good cause shewn, order any proceedings which have been commenced or are pending in his Court to be transferred to any Court which has jurisdiction to order the winding up of a company not being the High Court or a Palatine Court.

Notice to Official Receiver.

10. Notice of an application for a transfer of proceedings shall be served on the Official Receiver before the hearing thereof.

Transmission of order of transfer.

11. When an order of transfer has been made the person on whose application the order is made shall, if the transfer is to the High Court, lodge with the Chief Clerk of the Judge to whom the winding up becomes assigned, and if the transfer is to any other Court with the Registrar of that Court, a sealed copy of the order of transfer.

Transfer of Official Receiver's duties.

12. Where the proceedings in any winding up are transferred by any Court, the Official Receiver of the Court to which such proceedings are transferred shall become the Official Receiver in the winding-up in place of the Official Receiver of the Court from which the proceedings are transferred.

13. Where any proceedings are transferred from a Court to any other Court, the records of proceedings shall, if the transfer is to the High Court, be transmitted to the Chief Clerk of the Judge to whom the winding up becomes assigned, and if the transfer is to any other Court to the Registrar of that Court. **Rule 13.** Transmission of records.

14. As soon as the Chief Clerk of the Judge (if the transfer is to a Judge of the High Court) or the Registrar of the Court (if the transfer is to any other Court) has received the records of proceedings from the Court from which the transfer is made he shall give notice of the transfer to the Official Receiver of the Court to which the proceedings are transferred, who shall give notice of the transfer to the Board of Trade. When a winding-up is transferred from one Court to another, it shall receive a new distinctive number. Notice of transfer to Official Receiver and Board of Trade. Form 4.

15. Whenever the Lord Chancellor, by order under his hand, shall exclude any County Court from having jurisdiction under the Acts, or shall attach the district or any part of the district of a County Court to the High Court, or any other County Court, or shall detach the district or any part of the district of any County Court from the district and jurisdiction of the High Court, any winding-up business pending in the Court or district to which the order relates shall become transferred to such Court as shall be mentioned for the purpose in the order; and, thereupon, the Rules as to transfer of proceedings shall apply to the transfer of such pending proceedings in all respects as if the proceedings had been transferred by order of a Court having power to transfer proceedings. Transfer of jurisdiction of County Court and pending business.

Witnesses and Depositions.

16. If the Court or the officer of the Court before whom any examination is under the Acts and these Rules directed to be held shall in any case, and at any stage in the proceedings, be of opinion that it would be desirable that a person (other than the person before whom an examination is taken) should be appointed to take down the evidence of any person examined under the Acts and Rules in shorthand or otherwise, it shall be competent for the Court or officer aforesaid to make such appointment; provided that where the application is made by the Official Receiver he shall nominate a person for the purpose, and the person so nominated shall be appointed, unless the Court or officer holding the examination shall otherwise order. Every person so appointed shall be paid a sum not exceeding one guinea a day, and where the Court appoints a shorthand writer a sum not exceeding 8*d.* per folio of 90 words for any transcript of the evidence that may be required, and such sums shall be paid by the party at whose instance the appointment was made, or out of the assets of the Company as may be directed by the Court. Shorthand notes, &c. Forms 5, 6, 7.

17.—(1.) If a person examined before a Registrar or other officer of the Court who has no power to commit for contempt of Court, refuses to answer to the satisfaction of the Registrar or officer any question which he may allow to be put, the Registrar or officer shall report such refusal to the Judge, and upon such report being made the person in default shall be in the same position and be dealt with in the same manner as if he had made default in answering before the Judge. Committal of contumacious witness. Form 39.

(2.) The report shall be in writing, but without affidavit, and shall set forth the question put, and the answer (if any) given by the person examined.

(3.) The Registrar or officer shall, before the conclusion of the examination at which the default in answering is made, name the time when and the place where the default will be reported to the Judge; and upon receiving the report the Judge may take such action thereon as he shall think fit. If the Judge is sitting at the time when the default in answering is made, such default may be reported immediately.

Sittings of Courts.

18. Subject to the orders of the Lord Chancellor, the place of sitting of each County Court having jurisdiction under the Acts shall, for the purpose of such jurisdiction, be the town in which the Court holds its sittings for Place of sitting of County Court.

Rule 19. the general business of the Court, under the provisions of the County Courts Act, 1888.

Times for holding Courts other than the High Court.

19. Subject to the provisions of the Acts, the times of the sitting of each Court other than the High Court in matters of the winding up of companies shall be those appointed for the transaction of the general business of the Court, unless the Judge of any such Court shall otherwise order.

Service and Execution of Process.

Duties of bailiff, &c.

20.—(1.) It shall be the duty of the high bailiff of a County Court to serve such orders, summonses, petitions, and notices as the Court may require him to serve; to execute warrants and other process; to attend any sittings of the Court (but not sittings in Chambers); and to do and perform all such things as may be required of him by the Court.

(2.) But this Rule shall not be construed to require any order, summons, petition, or notice to be served by a bailiff or officer of such Court which is not specially by the Acts or Rules required to be so served, unless the Court in any particular proceeding by order specially so directs.

Service.

21.—(1.) All notices and other documents for the service of which no special mode is directed may be sent by prepaid post letter to the last known address of the person to be served therewith; and the notice or document shall be considered as served at the time that the same ought to be delivered in the due course of post by the post-office, and notwithstanding the same may be returned by the post-office.

Taxation of Costs.

Taxation of costs payable by or to Official Receiver or Liquidator or by company.

22. The provisions of the following Rules numbered 23 to 30 shall apply to the taxation and allowance of costs payable by or to the Official Receiver or Liquidator or which are to be paid out of the assets of the company.

Notice of appointment.

23. Every person whose bill or charges is or are to be taxed shall in all cases give not less than four days' notice of the appointment to tax the same to the Official Receiver and to the Liquidator (if any).

Lodgment of bill.

24. The bill or charges, if incurred prior to the appointment of a Liquidator, shall be lodged with the Official Receiver, and if incurred after the appointment of a Liquidator, shall be lodged with the Liquidator, three clear days before the application for the appointment to tax the same is made. The Official Receiver or the Liquidator, as the case may be, shall forthwith, on receiving notice of taxation, lodge such bill or charges with the proper Taxing Officer.

Copy of bill to be furnished.

25. Every person whose bill or charges is or are to be taxed shall, on application either of the Official Receiver or the Liquidator, furnish a copy of his bill of charges so to be taxed, on payment at the rate of 4*d.* per folio, which payment shall be charged on the assets of the Company. The Official Receiver shall call the attention of the Liquidator to any items which, in his opinion, ought to be disallowed or reduced, and may attend or be represented on the taxation.

Applications for costs.

26. Where any party to, or person affected by, any proceeding desires to make an application for an order that he be allowed his costs, or any part of them, incident to such proceedings, and such application is not made at the time of the proceeding—

(1.) Such party or person shall serve notice of his intended application on the Official Receiver, and, if a Liquidator has been appointed, on the Liquidator.

(2.) The Official Receiver and Liquidator may appear on such application and object thereto.

(3.) No costs of or incident to such application shall be allowed to the applicant, unless the Court is satisfied that the application could not have been made at the time of the proceeding.

Certificate of taxation. Form 10.

27. Upon the taxation of any bill of costs, charges, or expenses being completed, the Taxing Officer shall issue to the person presenting such bill for taxation his certificate of taxation. The bill of costs, charges, and expenses shall be filed.

Rule 28.

28. Every Taxing Officer shall keep a register of all bills taxed by him in windings-up under these Rules, and shall, within fourteen days after the 31st day of October in each year, make a return to the Board of Trade of all bills taxed by him during the twelve months preceding such 31st day of October. Register of bills taxed. Forms 9 and 11.

29. Before the bill or charges of any solicitor, manager, accountant, auctioneer, broker, or other person employed by an Official Receiver or Liquidator, is or are taxed, a certificate in writing, signed by the Official Receiver or Liquidator, as the case may be, shall be produced to the Taxing Officer, setting forth whether any, and if so what, special terms of remuneration have been agreed to, and in the case of the bill of costs of a solicitor, a copy of the resolution or other authority sanctioning the employment. Certificate of employment.

30.—(1.) Where any bill of costs, charges, fees, or disbursements of any solicitor, manager, accountant, auctioneer, broker, or other person has been taxed by a Registrar of a Court other than the High Court, the Board of Trade may require the taxation to be reviewed by a Taxing Master of the Chancery Division of the High Court. Review of taxation at instance of Board of Trade.

(2.) In any case in which the Board of Trade require such a review of taxation as is above mentioned they shall give notice to the person whose bill has been taxed, and shall apply to the Taxing Master of the Chancery Division of the High Court to appoint a time for the review of such taxation, and thereupon such Taxing Master shall appoint a time for the review of, and shall review, such taxation and certify the result thereof. The Board of Trade shall give to the person whose bill of costs is to be reviewed notice of the time appointed for the review.

(3.) Where any such review of taxation as is above mentioned is required to be made by a Taxing Master of the Chancery Division of the High Court, the Registrar whose taxation is to be reviewed shall forward to the said Taxing Master the bill which is required to be reviewed.

(4.) The Board of Trade may appear upon the review of the taxation; and if, upon the review of the taxation, the bill is allowed at a lower sum than the sum allowed on the original taxation, the amount disallowed shall (if the bill has been paid) be repaid to the Official Receiver, or the Liquidator, or other person entitled thereto. The certificate of the Taxing Master shall in every case of a review by him under this Rule be a sufficient authority to entitle the person to whom the amount disallowed ought to be repaid to demand such amount from the person liable to repay the same.

(5.) There shall be allowed to the person whose bill is reviewed such costs of and incidental to his appearance on the review as the Taxing Master of the High Court shall think proper, and such costs shall be paid to such person out of the assets of the company: Provided that the costs of the attendance of a principal shall not be allowed if in the opinion of the Taxing Master he could have been sufficiently represented by his London agent.

Costs payable out of the Assets of the Company.

31. The assets of a company which is being wound up, remaining after payment of the fees and actual expenses incurred in realising or getting in the assets, shall, subject to any Order of the Court, and, if the winding-up is in the Stannaries Court, subject to the provisions of the Stannaries Act, 1887, be liable to the following payments, which shall be made in the following order of priority, namely:— Costs payable out of the assets.

First. The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the Court:

Next. The remuneration of the special manager (if any):

„ The costs and expenses of any person who makes, or concurs in making, the company's statement of affairs:

„ The taxed charges of any shorthand writer appointed to take an examination: Provided that where the shorthand writer is appointed at the instance of the Official Receiver the cost of the

Rule 32.

shorthand notes shall be deemed to be an expense incurred by the Official Receiver in getting in and realising the assets of the Company:

Next. The Liquidator's necessary disbursements, other than actual expenses of realisation heretofore provided for:

" The costs of any person properly employed by the Liquidator with the sanction of the committee of inspection:

" The remuneration of the Liquidator:

" The actual out-of-pocket expenses necessarily incurred by the committee of inspection, subject to the approval of the Board of Trade.

Official Receiver as Provisional Liquidator.

Appointment of Provisional Liquidator.

32.—(1.) After the presentation of a petition, upon the application of a creditor, or of a contributory, or of the Company, and upon proof by affidavit of sufficient grounds for the appointment of the Official Receiver as Provisional Liquidator, the Court may, if it thinks fit, and upon such terms as may be just, make such appointment.

Form 21.

(2.) An order appointing the Official Receiver to be Provisional Liquidator prior to the making of a winding-up order, shall bear the number of the petition in respect of which it is made, and shall state the nature and short description of the property of which the Official Receiver is ordered to take possession.

Petition.

Form of petition. Forms 12 and 13.

33. Every petition for the winding up of any company by the Court, or subject to the supervision of the Court, shall be in the Forms Nos. 12 and 13 in the Appendix, with such variations as circumstances may require.

34. Every petition shall be advertised seven clear days before the hearing, as follows:—

Advertisement of petition. Form 16.

(1.) In the case of a company whose registered office, or if there shall be no such office, then whose principal or last known principal place of business is or was situate within ten miles of the principal entrance of the Royal Courts of Justice, once in the *London Gazette*, and once at least in one London daily morning newspaper, or in such other newspaper as the Court directs.

(2.) In the case of any other company, once in the *London Gazette*, and once at least in one local newspaper circulating in the district where such registered office, or principal or last known place of business, as the case may be, of such company is or was situate.

The advertisement shall state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (if any).

Service of petition. Forms 14 and 15.

35. Every petition shall, unless presented by the company, be served at the registered office, if any, of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if any such can be found, upon any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by being left at such registered office or principal place of business, or by being served on such member or members of the company as the Court may direct; and every petition for the winding up of a company, subject to the supervision of the Court, shall also be served upon the Liquidator (if any) appointed for the purpose of winding up the affairs of the company.

Verification of petition. Form 17.

36. Every petition for the winding-up of any company by the Court, or subject to the supervision of the Court, shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a company, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is pre-

sented, and such affidavit shall be sufficient *primâ facie* evidence of the statements in the petition. **Rule 37.**

37. Every contributory or creditor of the company shall be entitled to be furnished, by the solicitor of the petitioner, with a copy of the petition, within 24 hours after requiring the same, on paying the rate of 4*d.* per folio of 72 words for such copy. Copy of petition to be furnished to creditor or contributory.

Order to Wind up a Company.

38. An order to wind up a company shall contain at the foot thereof a notice stating that it will be the duty of the person who is at the time secretary or chief officer of the company, and of such of the persons who are liable to make out or concur in making out the company's statement of affairs as the Official Receiver may require, to attend on the Official Receiver forthwith on the service thereof at the place mentioned therein. Form and contents. Forms 18 and 19.

39. Three copies of every order to wind up a company, and order for the appointment of the Official Receiver as Provisional Liquidator of a company, sealed with the seal of the Court, shall forthwith be sent by post or otherwise by the Registrar to the Official Receiver. Transmission of copy to Official Receiver.

40. The Official Receiver shall cause a copy of the order to wind up the company sealed with the seal of the Court to be served upon the secretary or other chief officer of the company at the registered office of the company, or upon such other person or persons, or in such other manner as the Court may direct. Service of order.

41.—(1.) When an order to wind up a company is made the Official Receiver shall forthwith give notice thereof to the Board of Trade, who shall forthwith cause such notice to be gazetted. Notice of order.

(2.) The Official Receiver shall forthwith send notice thereof to such local paper as the Board of Trade may from time to time direct, or, in default of such direction, as he may select. Form 20.

Special Manager.

42.—(1.) An application by the Official Receiver for the appointment of a special manager shall be supported by a report of the Official Receiver, which shall be placed on the file of proceedings, and in which shall be stated the amount of remuneration which, in the opinion of the Official Receiver, ought to be allowed to the special manager. No affidavit by the Official Receiver in support of such an application shall be required. Appointment of special manager. [s. 5 of Act of 1890.]

(2.) The remuneration of the special manager shall, unless the Judge otherwise in any special case directs, be stated in the order appointing him.

(3.) A copy of the order appointing a special manager shall be transmitted to the Board of Trade by the Official Receiver.

First Meetings of Creditors and Contributories.

43.—(1.) The Official Receiver shall give to each of the directors and other officers of the company who in his opinion ought to attend the first meetings of creditors and contributories seven days' notice of the time and place appointed for each meeting. The notice may be either delivered personally or sent by prepaid post letter, as may be convenient. It shall be the duty of every director or officer who receives notice of such meeting to attend if so required by the Official Receiver. Notice of first meeting to officers of company. [s. 6 of Act of 1890.] Forms 22, 23.

44. The Official Receiver shall fix the days for the first meetings of creditors and contributories, and shall forthwith give notice thereof to the Board of Trade, who shall gazette the same. Notice of first meetings to Board of Trade.

45. Where practicable, and unless the Court specially directs to the contrary, the first meetings of creditors and contributories shall not be held until after the statement of affairs prescribed by section 7 of the Companies (Winding-up) Act, 1890, has been submitted to the Official Receiver. If an extension of time for summoning the meetings or either of them is required, an application for extension of time may be made by the Official Receiver *ex parte* on a report without any affidavit. Times for holding first meeting.

Rule 46.

Notice to contributories, Form 23.

46. Notice of the first meeting of contributories shall be sent to every person who appears from the company's books or otherwise to be a contributory of the company.

GENERAL MEETINGS OF CREDITORS AND CONTRIBUTORIES.

Meetings for ascertaining wishes of creditors and contributories, Form 31. [s. 13 of Act of 1890.]

47. Subject to the provisions of the Companies (Winding-up) Act, 1890, and to the control of the Court, the Liquidator may from time to time, when he thinks expedient, summon, hold, and conduct meetings of the creditors or contributories for the purpose of ascertaining their wishes in all matters relating to the winding up.

Meetings subsequent to the first meetings. Form 30.

48. Meetings subsequent to the first meetings of creditors and contributories shall be summoned by sending notices to them. The notice to each creditor shall be sent to the address given in his proof, or if he has not proved, to the address given in the statement of affairs of the company, or to such other address as may be known to the person summoning the meeting. The notice to each contributory shall be sent to the address mentioned in the company's books as the address of such contributory, or to such other address as may be known to the person summoning the meeting.

Notices of general meetings. Form 26.

49. The notices of general meetings to be issued to creditors and contributories by the Official Receiver or Liquidator shall, where no special time is prescribed, be sent off not less than seven days before the day appointed for the meeting.

Proof of notice. Forms 27 and 28.

50. A certificate by the Official Receiver or other officer of the Court, or by the clerk of any such person, or an affidavit by the Liquidator, or his solicitor or the clerk of either of such persons, that the notice of any meeting has been duly posted, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

Costs of calling meeting.

51. The costs of summoning a meeting of creditors at the instance of any person other than the Official Receiver or Liquidator shall be paid by the person at whose instance it is summoned, who shall before the meeting is summoned deposit with the Official Receiver or Liquidator (as the case may be) such sum as may be required by the Official Receiver or Liquidator as security for the payment of such costs. The said costs shall be repaid out of the assets of the Company, if the creditors or contributories, as the case may be, shall by resolution so direct.

Chairman of general meetings. Form 25.

52. Where a meeting is summoned by the Official Receiver he or some one nominated by him shall be chairman of the meeting. At every other meeting of creditors and contributories (other than meetings to which the schedule of the Companies (Winding-up) Act, 1890, applies) the chairman shall be such person as the meeting by resolution shall appoint.

Votes at meetings.

53. The provisions of section 91 of the Companies Act, 1862, relating to votes of creditors and contributories at meetings summoned under that section shall apply to the voting of creditors and contributories at meetings held under the Companies (Winding-up) Act, 1890, and these Rules.

Copy of resolution for Chief Clerk or Registrar. Form 32.

54. The Official Receiver, or, as the case may be, the Liquidator, shall send in the High Court to the Chief Clerk of the Judge to whom the winding up of the Company is assigned, and in any other Court to the Registrar, a copy, certified by him, of every resolution of a meeting of creditors or contributories.

Non-reception of notice by a creditor.

55. Where a meeting of creditors or contributories is summoned by notice, the proceedings and resolutions at the meeting shall, unless the Court otherwise orders, be valid, notwithstanding that some creditors or contributories may not have received the notice sent to them.

Adjournment. Form 29.

56. Where a meeting of creditors is adjourned, the adjourned meeting shall be held at the same place as the original place of meeting, unless in the resolution for adjournment another place is specified, or unless the Court otherwise orders.

Quorum.

57. In calculating a quorum at a creditors' meeting, those persons only who are entitled to vote shall be reckoned.

STATEMENT OF AFFAIRS.

58.—(1.) Every person who under section 7 of the Companies (Winding-up) Act, 1890, has been required by the Official Receiver to submit and verify a statement as to the affairs of the company, shall be furnished by the Official Receiver with forms and instructions for the preparation of the statement. The statement shall be made out in duplicate, one copy of which shall be verified by affidavit. The Official Receiver shall place upon the file of proceedings in the winding-up the verified statement of affairs. Preparation of statement of affairs. [s. 7 of Act of 1890.] Form 33.

(2.) The Official Receiver may from time to time hold personal interviews with such person or persons, for the purpose of investigating the Company's affairs; and it shall be the duty of every such person to attend on the Official Receiver at such time and place as the Official Receiver may appoint, and give the Official Receiver all information that he may require.

59. Where any person requires any extension of time for submitting the statement of affairs, he shall apply to the Official Receiver, who may, if he thinks fit, give a written certificate extending the time, which certificate shall be filed with the proceedings in the winding-up, and shall render an application to the Court unnecessary. Extension of time for submitting statement of affairs.

60. After the statement of affairs of a company has been submitted to the Official Receiver it shall be the duty of each person who has made it, if and when required, to attend on the Official Receiver and answer all such questions as may be put to him, and give all such further information as may be required of him by the Official Receiver in relation to the Statement of Affairs. Information subsequent to statement of affairs.

61. Any default in complying with the requirement of section 7 of the Companies (Winding-up) Act, 1890, may be reported by the Official Receiver to the Court. Default.

62. A person who is required to make or concur in making any statement of affairs of a company shall before incurring any costs or expenses in and about the preparation and making of the statement apply to the Official Receiver for his sanction, and submit a statement of the estimated costs and expenses which it is intended to incur; and no person shall be allowed out of the assets of the Company any costs or expenses which have not before being incurred been sanctioned by the Official Receiver. Expenses of statement of affairs.

APPOINTMENT OF LIQUIDATOR.

63.—(I.) As soon as possible after the first meetings of creditors and contributories have been held the Official Receiver, or the chairman of the meeting, as the case may be, shall report the result of each meeting to the Court. Appointment of Liquidator on report of meetings of creditors and contributories. Form 32.

(2.) Upon the result of the meetings of creditors and contributories being reported to the Court, the Court may, if the creditors and contributories are unanimous in their determination, upon the application of the Official Receiver, forthwith make the appointments necessary for giving effect to such determination. In any other case the Court shall, on application by the Official Receiver, fix a day for considering the determinations of the meetings, deciding differences (if any), and making such appointments and orders as shall be necessary. Form 34.

(3.) When a time and place have been fixed for the consideration of the determinations of the meetings such time and place shall be advertised by the Official Receiver in such manner as the Court shall direct, but so that the first or only advertisement shall be published not less than seven days before the day so fixed.

(4.) Upon the consideration of the determinations of the meetings the Court shall hear the Official Receiver or any creditor or contributory.

(5.) If a Liquidator is appointed copy of the order appointing him shall be transmitted to the Board of Trade by the Official Receiver, and the Board of Trade shall as soon as the Liquidator has given security, cause notice of the appointment to be gazetted. The expense of gazetting notice of the Form 34.

Rule 64. appointment shall be paid by the Liquidator, but may be charged by him on the assets of the Company.

Advertisement of appointment. Form 36.

64. Every appointment of a Liquidator or committee of inspection shall be advertised by the Liquidator in such manner as the Court directs immediately after the appointment has been made and the Liquidator has given the required security.

Death, &c., of Liquidator.

65. In case of the death, removal, or resignation of a Liquidator another may be appointed in his place in the same manner as directed in the case of a first appointment, and the Official Receiver shall on the request of not less than one-tenth in value of the creditors or contributories summon meetings for the purpose of determining whether or not the vacancy shall be filled.

Style of Official Receiver when he is Liquidator.

66. When the Official Receiver is Liquidator of a Company he shall be styled "Official Receiver and Liquidator."

Security by Liquidator or Special Manager.

Standing security to Board of Trade. Form 35.

67. In the case of a Special Manager or Liquidator other than the Official Receiver the following Rules as to security shall be observed, namely:—

(1.) The security shall be given to such officers or persons and in such manner as the Board of Trade may from time to time direct.

(2.) It shall not be necessary that security shall be given in each separate winding-up; but security may be given either specially in a particular winding-up or generally to be available for any winding-up in which the person giving security may be appointed either as Liquidator or Special Manager.

(3.) The Board of Trade shall fix the amount and nature of such security, and may from time to time, as they think fit, either increase or diminish the amount of special or general security which any person has given.

(4.) The certificate of the Board of Trade that a Liquidator or Special Manager has given security to their satisfaction shall be placed on the file of proceedings.

(5.) The cost of furnishing the required security by a Liquidator or Special Manager shall be borne by him personally, and shall not be charged against the assets of the Company as an expense incurred in the winding-up.

Failure to give or keep up security.

68.—(1.) If a Liquidator or Special Manager fails to give the required security within the time stated for that purpose in the order appointing him or any extension thereof, the Official Receiver shall report such failure to the Court, who shall thereupon rescind the order appointing the Liquidator or Special Manager.

(2.) If a Liquidator or Special Manager fails to keep up his security, the Official Receiver shall report such failure to the Court, who may thereupon remove the Liquidator or Special Manager and make such order as to costs as the Court shall think fit.

Public Examination.

Report of Official Receiver to be filed. [s. 8 of Act of 1890.]

69.—(1.) A report made by the Official Receiver pursuant to section 8 of the Companies (Winding-up) Act, 1890, shall state in a narrative form the facts and matters which the Official Receiver desires to bring to the notice of the Court, and his opinion as required by section 8 of the Companies (Winding-up) Act, 1890.

Appointment of time for consideration of report.

70. The Official Receiver may apply to the Court to fix a day for the consideration of the report, and on such application the Court shall appoint a day on which the report shall be considered.

Consideration of report.

71. The consideration of the report shall be before the Judge of the Court personally in Chambers, and the Official Receiver shall personally, or by counsel or solicitor, attend the consideration of the report, and give the Court any further information or explanation with reference to the matters stated in the report which the Court may require.

72. If the Court makes an order pursuant to sub-section 9 of section 8 of

the Companies (Winding-up) Act, 1890, directing any person to attend for public examination, the examination shall be held in open Court— **Rule 73.**

(*a.*) If the winding up of the company is in the High Court before such one of the officers of the Court mentioned in section 8 of the Companies (Winding-up) Act, 1890, as the Court may direct, and in the absence of any such direction before a Registrar in Bankruptcy of the High Court. Order for public examination. Form 37.

(*b.*) If the winding up of the company is in a County Court before the Judge of the Court, or before a Registrar of the Court if such Registrar is also a District Registrar of the High Court named by the Lord Chancellor for the purpose of holding public examinations under the Acts, or before any such District Registrar.

(*c.*) If the winding up of the company is in the Stannaries Court, before the Vice Warden.

73. Upon an order directing a person to attend for public examination being made, the Official Receiver shall apply for the appointment of a day on which the public examination is to be held. Application for day for holding examination.

74. A day and place shall be appointed for holding the public examination, and notice of the day and place so appointed shall be given by the Official Receiver to the person who is to be examined, by sending such notice in a registered letter addressed to his usual or last known address. Appointment of time and place for public examination. Form 38.

75. The Official Receiver shall give notice of the order appointing the time and place for holding a public examination to the creditors and contributories by advertising the order in such newspapers as the Board of Trade from time to time direct, or in default of any such direction as the Official Receiver thinks fit, and shall also forward notice of the order to the Board of Trade to be gazetted. Notice of public examination to creditors and contributories.

76. If any person who has been directed by the Court to attend for public examination fails to attend at the time and place appointed by the order for holding or proceeding with the same, and no good cause is shewn by him for such failure, or if before the day appointed for the examination the Official Receiver satisfies the Court that such person has absconded, or that there is reason for believing that he is about to abscond with the view of avoiding examination, it shall be lawful for the Court, upon its being proved to the satisfaction of the Court that the order for attendance at the public examination was duly served, without any further notice to issue a warrant for the arrest of the person required to attend, or to make such other order as the Court shall think just. Default in attending. Form 41.

77. The notes of every public examination held pursuant to the Companies (Winding-up) Act, 1890, shall, after being signed as required by the said Act, be filed with the proceedings. Notes of examination to be filed. Form 40.

PROCEEDINGS AGAINST DELINQUENT DIRECTORS, PROMOTERS, AND OFFICERS.

78. An application under section 10 of the Companies (Winding-up) Act, 1890, shall in any Court other than the High Court be made by motion to the Court. In the High Court the application shall be made in accordance with the practice heretofore observed with reference to applications under section 165 of the Companies Act, 1862. Where the application is made by the Official Receiver or Liquidator he may make a report to the Court stating any facts and information on which he proceeds which are verified by affidavit, or derived from sworn evidence in the matter. Where the application is made by any other person it shall be supported by affidavit. Application against delinquent directors, officers, and promoters. [s. 10 of Act of 1890.] Form 42.

79. Where the application is made by motion, notice of the intended motion shall be served on every person against whom an order is sought, not less than eight days before the day named in the notice for hearing the motion. A copy of every report and affidavit intended to be used in support of the motion shall be served on every person to whom notice of motion is given not less than four days before the hearing of the motion. Notice of application.

PAYMENTS INTO AND OUT OF A BANK.

80. All payments out of the Companies Liquidation Account shall be made in such manner as the Board of Trade may from time to time direct. Payments out of Bank of England. [s. 11 of Act of 1890.]

81. Where the Liquidator is authorised to have a special banking account Special bank account.

Rule 82. he shall forthwith pay all moneys received by him into that account to the credit of the Liquidator of the company. All payments out shall be made by cheque payable to order, and every cheque shall have marked or written on the face of it the name of the company, and shall be signed by the Liquidator, and shall be counter-signed by at least one member of the committee of inspection, and by such other person, if any, as the committee of inspection may appoint.

Application by committee of inspection and authority for special banking account. Forms 43 and 44.

82. Where application is made to the Board of Trade to authorise the Liquidator to make his payments into and out of a special bank account, the Board of Trade may grant such authorisation for such time and on such terms as they may think fit, and may at any time order the account to be closed if they are of opinion that the account is no longer required for the purposes mentioned in the application.

List of Contributories.

Liquidator to settle list of contributories. [s. 13 of Act of 1890; ss. 98 and 99 of Act of 1862.] Form 45.

83. The Liquidator shall with all convenient speed after his appointment settle a list of the contributories of the company, and shall appoint a day for that purpose. The list of contributories shall contain a statement of the address of, and the number of shares or extent of interest to be attributed to each contributory, and shall distinguish the several classes of contributories. As regards representative contributories the Liquidator shall observe the requirements of section 99 of the Companies Act, 1862.

Appointment of time and place for settlement of list. Form 46.

84. The Liquidator shall give notice in writing of the time and place appointed for the settlement of the list of contributories to every person whom he proposes to include in the list, and shall state in the notice to each person in what character and for what number of shares or interest he proposes to include such person in the list.

Settlement of list of contributories. Form 47.

85. On the day appointed for settlement of the list of contributories, the Liquidator shall hear any person who objects to being settled as a contributory, and after such hearing shall finally settle the list, which when so settled shall be the list of contributories of the company.

Notice to contributories. Forms 48, 50, and 51.

86. The Liquidator shall forthwith give notice to every person whom he has finally placed on the list of contributories, stating in what character and for what number of shares or interest he has been placed on the list, and in the notice inform such person that any application for the removal of his name from the list or for a variation of the list, must be made to the Court by summons within 21 days from the date of the service on the contributory or alleged contributory of notice of the fact that his name is settled in the list of contributories.

Application to the Court to vary the list. [s. 13 and s. 24 of Act of 1890.]

87. Subject to the power of the Court to extend the time or to allow an application to be made notwithstanding the expiration of the time limited for that purpose, no application to the Court by any person who objects to the list of contributories as finally settled by the Liquidator shall be entertained after the expiration of 21 days from the date of the service on such person of notice of the settlement of the list.

Variation of or addition to list of contributories. Forms 49, 52.

88. The Liquidator may from time to time vary or add to the list of contributories, but any such variation or addition shall be made in the same manner in all respects as the settlement of the original list.

Collection and Distribution of Assets.

Collection and distribution of company's assets by Liquidator. [s. 13 of Act of 1890; s. 98 of Act of 1862.]

89. The duties imposed on the Court by section 98 of the Companies Act, 1862, with regard to the collection of the assets of the company and the application of the assets in discharge of the company's liabilities shall be discharged by the Liquidator as an officer of the Court subject to the control of the Court.

Power of Liquidator. [s. 13 of Act of 1890.]

90. For the purpose of the discharge by the Liquidator of the duties imposed by section 98 of the Companies Act, 1862, as varied by section 13 of the Companies (Winding-up) Act, 1890, and the last preceding Rule, the Liquidator shall for the purpose of acquiring or retaining possession of the property of the company, be in the same position as if he were a Receiver of

the property appointed by the High Court, and the Court may, on his application, enforce such acquisition or retention accordingly. **Rule 91.**

Power of Liquidator to require delivery of property. [s. 13 of Act of 1890; s. 100 of Act of 1862.] Form 53.

91. The powers conferred on the Court by section 100 of the Companies Act, 1862, shall be exercised by the Liquidator. Any contributory for the time being on the list of contributories, trustee, receiver, banker, or agent or officer of a company which is being wound up under order of the Court shall, on notice from the Liquidator and within such time as he shall by notice in writing require, pay, deliver, convey, surrender, or transfer to or into the hands of the Liquidator any sum of money or balance, books, papers, estate, or effects which happen to be in his hands for the time being and to which the Company is *primâ facie* entitled.

Calls.

Calls by Liquidator. [s. 13 of Act of 1890; s. 102 of Act of 1862.]

92. The powers and duties of the Court in relation to making calls upon contributories conferred by section 102 of the Companies Act, 1862, shall and may be exercised by the Liquidator as an officer of the Court subject to the provisions of section 13 of the Companies (Winding-up) Act, 1890, and to the following regulations:—

(1.) Where the Liquidator desires to make any call on the contributories, or any of them, for any purpose authorised by the Acts, if there is a committee of inspection he may summon a meeting of such committee for the purpose of obtaining their sanction to the intended call. Form 54.

(2.) The notice of the meeting shall be sent to each member of the committee of inspection in sufficient time to reach him not less than seven days before the day appointed for holding the meeting, and shall contain a statement of the proposed amount of the call, and the purpose for which it is intended. Notice of the intended call and the intended meeting of the committee of inspection shall also be advertised once at least in a London newspaper, and where the winding-up is not in the High Court also in a newspaper circulating in the district of the Court in which the winding-up is being conducted. The advertisement shall state the time and place of the intended meeting of the committee of inspection, and that each contributory may either attend the said meeting and be heard, or make any communication in writing to the Liquidator or members of the committee of inspection to be laid before the meeting, in reference to the said intended call. Form 55.

(3.) At the meeting of the committee of inspection any statements or representations made either to the meeting personally or addressed in writing to the Liquidator or members of the committee by any contributory shall be considered before the intended call is sanctioned.

(4.) The sanction of the committee shall be given by resolution which shall be passed by a majority of the members present. Form 56.

(5.) Where there is no committee of inspection the Liquidator shall not make a call without obtaining the leave of the Court.

Application to the Court for leave to make a call. Forms 58, 59, 60, and 61.

93. Every application to the Court for leave to make any call on the contributories, or any of them, for any purpose authorised by the Acts, shall be made by summons stating the proposed amount of such call, and such summons shall be served four clear days at the least before the day appointed for making the call on every contributory proposed to be included in such call; or if the Court so directs notice of such intended call may be given by advertisement, without a separate notice to each contributory.

Service of notice of a call. Forms 57 and 62.

94. When, in pursuance of a Resolution of the Committee of Inspection or an Order of the Court, a call has been made by the Liquidator, a copy of the Resolution or Order shall be forthwith served upon each of the contributories included in such call, together with a notice from the Liquidator specifying the amount or balance due from such contributory in respect of such call, but such Resolution or Order need not be advertised unless for any special reason the Court so directs.

Enforcement of call. Forms 63, 64, and 65.

95. The payment of the amount due from each contributory on a call may be enforced by order of the Court to be made in Chambers on summons by the Liquidator.

Rule 96.

PROOFS.

Proof of debt. [s. 107 of Act of 1862, and s. 13 of Act of 1890.]

96. Every creditor shall prove his debt.

Mode of proof.

97. A debt may be proved by delivering or sending through the post in a prepaid letter to the Official Receiver, or, if a Liquidator has been appointed, to the Liquidator, an affidavit verifying the debt.

Verification of proof.

98. The affidavit may be made by the creditor himself, or by some person authorised by or on behalf of the creditor. If made by a person so authorised, it shall state his authority and means of knowledge.

Contents of proof. Form 66.

99. The affidavit shall contain or refer to a statement of account shewing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The Official Receiver or Liquidator may at any time call for the production of the vouchers.

Statement of security.

100. The affidavit shall state whether the creditor is or is not a secured creditor.

Costs of proof.

101. A creditor shall bear the cost of proving his debt, unless the Court otherwise orders.

Discount.

102. A creditor proving his debt shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any discount, not exceeding five per centum on the net amount of his claim, which he may have agreed to allow for payment in cash.

Periodical payments.

103. When any rent or other payment falls due at stated periods, and the order to wind up is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the winding-up order as if the rent or payment grow due from day to day.

Interest.

104. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the winding-up order, the creditor may prove for interest at a rate not exceeding four per centum per annum to the date of the commencement of the winding-up from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving notice that interest will be claimed from the date of the demand until the time of payment.

Proof for debt payable at a future time.

105. A creditor may prove for a debt not payable when the winding-up order was made, as if it were payable immediately subject to a rebate of interest at the rate of five per centum per annum computed from the date of the winding-up to the time when the debt would have become payable according to the terms on which it was contracted.

Workmen's wages. Form 67.

106. In any case in which it appears from the statement of affairs that there are numerous claims for wages by workmen and others employed by the company, it shall be sufficient if one proof for all such claims is made either by a foreman or by some other person on behalf of all such creditors. Such proof shall have annexed thereto, as forming part thereof, a schedule setting forth the names of the workmen and others, and the amounts severally due to them. Any proof made in compliance with this Rule shall have the same effect as if separate proofs had been made by each of the said workmen and others.

Production of bills of exchange and promissory notes.

107. Where a creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the company is liable, such bill of exchange, note, instrument, or security must, subject to any special order of the Court made to the contrary, be produced to the Official Receiver, chairman of a meeting, or Liquidator, as the case may be, and be marked by him before the proof can be admitted either for voting or for any purpose.

Time for lodging proofs.

108. A proof intended to be used at the first meeting of creditors or at an adjournment thereof shall be lodged with the Official Receiver not later than the time mentioned for that purpose in the notice convening the meeting, or adjourned meeting.

Transmission of proofs to Liquidator.

109. Where a Liquidator is appointed all proofs of debts that have been received by the Official Receiver shall be handed over to the Liquidator.

But the Official Receiver shall first make a list of such proofs, and take a receipt thereon from the Liquidator for such proofs. **Rule 110.**

ADMISSION AND REJECTION OF PROOFS, AND APPEAL TO THE COURT.

110. The Liquidator shall examine every proof and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection. Examination of proof. Form 68.

111. If a creditor or contributory is dissatisfied with the decision of the Liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but, subject to the power of the Court to extend the time, no application to reverse or vary the decision of the Liquidator rejecting a proof shall be entertained unless notice of the application is given before the expiration of 21 days from the date of the rejection. Appeal by creditor.

112. If the Liquidator thinks that a proof has been improperly admitted, the Court may, on the application of the Liquidator, after notice to the creditor who made the proof, expunge the proof or reduce its amount. Expunging at instance of liquidator.

113. The Court may also expunge or reduce a proof upon the application of a creditor or contributory if the Liquidator declines to interfere in the matter. Expunging at instance of creditor.

114. For the purpose of any of his duties in relation to proofs, the Liquidator may administer oaths and take affidavits. Oaths.

115. The Official Receiver, before the appointment of a Liquidator, shall have all the powers of a Liquidator with respect to the examination, admission, and rejection of proofs, and any act or decision of his in relation thereto shall be subject to the like appeal. Official Receiver's powers, &c.

116. The Official Receiver, where no other Liquidator is appointed, shall, before payment of a dividend, file all proofs tendered in the winding-up, with a list thereof, distinguishing in such list the proofs which were wholly or partly admitted, and the proofs which were wholly or partly rejected. Filing proofs by Official Receiver.

117. Every Liquidator other than the Official Receiver shall, on the first day of every month, file with the proceedings a certified list of all proofs, if any, received by him during the month next preceding, distinguishing in such lists the proofs admitted, those rejected, and such as stand over for further consideration; and, in the case of proofs admitted or rejected, he shall place the proofs on the file of proceedings. Proofs to be filed.

118. The Official Receiver, or, as the case may be, the Liquidator, shall, within three days after receiving notice from a creditor of his intention to appeal against a decision rejecting a proof, file such proof, with a memorandum thereon of his disallowance thereof. Procedure where creditor appeals.

119. Subject to the powers of the Court to extend the time, the Official Receiver as Liquidator, not less than fourteen days from the latest date specified in the notice of his intention to declare a dividend as the time within which such proofs must be lodged, shall, in writing, either admit or reject wholly or in part every proof lodged with him, or require further evidence in support of it. Time for admission or rejection of proofs by Official Receiver.

120. Subject to the power of the Court to extend the time, the Liquidator, other than the Official Receiver, within twenty-eight days after receiving a proof, which has not previously been dealt with, shall in writing either admit or reject it wholly or in part, or require further evidence in support of it. Provided that where the Liquidator has given notice of his intention to declare a dividend, he shall within fourteen days after the date mentioned in the notice as the latest date up to which proofs must be lodged examine and in writing admit or reject every proof which has not been already dealt with, and give notice of his decision rejecting a proof wholly or in part to the creditors affected thereby. Time for admission or rejection of proofs by Liquidator.

121. The Official Receiver shall in no case be personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part. Costs of appeals from decisions as to proofs.

Rule 122.

DIVIDENDS.

Notice of intended dividend. Forms 69, 70, and 72.

122.—(1.) Not more than two months before declaring a dividend, the Liquidator shall give notice of his intention to do so to the Board of Trade in order that the same may be gazetted, and at the same time to such of the creditors mentioned in the statement of affairs as have not proved their debts. Such notice shall specify the latest date up to which proofs must be lodged, which shall be not less than fourteen days from the date of such notice.

(2.) Where any creditor, after the date mentioned in the notice of intention to declare a dividend as the latest date upon which proofs may be lodged, appeals against the decision of the Liquidator rejecting a proof, notice of appeal shall, subject to the power of the Court to extend the time in special cases, be given within seven days from the date of the notice of the decision against which the appeal is made, and the Liquidator may in such case make provision for the dividend upon such proof, and the probable costs of such appeal in the event of the proof being admitted. Where no notice of appeal has been given within the time specified in this Rule, the Liquidator shall exclude all proofs which have been rejected from participation in the dividend.

(3.) Immediately after the expiration of the time fixed by this Rule for appealing against the decision of the Liquidator he shall proceed to declare a dividend, and shall give notice to the Board of Trade (in order that the same may be gazetted), and shall also send a notice of dividend to each creditor whose proof has been admitted.

(4.) If it becomes necessary, in the opinion of the Liquidator and the committee of inspection, to postpone the declaration of the dividend beyond the limit of two months, the Liquidator shall give a fresh notice of his intention to declare a dividend to the Board of Trade in order that the same may be gazetted; but it shall not be necessary for the Liquidator to give a fresh notice to such of the creditors mentioned in the statements of affairs as have not proved their debts. In all other respects the same procedure shall follow the fresh notice as would have followed the original notice.

PROXIES.

Time for lodging. Forms 73, 74.

123.—(1.) A proxy shall be lodged with the Official Receiver or Liquidator not later than four o'clock in the afternoon of the day before the meeting at which it is to be used.

No minor to be a proxy.

(2.) No person shall be appointed a general or special proxy who is a minor.

Use of proxies by deputy Official Receiver.

124. Where an Official Receiver who holds any proxies cannot attend the meeting for which they are given, he may, in writing, depute some person under his official control to use the proxies on his behalf, and in such manner as he may direct.

Filling in where creditor blind or incapable.

125. The proxy of a creditor blind or incapable of writing may be accepted, if such creditor has attached his signature or mark thereto in the presence of a witness, who shall add to his signature his description and residence; provided that all insertions in the proxy are in the handwriting of the witness, and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request of the creditor and in his presence before he attached his signature or mark.

STATEMENTS BY LIQUIDATOR TO THE REGISTRAR OF JOINT STOCK COMPANIES.

Conclusion of liquidation. [Act of 1890, s. 15 (1).] Form 75.

126. The winding up of a company shall for the purposes of section 15 of the Companies (Winding-up) Act, 1890, be deemed to be concluded—

(*a.*) In the case of companies wound up by order of the Court, at the date on which the order dissolving the company has been reported by the Liquidator to the Registrar of Joint Stock Companies:

(*b.*) In the case of companies wound up voluntarily or under the supervision of the Court, at the date of the dissolution of the company, unless at such date any funds or assets of the company remain unclaimed or

undistributed in the hands or under the control of the Liquidator, or any person who has acted as Liquidator, in which case the winding-up shall not be deemed to be concluded until such funds or assets have either been distributed or paid into the Companies Liquidation Account at the Bank of England. **Rule 127.**

Information by Liquidator as to pending liquidations. [Act of 1890, s. 15.]

127.—(1.) Where a winding up of a company is not concluded within the year after its commencement, the statements which the Liquidator is to send to the Registrar of Joint Stock Companies with respect to the proceedings in and position of the liquidation shall be sent in duplicate at such intervals and in such form as the Board of Trade may from time to time by general order direct. In the absence of any such direction a statement shall be sent twice in each year, the first statement being sent at the expiration of 30 days from the termination of the first year during which the liquidation proceedings have been pending, and the succeeding statements being sent at intervals of half a year until the winding up of the company is concluded; and each statement shall consist of a Statement of Account dated from the last Statement of Account sent in under this Rule, together with a copy of the entries in the Record Book made since such date.

(2.) Where the winding up of a company has been commenced on or before the 1st day of January, 1890, and has not been concluded before the 1st day of January, 1891, the first statement which the Liquidator shall send to the Registrar of Joint Stock Companies with respect to the proceedings and position of the liquidation shall be sent in duplicate within 30 days from the 1st January, 1891, or within such extended period as the Board of Trade or the Court may in any particular case for special reasons sanction.

Unclaimed Funds and Undistributed Assets in the Hands of the Liquidator.

Duty of Liquidator to furnish information to Board of Trade.

128. Every person who has acted as Liquidator of any company, whether the liquidation has been concluded or not, shall furnish to the Board of Trade particulars of any money in his hands or under his control representing unclaimed or undistributed assets of the company on the 1st January, 1891, or subsequently, and such other particulars as the Board of Trade may require for the purpose of ascertaining or getting in any money payable into the Companies Liquidation Account at the Bank of England. The Board of Trade may require such particulars to be verified by affidavit.

Power of Board of Trade to call for verified accounts. Form 82.

129.—(1.) The Board of Trade may at any time order any such person to submit to them an account verified by affidavit of the sums received and paid by him as Liquidator of the company, and may direct and enforce an audit of the account.

(2.) For the purposes of section 15 of the Companies (Winding-up) Act, 1890, and these Rules, the Court (as hereinafter defined) shall have and, at the instance of the Board of Trade, may exercise all the powers conferred by the Bankruptcy Act, 1883, with respect to the discovery and realisation of the property of a debtor, and the provisions of Part I. of that Act with respect thereto shall, with any necessary modifications, apply to proceedings under section 15 of the Companies (Winding-up) Act, 1890.

Applications to the Court for enforcing Account.

130. Every application by the Board of Trade to the Court for the purpose of ascertaining and getting in money payable into the Bank of England pursuant to section 15 of the Companies (Winding-up) Act, 1890, and these Rules shall, if the winding-up is in the High Court, or in the Stannaries Court, be made to and dealt with by the Division of the High Court which for the time being exercises the bankruptcy jurisdiction of the High Court, and if the winding-up is in the Palatine Court or a County Court to that Court, and the practice which is observed in reference to applications by the Board of Trade under section 162 of the Bankruptcy Act, 1883, shall govern and be observed in every application by the Board of Trade under the said section 15 of the Companies (Winding-up) Act, 1890, and these Rules.

Mode of payment into Companies Liquidation Account.

131. Any Liquidator whose duty it is under section 15 of the Companies (Winding-up) Act, 1890, to pay into the Companies Liquidation Account at the Bank of England, any money representing unclaimed or undistributed assets of the company shall apply in such manner as the Board of Trade may

Rule 132. direct to the Board of Trade for a paying-in order, which paying-in order shall be an authority to the Bank of England to receive the payment.

[Act of 1890, s. 15.]

Application for payment out by person entitled.

132. An application by a person claiming to be entitled to any money paid into the Bank of England in pursuance of section 15 of the Companies (Winding-up) Act, 1890, shall be made in such form and manner as the Board of Trade may from time to time direct, and shall, unless the Board of Trade otherwise directs, be accompanied by the certificate of the Liquidator that the person claiming is entitled, and such further evidence as the Board of Trade may direct.

Transfer of funds to Companies Liquidation Account.

133.—(1.) For the purposes of subsection 3 of section 15 of the Companies (Winding-up) Act, 1890, money at the credit of the account of the Official Liquidator of any company with the Bank of England shall be deemed to be money under the control of the Official Liquidator, and when such money has remained unclaimed or undistributed for six months after the date of receipt it shall be transferred to the Companies Liquidation Account, and the Official Liquidator and Chief Clerk of the Chancery Division of the High Court shall draw and sign such cheques or orders as may be necessary for the transfer of the money.

(2.) Any application to the Board of Trade for payment out of moneys so transferred shall be signed by the Liquidator and countersigned by the Chief Clerk of the Judge of the Chancery Division to whom the winding-up is assigned.

Investment of Funds.

Investment of assets in securities, and realisation of securities. Forms 83 and 84.

134.—(1.) Where the Committee of Inspection are of opinion that any part of the cash balance standing to the credit of the account of the Company should be invested, they shall sign a certificate and request, and the Liquidator shall transmit such certificate and request to the Board of Trade.

(2.) Where the Committee of Inspection are of opinion that it is advisable to sell any of the securities in which the moneys of the Company's assets are invested they shall sign a certificate and request to that effect, and the Liquidator shall transmit such certificate and request to the Board of Trade.

Accounts and Audit.

Audit of Cash Book. [Act of 1890, s. 20.] Form 76.

135. The Committee of Inspection shall not less than once every three months audit the Liquidator's Cash Book and certify therein under their hands the day on which the said book was audited.

Board of Trade audit Liquidators' accounts.

136.—(1.) Every Liquidator shall, at the expiration of six months from the date of the winding-up order, and at the expiration of every succeeding six months thereafter until his release, transmit to the Board of Trade a copy of the Cash Book for such period in duplicate, together with the necessary vouchers and copies of the certificates of audit by the Committee of Inspection. He shall also forward with the first accounts a summary of the company's statement of affairs, in such form as the Board of Trade may direct, shewing thereon in red ink the amounts realised, and explaining the cause of the non-realisation of such assets as may be unrealised.

(2.) When the assets of the company have been fully realised and distributed, the Liquidator shall forthwith send in his accounts to the Board of Trade, although the six months may not have expired.

Form 77.

(3.) The accounts sent in by the Liquidator shall be certified and verified by him.

Liquidator carrying on business.

137.—(1.) Where the Liquidator carries on the business of the company, he shall keep a distinct account of the trading, and shall incorporate in the Cash Book the total weekly amount of the receipts and payments on such trading account.

Forms 80 and 81.

(2.) The trading account shall from time to time, and not less than once in every month, be verified by affidavit, and the Liquidator shall thereupon submit such account to the Committee of Inspection (if any), or such member thereof as may be appointed by the committee for that purpose, who shall examine and certify the same.

138. When the Liquidator's account has been audited, the Board of Trade shall certify the fact upon the account, and thereupon the duplicate copy, bearing a like certificate, shall be filed with the proceedings in the winding-up. **Rule 138.** Copy of accounts to be filed.

139.—(1.) The Liquidator shall transmit to the Board of Trade with his accounts a summary of such accounts in such form as the Board of Trade from time to time direct, and, on the approval of such summary by the Board of Trade, shall forthwith obtain, prepare, and transmit to the Board of Trade so many printed copies thereof, duly stamped for transmission by post, and addressed to the creditors and contributories, as may be required for transmitting such summary to each creditor and contributory. Summary of accounts.

(2.) The cost of printing and posting such copies shall be a charge upon the assets of the company.

140. Where a Liquidator has not since the date of his appointment or since the last audit of his accounts, as the case may be, received or paid any sum of money on account of the assets of the company, he shall, at the time when he is required to transmit his accounts to the Board of Trade, forward to the Board an affidavit of no receipts or payments. Affidavit of no receipts.

141. Upon a Liquidator resigning, or being released or removed from his office, he shall deliver over to the Official Receiver, or, as the case may be, to the new Liquidator, all books kept by him, and all other books, documents, papers, and accounts in his possession relating to the office of Liquidator. The release of a Liquidator shall not take effect unless and until he has delivered over to the Official Receiver all the books, papers, documents, and accounts which he is by this Rule required to deliver on his release. Proceedings on resignation, &c., of liquidator.

142. Where property forming part of a company's assets is sold by the Liquidator through an auctioneer or other agent, the gross proceeds of the sale shall be paid over by such auctioneer or agent, and the charges and expenses connected with the sale shall afterwards be paid to such auctioneer or agent, on the production of the necessary certificate of the taxing officer. Every Liquidator, by whom such auctioneer or agent is employed, shall, unless the Court otherwise orders, be accountable for the proceeds of every such sale. Expenses of sales.

Books.

143. The Official Receiver, until a Liquidator is appointed by the Court, and thereafter the Liquidator, shall keep a book to be called the "Record Book," in which he shall record all minutes, all proceedings had and resolutions passed at any meeting of creditors or contributories, or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration of the company's affairs, but he shall not be bound to insert in the "Record Book" any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors or contributories), nor need he exhibit such document to any person other than a member of the committee of inspection. Record Book. [s. 21 of Act of 1890.]

144.—(1.) The Official Receiver, until a Liquidator is appointed by the Court, and thereafter the Liquidator, shall keep a book to be called the "Cash Book" (which shall be in such form as the Board of Trade may from time to time direct), in which he shall (subject to the provisions of these Rules as to trading accounts) enter from day to day the receipts and payments made by him. Cash Book.

(2.) The Liquidator shall submit the Record Book and Cash Book, together with any other requisite books and vouchers, to the committee of inspection (if any) when required, and not less than once every three months.

Register and File of Proceedings.

145. A register shall be kept in the Chambers of the Judge of all proceedings held there, in each matter with proper dates, so that all the proceedings in each cause or matter may appear consecutively and in chronological order, with a short statement of the questions on points decided or ruled at every hearing, and no documents or proceedings are to be filed in the Chambers of the Judge unless the Court, by any general or special order, otherwise directs. Register of proceedings in Judges' Chambers. [See Gen. Orders of 1862, r. 57; and O. LV. r. 73 of R. S. C., 1883.]

Rule 146.

File of proceedings.

146.—(1.) The file of proceedings shall be kept by the Official Receiver, and all orders, reports, exhibits, admissions, memorandums, and office copies of affidavits, examinations, depositions, and certificates, and all other documents relating to the winding up of any company shall be placed on the file by the Official Receiver or the Liquidator, as far as may be in continuous order. Every contributory of the company, and every creditor thereof whose proof or claim has been admitted, and every person who has been a director or officer of the company, shall be entitled, at all reasonable times, to inspect the file free of charge, and, at his own expense, to take copies or extracts from any of the documents comprised therein, or to be furnished with such copies or extracts at a rate not exceeding threepence per folio of seventy-two words; and the file shall be produced in Court, or before the Judge, and otherwise as occasion may require.

Memorandum of advertisements.

147.—(1.) Whenever the *London Gazette* contains any advertisement relating to any winding-up to which these Rules apply, the Liquidator shall file with the proceedings a memorandum referring to and giving the date of the advertisement.

Form 87.

(2.) In the case of an advertisement in a local paper, the Official Receiver shall keep a copy of the paper, and a memorandum referring to and giving the date of the advertisement shall be placed on the file.

(3.) For this purpose one copy of each local paper in which any advertisement relating to any winding-up proceeding in the Court is inserted, shall be left with the Official Receiver by the person who inserts the advertisement.

(4.) A memorandum under this Rule shall be *primâ facie* evidence that the advertisement to which it refers was duly inserted in the issue of the *Gazette* or newspaper mentioned in it.

Release of Liquidator.

Application for release. [s. 22 of Act of 1890.]

148. A Liquidator, before making application to the Board of Trade for his release, shall give notice of his intention so to do to all the creditors who have proved their debts and to all the contributories, and shall send with the notice a summary of his receipts and payments as Liquidator.

Forms 78 and 79.

149. Where the Board of Trade have granted to a Liquidator his release, a notice of the order granting the release shall be gazetted. The Liquidator shall provide the requisite stamp fee for the *Gazette*, which he may charge against the company's assets.

Gazetting release.

Books to be kept, and Returns made, by Officers of Courts.

Books to be kept by officers of Courts. [s. 29 of Act of 1890.]

150. In the High Court the Chief Clerks of the Chancery Division, and in the District Registries of the High Court at Liverpool and Manchester respectively the District Registrars of the High Court, and in a Court other than the High Court, the Registrar or other officer of the Court whose duty it is to perform under direction of the Judge the duties which in a County Court are performed by the Registrar, shall keep books according to the Forms in the Appendix, and the particulars given under the different heads in such books shall be entered forthwith after each proceeding has been concluded.

Forms 88 and 89.

Extracts to be sent to Board of Trade.

151. The officers of the Courts whose duty it is to keep the books prescribed by these Rules shall make and transmit to the Board of Trade such extracts from their books, and shall furnish the Board of Trade with such information and returns as the Board of Trade may from time to time require.

Gazetting.

Gazetting notices. Form 86.

152. All notices subsequent to the making by the Court of a winding-up order in pursuance of the Act or these Rules requiring publication in the *London Gazette* shall be gazetted by the Board of Trade.

Re-gazetting.

153. Where any winding-up order is amended, and also in any case in which any matter which has been gazetted has been amended or altered, or in which a matter has been wrongly or inaccurately gazetted, the Board of Trade shall re-gazette such order or matter with the necessary amendments and alterations in the prescribed form, at the expense of the company's assets, or otherwise as the Board of Trade may direct.

LIQUIDATORS AND COMMITTEES OF INSPECTION.

Remuneration of Liquidator.

154.—(1.) The remuneration of a Liquidator shall, unless the Court shall otherwise order, be fixed by the Committee of Inspection, and shall be in the nature of a commission or percentage of which one part shall be payable on the amount realised after deducting the sums (if any) paid to secure creditors out of the proceeds of their securities and the other part on the amount distributed in dividend.

(2.) If there is no Committee of Inspection the remuneration of the Liquidator shall be in accordance with the scale of percentage payable for realisations and distributions by the Official Receiver as Liquidator.

Limit of remuneration.

155. Except as provided by the Acts or these Rules, no Liquidator shall be entitled to receive out of the estate any remuneration for services rendered to the company, except the remuneration to which under the Acts and Rules he is entitled as Liquidator.

Dealings with assets.

156. Neither the Liquidator nor any member of the committee of inspection of a company shall, while acting as Liquidator or member of such committee, except by leave of the Court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the company's assets. Any such purchase made contrary to the provisions of this Rule may be set aside by the Court on the application of the Board of Trade or any creditor or contributory, and the Court may make such order as to costs as the Court shall think fit.

Liquidator not to purchase from his employer or partner without Court's sanction.

157. Where the Liquidator carries on the business of the company, he shall not, without the express sanction of the Court, purchase goods for the carrying on of such business from any person whose connection with the Liquidator is of such a nature as would result in the Liquidator obtaining any portion of the profit (if any) arising out of the transaction.

Committee of inspection.

158. No member of a committee of inspection in a winding-up shall, except under and with the sanction of the Court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the winding-up, or to receive out of the assets any payment for services rendered by him in connection with the administration of the assets, or for any goods supplied by him to the Liquidator for or on account of the Company. If it appears to the Board of Trade that any profit or payment has been made contrary to the provisions of this Rule they may disallow such payment or recover such profit, as the case may be, on the audit of the Liquidator's accounts.

Costs of obtaining sanction.

159. In any case in which the sanction of the Court is obtained under the two last preceding Rules, the cost of obtaining such sanction shall be borne by the person in whose interest such sanction is obtained, and shall not be payable out of the company's assets.

Sanction of payments to members of committee of inspection.

160. Where the sanction of the Court to a payment to a member of a committee of inspection for services rendered by him in connection with the administration of the company's assets is obtained, the order of the Court shall specify the nature of the services, and shall only be given where the service performed is of a special nature. No payment shall, under any circumstances, be allowed to a member of a committee for services rendered by him in the discharge of the duties attaching to his office as a member of such committee.

Discharge of costs, &c., before assets handed over to Liquidator.

161.—(1.) Where a Liquidator is appointed by the Court, the Official Receiver shall forthwith put the Liquidator into possession of all property of the company of which the Official Receiver may have custody; provided that such Liquidator shall have, before the assets are handed over to him by the Official Receiver, discharged any balance due to the Official Receiver on account of fees, costs, and charges properly incurred by him, and on account of all advances properly made by him in respect of the company, together with interest on such advances at the rate of four pounds per cent. per annum; and the Liquidator shall pay all fees, costs, and charges of the Official Receiver which may not have been discharged by the Liquidator before being put into possession of the property of the company, and whether incurred before or after he has been put into such possession.

Rule 162.

(2.) The Official Receiver shall be deemed to have a lien upon the company's assets until such balance shall have been paid and the other liabilities shall have been discharged.

(3.) It shall be the duty of the Official Receiver, if so requested by the Liquidator, to communicate to the Liquidator all such information respecting the estate and affairs of the company as may be necessary or conducive to the due discharge of the duties of the Liquidator.

OFFICIAL RECEIVERS, AND BOARD OF TRADE.

Appointment.

162.—(1.) Judicial notice shall be taken of the appointment of the Official Receivers appointed by the Board of Trade.

(2.) When the Board of Trade appoints any officer to act as deputy for or in the place of an Official Receiver, notice thereof shall be given by letter to the Court to which such Official Receiver is or was attached. The letter shall specify the duration of such acting appointment.

(3.) Any person so appointed shall, during his tenure of office, have all the status, rights, and powers, and be subject to all the liabilities of an Official Receiver.

Removal.

163.—(1.) Where an Official Receiver is removed from his office by the Board of Trade, notice of the order removing him shall be communicated by letter to the Court to which the Official Receiver was attached.

Personal performance of duties.

164. The Board of Trade may, by general or special directions, determine what acts or duties of the Official Receiver in relation to the winding-up of companies are to be performed by him in person, and in what cases he may discharge his functions through the agency of his clerks or other persons in his regular employ, or under his official control.

Assistant Official Receivers.

165. An assistant Official Receiver, appointed by the Board of Trade, shall be an officer of the Court, like the Official Receiver to whom he is assistant, and, subject to the directions of the Board of Trade, he may represent the Official Receiver in all proceedings in Court, or in any administrative or other matter. Judicial notice shall be taken of the appointment of an assistant Official Receiver, and he may be removed in the same manner as is provided in the case of an Official Receiver.

Power of officers of Board of Trade and Official Receivers' clerks in certain cases to act for Official Receivers.

166. In the absence of the Official Receiver any officer of the Board of Trade duly authorised for the purpose by the Board of Trade, and any clerk of the Official Receiver duly authorised by him in writing, may by leave of the Court act on behalf of the Official Receiver, and take part for him in any public or other examination and in any unopposed application to the Court.

167. Where a company against whom a winding-up order has been made has no available assets, the Official Receiver shall not be required to incur any expense in relation to the winding-up without the express directions of the Board of Trade.

Duties where no assets.

168.—(1.) Where a Liquidator is appointed by the Court, the Official Receiver shall account to the Liquidator.

Accounting by official Receiver.

(2.) If the Liquidator is dissatisfied with the account or any part thereof, he may report the matter to the Board of Trade, who shall take such action (if any) thereon as it may deem expedient.

Official Receiver to Act for Board of Trade where no committee of inspection.

(3.) The provisions of these Rules as to Liquidators and their accounts shall not apply to the Official Receiver when he is Liquidator, but he shall account in such manner as the Board of Trade may from time to time direct.

169. Where there is no committee of inspection any functions of the committee of inspection which devolve on the Board of Trade may, subject to directions of the Board, be exercised by the Official Receiver.

Appeals from Board of Trade and Official Receiver.

170. An appeal in the High Court against a decision of the Board of Trade, or an appeal to the Court from an act or decision of the Official Receiver, shall be brought within 21 days from the time when the decision or act appealed against is done, pronounced, or made.

Applications under s. 25 (2) of Act of 1890.

171.—(1.) An application by the Board of Trade to the Court to examine on oath the Liquidator or any other person pursuant to section 25 of the Companies (Winding-up) Act, 1890, shall be made *ex parte*, and shall be supported by a report to the Court filed with the proceedings, stating the circumstances in which the application is made.

(2.) The report may be signed by any person duly authorised to sign documents on behalf of the Board of Trade; and shall for the purposes of such application be *primâ facie* evidence of the statement therein contained. **Rule 172.**

SPECIAL MANAGER.

172. Every Special Manager shall account to the Official Receiver, and such Special Manager's accounts shall be verified by affidavit, and, when approved by the Official Receiver, the totals of the receipts and payments shall be added to the Official Receiver's accounts. Accounts. Form 85.

ATTENDANCE AND APPEARANCE OF PARTIES, &c.

173. Every person for the time being on the list of contributories of the company and every person whose proof has been admitted shall be at liberty, at his own expense, to attend proceedings, and shall be entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he shall by written request desire to have notice of; but if the Court shall be of opinion that the attendance of any such person upon any proceedings has occasioned any additional costs which ought not to be borne by the funds of the Company, he may direct such costs, or a gross sum in lieu thereof, to be paid by such person; and such person shall not be entitled to attend any further proceedings until he has paid the same. Attendance at proceedings.

174. Where the attendance of the Liquidator's solicitor is required on any proceeding in Court or Chambers, the Liquidator need not attend in person, except in cases where his presence is necessary in addition to that of his solicitor, or the Court directs him to attend. Solicitor of Liquidator.

MISCELLANEOUS MATTERS.

175. The Board of Trade may from time to time issue general orders or regulations for the purpose of regulating any matters under the Act or these Rules which are of an administrative and not of a judicial character. Judicial notice shall be taken of any general orders or regulations which are printed by the Queen's printers, and purport to be issued under the authority of the Board of Trade. Board of Trade orders, &c.

176. The Court may, in any case in which it shall see fit, extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding. Enlargement or abridgment of time.

177.—(1.) No proceeding under the Acts shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court. Formal defect not to invalidate proceedings.

(2.) No defect or irregularity in the appointment or election of a Receiver, Liquidator, or member of a committee of inspection shall vitiate any act done by him in good faith.

178. In all proceedings in or before the Court, or any Judge or officer thereof, or over which the Court has jurisdiction under the Acts and Rules, where no other provision is made by the Acts or these Rules the practice, proceeding, and regulations shall, unless the Court otherwise in any special case directs, in the High Court and Stannaries Court be in accordance with the Rules of the Supreme Court and practice of the High Court, and in a County Court and Palatine Court in accordance, as far as practicable, with the existing Rules and practice of the Court in proceedings for the administration of assets by the Court. Application of existing procedure.

179. The provisions of Rule 2 of the Rules of the Supreme Court, 1887, relating to petitions in the District Registries of Liverpool and Manchester, shall apply to petitions presented in the said Registries under the Acts and these Rules. Petitions in Liverpool and Manchester District Registries.

180. The Rules contained in the General Orders of the Court of Chancery of 1862, and the Forms prescribed by such Rules, shall from and after the commencement of these Rules cease to have effect or apply in the winding up of any company wound up under the order of the Court where the winding-up order is made after the 31st of December, 1890. Rules under Order of 1862 not to apply in compulsory windings-up after December 31, 1890.

APPENDIX.

FORMS.

No. 1.

General Title (*High Court*).

In the High Court of Justice , 189 . [*Here state letter and number.*]

Chancery Division,

Mr. Justice

In the matter of the Companies Acts, 1862 to 1890,

and

In the matter of the (*a*) Company, Limited.

(*a*) Insert full name of Company.

No. 2.

General Title (*County Court*).

In the County Court of , holden at

In the matter of the Companies Acts, 1862 to 1890,

and

In the matter of the (*a*) Company, Limited.

(*a*) Insert full name of Company.

No. 3.

ORDER OF TRANSFER.

(*Title.*)

Upon the application of (*a*) and upon hearing and upon reading it is ordered that the said proceedings be transferred from the (*b*) Court to the (*c*) Court.

Dated this day of , 189 .

(*a*) Name of Applicant.

(*b*) Court from which the transfer is to be made.

(*c*) Court to which the transfer is to be made.

No. 4.

NOTICE OF TRANSFER OF PROCEEDINGS TO THE BOARD OF TRADE AND OFFICIAL RECEIVER.

(*Title.*)

The proceedings in the winding up of the above-named Company have been, by order dated the 18 , transferred to this Court from the [High Court] *or* [the County Court of , holden at , *or as the case may be*] and have had the above letter and number allotted to them. The letter and number before transfer were .

Dated this day of , 189

Form 5.

No. 5.

APPOINTMENT OF SHORTHAND WRITER TO TAKE EXAMINATION.

(*Title.*)

Before .

Upon the application of the Official Receiver the Court hereby appoints of in the county of to take the examination of at his public examination this day pursuant to Rule of the Companies Winding-up Rules, 1890.

Dated this day of , 189 .

No. 6.

DECLARATION BY SHORTHAND WRITER.

(*Title.*)

Before .

I, , of , in the county of , the shorthand writer appointed by this Court to take down the examination of , do solemnly and sincerely declare that I will truly and faithfully take down the questions and answers put and given by the said in this matter, and will deliver true and faithful transcripts thereof as the Court may direct.

Dated this day of , 189 .

[Declared before me at the time and place above mentioned.]

No. 7.

NOTES OF PUBLIC EXAMINATION WHERE A SHORTHAND WRITER IS APPOINTED.

(*Title.*)

Public examination of (*a*).

Before at the Court , this day of , 189 .

The above-named , being sworn and examined at the time and place above mentioned, upon the several questions following being put and propounded to him, gave the several answers thereto respectively following each question, that is to say:—

(*a*) Mr. an officer [*or as the case may be*] of the above-named Company.

A.

These are the notes of the public examination referred to in the memorandum of public examination of , taken before me this day of , 189 .

No. 8.

NOTES OF PUBLIC EXAMINATION WHERE SHORTHAND WRITER IS NOT APPOINTED.

(*Title.*)

Public examination of (*a*).

Before at the Court , this day of , 189 .

The above-named , being sworn and examined at the time and place above mentioned, upon his oath saith as follows:—

(*a*) Mr. an officer [*or as the case may be*] of the above-named Company.

A.

These are the notes of the public examination referred to in the memorandum of public examination of , taken before me this day of , 189 .

No. 9.

RETURN BY TAXING OFFICER.

In the (*a*) .

Return of Bills taxed during the year ending day of , 189 .

(*a*) Name of Court.

Form 10.

	The Companies Acts.			
	Number of Bills taxed.	Gross amount of Bills.	Amount disallowed on Taxation.	Net amount allowed.
Solicitors' Bills – – – –				
Accountants' Bills – – –				
Auctioneers' Bills – –				
High Bailiffs' Bills – – – –				
Brokers' and other persons' Bills –				
Totals – – – –				

Date , 189 . (Signed) .

No. 10.

CERTIFICATE OF TAXATION.

(*Title.*)

I hereby certify that I have taxed the bill of costs [*or* charges] [*or* expenses] of Mr. *C. D.* [*here state capacity in which employed or engaged*] [*where necessary add* "pursuant to an order of the Court dated the day of , 189 "], and have allowed the same at the sum of pounds shillings and pence [*where necessary add* "which sum is to be paid to the said *C. D.* by as directed by the said order"].

Dated this day of , 189 .

Taxing Master [*or* Registrar].

£ : :

No. 11.

REGISTER TO BE KEPT BY TAXING OFFICER.

The Companies Acts, 1862 to 1890.

Name of Company.	Solicitors' Bills.			Auctioneers' Bills.			High Bailiffs' Bills.			Accountants' Bills.			Brokers' or other Persons' Bills.		
	Gross Amount of Bill.	Amount Taxed off.	Net Amount Allowed.	Gross Amount of Bill.	Amount Taxed off.	Net Amount Allowed.	Gross Amount of Bill.	Amount Taxed off.	Net Amount Allowed.	Gross Amount of Bill.	Amount Taxed off.	Net Amount Allowed.	Gross Amount of Bill.	Amount Taxed off.	Net Amount Allowed.

No. 12.

Form 12.

PETITION.

189 . [*Here state letter and number.*]

In the (*a*)

In the matter of the Companies Acts, 1862 to 1880,
and
In the matter of the Company, Limited (*b*).

To (*c*)

The humble petition of (*d*) showeth as follows :—

1. The Company, Limited (hereinafter called the company), was in the month of incorporated under the Companies Acts.

2. The registered office of the company is at (*e*)

3. The nominal capital of the company is £ , divided into shares of £ each. The amount of the capital paid up or credited as paid up is £ .

4. The objects for which the company was established are as follows :—

To

and other objects set forth in the memorandum of association thereof.

[*Here set out in paragraphs the facts on which the petitioner relies, and conclude as follows*] :—

Your petitioner therefore humbly prays as follows :—

(1.) That the Company, Limited, may be wound up by the court under the provisions of the Companies Acts, 1862 to 1890 :

(2.) Or that such other order may be made in the premises as shall be just.

NOTE.—(*f*) It is intended to serve this petition on .

(*a*) State name of Court, and in the High Court the Division and Judge.

(*b*) [*or as the case may be.*]

(*c*) Insert title of Court.

(*d*) Insert full name, title, &c., of petitioner.

(*e*) State the full address of the registered office so as sufficiently to show the district in which it is situate.

(*f*) This note will be unnecessary if the company is petitioner.

No. 13.

PETITION BY UNPAID CREDITOR ON SIMPLE CONTRACT.

(*Title as in No.* 12.)

Paragraphs 1, 2, 3, and 4 as in No. 12.

5. The company is indebted to your petitioner in the sum of £ for (*a*)

6. Your petitioner has made application to the company for payment of his debt, but the company has failed and neglected to pay the same or any part thereof.

7. The company is [insolvent and] unable to pay its debts.

8. In the circumstances it is just and equitable that the company should be wound up.

Your petitioner therefore, &c. [as in No. 12].

(*a*) State consideration for the debt, with particulars so as to establish that the debt claimed is due.

No. 14.

AFFIDAVIT OF SERVICE OF PETITION ON MEMBERS, OFFICERS, OR SERVANTS.

(*Title.*)

In the matter of a petition dated .

I, , of , make oath and say :—

1. [*In the case of service of petition on a member, officer, or servant at the registered office, or if no registered office at the principal or last known principal place of business of the company.*]

That I did on day, the day of , 189 , serve [*name and description*] a member (or officer) (or servant) of the said company with a copy of the above-mentioned petition, duly sealed with the seal of the Court, by delivering the same personally to the said , at [*office or place of business as aforesaid*], before the hour of in the noon.

2. [*In the case of no member, officer, or servant of the company being found at the registered offices or place of business.*]

That I did on day, the day of , 189 , having failed to find any member, officer, or servant of the above-named company at [*here state registered office or place of business*], leave there a copy of the above-named petition, duly sealed with the seal of the Court, before the hour of in the noon [*add with whom such sealed copy was left, or where*, e.g.; *affixed to door of offices, or placed in letter box, or otherwise.*]

3. [*In the case of directions by the Court as to the member or members of the company to be served.*]

Form 15.

That I did on day, the day of , 189 , serve [*name or names and description*] with a copy of the above-mentioned petition, duly sealed with the seal of the Court, by delivering the same personally to the said , at [*place*], before the hour of in the noon.

4. A sealed copy of the said petition is hereunto annexed.

Sworn at, &c.

No. 15.

Affidavit of Service of Petition on Liquidator.

(*Title.*)

In the matter of a petition, dated , for winding up the above company under the supervision of the Court.

I, , of , make oath and say:—

That I did, on day, the day of , 189 , serve [*name and description*] the liquidator of the above-named company with a copy of the above-mentioned petition, duly sealed with the seal of the Court, by delivering the same personally to the said , at [*place*], before the hour of in the noon.

A sealed copy of the said petition is hereunto annexed.

Sworn at, &c.

No. 16.

Advertisement of Petition.

In the matter of the Companies Acts, 1862 to 1890,

and

In the matter of the (*a*) Company.

Notice is hereby given that a petition for the winding up of the above-named company by (*b*) the High Court of Justice [*or* the county court of] holden at [*or, as the case may be*], was, on the day of , 189 , presented to the said court by the said company [*or* by *A. B.*, of , a creditor [*or* contributory] of the said company [*or, as the case may be*]. And that the said petition is directed to be heard before the court sitting at on the day of , 189 ; and any creditor or contributory of the said company desirous to oppose the making of an order for the winding up of the said company under the above Acts, should appear at the time of hearing by himself or (*c*) his counsel for that purpose; and a copy of the petition will be furnished to any creditor or contributory of the said company requiring the same by the undersigned on payment of the regulated charge for the same.

C. and *D.*, of &c. [Agents for *E.* and *F.*, of &c.]

Solicitors for the petitioner.

(*a*) Insert name of Company.

(*b*) If the winding-up is to be subject to supervision, insert instead of "by" the words "subject to the supervision of."

(*c*) In the county court add "his solicitor or."

No. 17.

Affidavit verifying Petition.

I, *A. B.*, of &c., make oath and say, that such of the statements in the petition now produced and shewn to me, and marked with the letter A., as relate to my own acts and deeds are true, and such of the said statements as relate to the acts and deeds of any other person or persons I believe to be true.

Sworn, &c.

No. 18.

Order for Winding-up by the Court.

day of , 189 .

(*Title.*)

Upon the petition of the above-named company [*or A. B.*, of &c., a creditor [*or* contributory] of the above-named company], on the day of , 189 , preferred unto the court, and upon hearing for the petitioner, and for , and upon reading the said petition, an affidavit of

(the said petitioner), filed, &c., verifying the said petition, an affidavit of *L. M.*, filed the day of , 189 , the *London Gazette* of the day of , 189 , the newspaper of the day of [*enter any other papers*], each containing an advertisement of the said petition [*enter any other evidence*], this court doth order that the said Company be wound up by this court under the provisions of the Companies Acts, 1862 to 1890, and that (*a*) , the Official Receiver attached to this court, be constituted Provisional Liquidator of the affairs of the company. **Form 19.**

(*a*) Name of Official Receiver.

NOTE.—*A. B.*, being a of the company, is hereby required to attend at the office of the Official Receiver at (*b*) .

(*b*) Insert the place at which attendance is required.

The Official Receiver's offices are open every weekday from 10 a.m. to 4 p.m., except days, when they close at p.m.

No. 19.

ORDER FOR WINDING-UP, SUBJECT TO SUPERVISION.

day, the day of , 189 .

(*Title.*)

Upon the petition, &c., this court doth order that the voluntary winding up of the said company be continued, but subject to the supervision of this court; and any of the proceedings under the said voluntary winding-up may be adopted as the judge shall think fit. And the creditors, contributories, and liquidators of the said company, and all other persons interested are to be at liberty to apply to the judge at chambers as there may be occasion.

No. 20.

NOTICE OF ORDER TO WIND UP [FOR LOCAL PAPER].

In the matter of the (*a*) company . (*a*) Insert full title of company.

Notice is hereby given that by an order made by the (*b*) in the above matter, dated the day of , 189 , on the petition of the above-named company [*or A. B.* of]. It was ordered that, &c. [*as in Order*]. (*b*) Insert name of court which made the order.

Notice is also hereby given that the first meeting of creditors will be held at , on the day of , 189 , at o'clock, and the first meeting of contributories will be held at , on the day of , 189 , at o'clock.

Dated this day of , 189 .

Official Receiver.

NOTE.—All debts due to the company should be paid to the Official Receiver at his office at (*c*) .

(*c*) State address of Official Receiver's office.

No. 21.

ORDER APPOINTING THE OFFICIAL RECEIVER AS PROVISIONAL LIQUIDATOR AFTER PRESENTATION OF PETITION, AND BEFORE ORDER TO WIND UP.

the day of , 189 .

(*Title.*)

Upon the application, &c., and upon reading, &c., the Court doth hereby appoint Mr. , the Official Receiver attached to the Court, to be Provisional Liquidator of the above-named Company. And the Court doth hereby limit and restrict the powers of the said Official Receiver as Provisional Liquidator to the following acts, that is to say [*describe the acts which the Provisional Liquidator is to be authorised to do and the property of which he is to take possession*].

No. 22.

NOTICE TO CREDITORS OF FIRST MEETING.

(*Title.*)

(Under the order for winding up the above-named Company, dated the day of , 189 .)

Form 23. Notice is hereby given, that the first meeting of creditors in the above matter will be held at on the day of , 189 , at o'clock in the noon.

To entitle you to vote thereat your proof must be lodged with me not later than o'clock on the day of , 189 .

Forms of proof and of general and special proxies are enclosed herewith. Proxies to be used at the meeting must be lodged with me not later than o'clock on the day of , 189 .

Official Receiver.

Address.

(a) Here insert "has not been lodged," or "has been lodged, and summary is enclosed."

(The statement of the Company's affairs (a) .)

NOTE.

At the first meetings of the creditors and contributories they may amongst other things:—

1. By resolution determine whether or not an application is to be made to the Court to appoint a liquidator in place of the Official Receiver.

2. By resolution determine whether or not an application shall be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of the committee if appointed.

NOTE.—If a liquidator is not appointed by the Court the Official Receiver will be the liquidator.

No. 23.

NOTICE TO CONTRIBUTORIES OF FIRST MEETING.

(*Title.*)

Notice is hereby given that the first meeting of the contributories in the above matter will be held at on the day of , 189 , at o'clock in the noon.

Forms of general and special proxies are enclosed herewith. Proxies to be used at the meeting must be lodged with me not later than o'clock on the day of 189

Dated this day of , 189 .

Official Receiver.

(a) Here insert "has not been lodged," or "has been lodged, and summary is enclosed."

(The Company's statement of affairs (a) .)

NOTE.

At the first meetings of creditors and contributories they may amongst other things:—

1. By resolution determine whether or not an application shall be made to the Court to appoint a liquidator in place of the Official Receiver.

2. By resolution determine whether or not an application shall be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of the committee of inspection.

NOTE.—If a liquidator is not appointed by the Court the Official Receiver will be the liquidator.

No. 24.

NOTICE TO DIRECTORS AND OFFICERS OF COMPANY TO ATTEND FIRST MEETING OF CREDITORS OR CONTRIBUTORIES.

(*Title.*)

(a) Here insert place where meeting will be held.

(b) Insert name of person required to attend.

Take notice that the first meeting of creditors [or contributories] will be held on the day of , 189 , at o'clock at (a) , and that you are required to attend thereat, and give such information as the meeting may require.

Dated this day of , 189 .

To (b) .

Official Receiver.

Form 25.

No. 25.

AUTHORITY TO DEPUTY TO ACT AS CHAIRMAN OF MEETING AND USE PROXIES.

(*Title.*)

I, , the Official Receiver of , do hereby nominate Mr. , of , to be the chairman of the first meeting of creditors [*or* contributories] in the above matter, appointed to be held at on the day of 189 , and I depute him (*a*) to attend such meeting and use, on my behalf, any proxy or proxies held by me in this matter.

Dated this day of , 189 .

Official Receiver.

(*a*) Here insert "being a person in my employment or under my official control," *or* "being an officer of the Board of Trade."

No. 26.

NOTICE OF MEETING [GENERAL FORM].

(*Title.*)

Take notice that a meeting of creditors [*or* contributories] in the above matter will be held at on the day of , 189 , at o'clock in the noon.

Agenda (*a*).

Dated this day of , 189 .

(Signed) (*b*)

(*a*) Here insert purpose for which meeting called.

(*b*) "Liquidator" or "Official Receiver."

Forms of general and special proxies are enclosed herewith. Proxies to be used at the meeting must be lodged not later than o'clock on the day of , 189 .

No. 27.

AFFIDAVIT OF POSTAGE OF NOTICES OF MEETING.

(*Title.*)

I, , a (*a*) , make oath and say as follows:—

1. That I did on the day of , 189 , send to each creditor mentioned in the Company's statement of affairs, [*or* to each contributory mentioned in the register of members of the Company] a notice of the time and the place of the (*b*) in the form hereunto annexed marked "A."

2. That the notices for creditors were addressed to the said creditors respectively, according to their respective names and addresses appearing in the statement of affairs of the Company.

3. That the notices for contributories were addressed to the contributories respectively according to their respective names and addresses appearing in the register of the Company.

4. That I sent the said notices by putting the same prepaid into the post-office at before the hour of o'clock in the noon on the said day.

Sworn, &c.

(*a*) State the description of the deponent.

(*b*) Insert here "general" or "adjourned general" or "first" meeting of creditors [*or* contributories, *as the case may be*].

No. 28.

CERTIFICATE OF POSTAGE OF NOTICES (GENERAL).

(*Title.*)

I, , a clerk in the office of the Official Receiver, hereby certify:—

1. That I did on the day of , 189 , send to (*a*) , a notice of the time and the place of the first meeting, or (*b*) in the form hereunto annexed marked "A."

Paragraphs 2, 3, and 4 as in No. 27.

Signature

Dated

(*a*) Each creditor mentioned in the statement of affairs, *or* each contributory mentioned in the Register of Members of the Company [*or as the case may be*].

(*b*) "A general meeting," or "adjourned general meeting" [*or as the case may be*].

Form 29.

No. 29.

MEMORANDUM OF ADJOURNMENT OF FIRST OR OTHER MEETING.

(*Title.*)

Before at on the day of , 189 , at o'clock.

Memorandum.—The (*a*) meeting of (*b*) in the above matter was held at the time and place above mentioned; but it appearing that (*c*) the meeting was adjourned until the day of , 189 , at o'clock in the noon, then to be held at the same place.

Chairman.

(*a*) "First" or as the case may be.

(*b*) Insert "creditors" or "contributories" as the case may be.

(*c*) Here state reason for adjournment.

No. 30.

MEMORANDUM OF PROCEEDINGS AT ADJOURNED FIRST MEETING.

(No quorum.)

(*Title.*)

Before at on the day of , 189 , at o'clock.

Memorandum.—The adjourned meeting of (*a*) in the above matter was held at the time and place above mentioned; but it appearing that there was not a quorum of (*a*) qualified to vote present or represented, no resolution was passed, and the meeting was not further adjourned.

Chairman.

(*a*) Insert "creditors" or "contributories" as the case may be.

No. 31.

LIST OF CREDITORS (*a*) ASSEMBLED TO BE USED AT EVERY MEETING.

(*Title.*)

Meeting held at this day of , 189

Number.	Names of creditors (*a*) present or represented.	Amount of (*b*) Proof.
1		
2		
3		
4		
5		
6		
7		
7	Total number of creditors (*a*) present or represented	

(*a*) Or "contributories."

(*b*) In case of contributories insert "number of shares."

No. 32.

REPORT OF RESULT OF MEETING OF CREDITORS OR CONTRIBUTORIES.

In the matter, &c.

I, *A. B.*, the Official Receiver of the Court [or as the case may be], chairman of a meeting of the creditors [*or* contributories] of the above-named company, summoned by advertisement [*or* notice] dated the day of , 189 , and held

ou the day of , 189 , at , in the county of , **Form 32.**
do hereby report to the Court the result of such meeting as follows:—

The said meeting was attended, either personally or by proxy, by creditors whose proofs of debt against the said company were admitted for voting purposes, amounting in the whole to the value of £ [*or* by contributories, holding in the whole shares in the said company, and entitled respectively by the regulations of the company to the number of votes hereinafter mentioned].

The question submitted to the said meeting was, whether the creditors [*or* contributories] of the said company wished that [*here state proposal submitted to the meeting*].

The said meeting was of opinion that the said proposal should [*or* should not] be adopted and carried into effect [*or* the result of the voting upon such question was as follows:—]

The undermentioned creditors [*or* contributories] voted in favour of the said proposal being adopted and carried into effect:—

Name of Creditor [*or* Contributory].	Address.	Value of Debt [*or* Number of Shares].	Number of Votes conferred on each Contributory by the Regulations of the Company.

The undermentioned creditors [*or* contributories] voted against the said proposal being adopted and carried into effect:—

Name of Creditor [*or* Contributory].	Address.	Value of Debt [*or* Number of Shares.	Number of Votes conferred on each Contributory by the Regulations of the Company.

Dated this day of , 189 .

(Signed) *H. T.*,
Chairman.

Form 33.

No. 33.

STATEMENT OF AFFAIRS.

(*Title.*)

STATEMENT OF AFFAIRS on the day of , 189 , the date of the Winding-up Order.

I.—*As regards Creditors.*

Gross Liabilities. £	s.	d.	Liabilities.	£	s.	d.	Expected to rank. £	s.	d.
			Debts and liabilities, viz.:—						
			(*a.*) Unsecured creditors, as per List "A"						
			(*b.*) Creditors fully secured [not including debenture holders] as per List "B"						
			Estimated value of securities						
			Estimated surplus £ Carried to List "C"						
			Balance to contra £						
			(*c.*) Creditors partly secured as per List "C" £						
			Less estimated value of securities						
			Estimated to rank for dividend						
			(*d.*) Liabilities on bills discounted other than the company's own acceptances for value, as per List "D"						
			Of which it is expected will rank for dividend						
			(*e.*) Other liabilities, as per List "E"						
			Of which it is expected will rank against the assets for dividend						
			(*f.*) Loans on debenture bonds, as per List "F" deducted contra £						
			(*g.*) Preferential creditors for rates, taxes, wages, &c., as per List "G" deducted contra £						
				£					
			Estimated surplus (if any) after meeting liabilities of company, subject to cost of liquidation						
				£					

II.—*As regards Contributories.*

Capital issued and allotted, viz.:—			
Founders Shares of £ per share			
Amount called up at £ per share, as per List "L"			
Ordinary Shares of £ per share			
Amount called up at £ per share, as per List "M"			
Preference Shares of £ per share			
Amount called up at £ per share, as per List "N"			
(Add particulars of any other capital)			
Add deficiency to meet liabilities as above			
	£		

No. 33.—*continued.* **Form 33.**

STATEMENT OF AFFAIRS—*continued.*

(Title.)

STATEMENT OF AFFAIRS on the day of , 189 , the date of the Winding-up Order.

I.—*As regards Creditors.*

Assets.				Estimated to produce.		
				£	s.	d.
(*a.*) Property as per List "H," viz.:—						
(*a.*) Cash at banker's						
(*b.*) Cash in hand						
(*c.*) Stock in Trade [estimated cost £]						
(*d.*) Machinery						
(*e.*) Trade fixtures, fittings, utensils, &c.						
(*f.*) Investments in shares, &c.						
(*g.*) Loans on mortgage						
(*h.*) Other property, viz.						
(*b.*) Book debts, as per List "I," viz.:—						
Good						
	£	*s*	*d.*			
Doubtful						
Bad						
	£					
Estimated to produce						
(*c.*) Bills of exchange, or other similar securities on hand, as per List "J"	£	*s.*	*d.*			
Estimated to produce						
(*d.*) Surplus from securities in the hands of creditors fully secured (per contra) (*b*)						
(*e.*) Unpaid calls, as per List "K":—						
Estimated to produce						
Estimated total assets						
Deduct loans on debenture bonds secured on the assets of the company as per contra (*f*)						
Estimated net assets						
Deduct preferential creditors as per contra (*g*)						
Estimated amount available to meet unsecured creditors, and subject to cost of liquidation						
Estimated deficiency of assets to meet liabilities of the Company, subject to cost of liquidation						
			£			

The nominal amount of unpaid capital liable to be called up to meet the above deficiency is £

II.—*As regards Contributories.*

Estimated surplus as above (if any) subject to costs of liquidation			
Total deficiency as explained in Statement "O"			
	£		

I, of , make oath and say that the above statement and the several lists hereunto annexed marked are, to the best of my knowledge and belief, a full, true, and complete statement of the affairs of the above-named company on the day of , 189 , the date of the winding-up order.

Sworn at this day of , 189 , before me } Signature

Form 33.

LIST "A."

UNSECURED CREDITORS.

The Names to be arranged in Alphabetical Order and numbered consecutively, Creditors for £10 and upwards being placed first.

NOTES.—1. When there is a contra account against the creditor, less than the amount of his claim against the company, the amount of the creditor's claim and the amount of the contra account should be shown in the third column, and the balance only be inserted under the heading "Amount of Debt," thus:—

	£	s.	d.
Total amount of claim -	:	:	
Less: Contra account	:	:	

No such set-off should be included in List "I."

2. The particulars of any bills of exchange and promissory notes held by a creditor should be inserted immediately below the name and address of such creditor.

3. The names of any creditors who are also contributories, or alleged to be contributories, of the company must be shewn separately and described as such at the end of the list.

No.	Name.	Address and Occupation.	Amount of Debt.	Date when contracted.		Consideration.
				Month.	Year.	

Signature

Dated , 189 .

LIST "B."

CREDITORS FULLY SECURED (NOT INCLUDING DEBENTURE HOLDERS).

No.	Name of Creditor.	Address and Occupation.	Amount of Debt.	Date when contracted.		Consideration.	Particulars of Security.	Date when given.	Estimated Value of Security.	Estimated Surplus from Security.
				Month.	Year.					

Signature .

Dated , 189 .

Form 33.

LIST "C."

CREDITORS PARTLY SECURED.

(State whether also Contributories of the Company.)

No.	Name of Creditor.	Address and Occupation.	Amount of Debt.	Date when contracted.		Consideration.	Particulars of Security.	Month and Year when given.	Estimated Value of Security.	Balance of Debt unsecured.
				Month.	Year.					

Signature .

Dated , 189 .

LIST "D."

LIABILITIES OF COMPANY ON BILLS DISCOUNTED OTHER THAN THEIR OWN ACCEPTANCES FOR VALUE.

No.	Acceptor's Name, Address, and Occupation.	Whether liable as Drawer or Indorser.	Date when due	Amount.	Holder's Name, Address, and Occupation (if known).	Amount expected to rank for Dividend.

Signature .

Dated , 189 .

LIST "E."

OTHER LIABILITIES.

Full Particulars of all Liabilities not otherwise Scheduled to be given here.

No.	Name of Creditor or Claimant.	Address and Occupation.	Amount of Liability or Claim.	Date when Liability incurred.		Nature of Liability.	Consideration.	Amount expected to rank against Assets for Dividend.
				Month.	Year.			

Signature .

Dated . 189

Form 33.

LIST "F."

List of Debenture Holders.

The Names to be arranged in Alphabetical Order and numbered consecutively. *Separate Lists* must be furnished of Holders of each Issue of Debentures should more than one Issue have been made.

No.	Name of Holder.	Address.	Amount.	Description of Assets over which Security extends.

Signature .
Dated , 189 .

LIST "G."

Preferential Creditors for Rates, Taxes, Salaries, and Wages.

No.	Name of Creditor.	Address and Occupation.	Nature of Claim.	Period during which Claim accrued due.	Date when due.	Amount of Claim.	Amount payable in full.	Difference ranking for Dividend.

Signature .
Dated , 189 .

LIST "H."

Property.

Full particulars of every description of property not included in any other list, are to be set forth in this list:—

Full Statement and Nature of Property.	Estimated Cost. £	s.	d.	Estimated to produce. £	s.	d.
(*a.*) Cash at banker's – – – – –						
(*b.*) Cash in hand – – – – – –						
(*c.*) Stock in trade, at [estimated cost £]						
(*d.*) Machinery at – – –						
(*e.*) Trade fixtures, fittings, office furniture, utensils, &c. – – – – – – –						
[State particulars.] (*f.*) Investments in stocks or shares –						
[State particulars.] (*g.*) Loans for which mortgage or other security held						
(*h.*) Other property, viz.:—						

Signature .
Dated , 189 .

Form 33.

LIST "I."

DEBTS DUE TO THE COMPANY.

The Names to be arranged in Alphabetical Order and numbered consecutively.

NOTE.—If any debtor to the Company is also a creditor, but for a less amount than his indebtedness, the gross amount due to the Company and the amount of the Contra account should be shown on the third column, and the balance only be inserted under the heading "Amount of Debt," thus:—

	£	s.	d.
Due to Company -	:	:	
Less: Contra account	:	:	

No such claim should be included in sheet "A."

No.	Name of Debtor.	Residence and Occupation.	Amount of Debt.			Folio of Ledger or other Book where Particulars to be found.	When contracted.		Estimated to produce.	Particulars of any Securities held for Debt.
			Good.	Doubtful.	Bad.		Month.	Year.		

Signature .

Dated , 189 .

LIST "J."

BILLS OF EXCHANGE, PROMISSORY NOTES, &C., ON HAND AVAILABLE AS ASSETS.

No.	Name of Acceptor of Bill or Note.	Address, &c.	Amount of Bill or Note.	Date when due.	Estimated to produce.	Particulars of any Property held as Security for Payment of Bill or Note.

Signature .

Dated , 189 .

Form 33.

LIST "K."

UNPAID CALLS.

No. in Share Register.	Name of Shareholder.	Address and Occupation.	No. of Shares held.	Amount of Call per Share unpaid.	Total Amount due.	Estimated to realise.

Signature .
Dated , 189 .

"L."

LIST OF FOUNDERS' SHARES.

Register No.	Name and Address of Shareholder.	Nominal Amount of Share.	No. of Shares held.	Amount per Share called up.	Total Amount called up.

Signature .
Dated , 189

"M."

LIST OF ORDINARY SHARES.

Register No.	Name and Address of Shareholder.	Nominal Amount of Share.	No. of Shares held.	Amount per Share called up.	Total Amount called up.

Signature .
Dated , 189 .

"N."

LIST OF PREFERENCE SHARES.

Register No.	Name and Address of Shareholder.	Nominal Amount of Shares.	No. of Shares held.	Amount per Share called up.	Total Amount called up.

Signature .
Dated , 189 .

O. *Deficiency Account.* **Form 33.**

(1) DEFICIENCY ACCOUNT WHERE WINDING-UP ORDER MADE WITHIN THREE YEARS OF FORMATION OF COMPANY.

	£	s.	d.	£	s.	d.		£	s.	d.	£	s.	d.
I. Gross profit (if any) arising from carrying on business from date of formation of Company, to date of Winding-up Order..							I. Expenses of carrying on business from date of formation of Company to date of Winding-up Order, viz. :—						
							Salaries and Wages						
							Rent, Rates, and Taxes ..						
							Miscellaneous trade Expenses						
							Depreciations written off in Company's Books						
							Interest on Loans						
II. Deficiency as per Statement of Affairs ..							II. Bad Debts (if any) as per Schedule I." (1)						
							III. Directors' Fees from date of formation of Company to date of Winding-up Order						
							IV. Dividends paid (if any) from date of formation of Company to date of Winding-up Order ..						
							V. Losses on Investments realised, from date of formation of Company to date of Winding-up Order, exclusive of depreciation written off as above, viz. :— (4)						
							VI. Depreciation on property not written off in Company's Books, viz. :— (4)						
							VII. Other Losses and Expenses (if any) (2) from date of formation of Company, to date of Winding-up Order, viz. :— (4)						
							VIII. Unpaid Calls as per List "K"						
							Less Amount taken credit for in front sheet as estimated to be realised therefrom .. Do.						
							Balance estimated as irrecoverable						
Total amount to be accounted for .. .. .. (3)£							Total amount accounted for .. (3)£						

NOTES.—(1) This List must shew when debts were contracted.
(2) Here add particulars of other losses or expenses (if any) and liabilities (if any) for which [no consideration received.
(3) These figures should agree.
(4) Where particulars are numerous they should be inserted in a separate schedule.

(2) DEFICIENCY ACCOUNT WHERE WINDING-UP ORDER MADE MORE THAN THREE YEARS AFTER FORMATION OF COMPANY.

	£	s.	d.	£	s.	d.		£	s.	d.	£	s.	d.
I. Excess of Assets over Capital and Liabilities on the (1) day of 18 (if any), as per Company's Balance Sheet							I. Excess of Capital and Liabilities over assets on the (1) day of 18 , (if any) as per Company's Balance Sheet						
II. Gross profit (if any) arising from carrying on business from the (1) day of 18							II. Expenses of carrying on business from the (1) day of 18 , viz. :—						
							Salaries and Wages						
							Rent, Rates, and Taxes ..						
							Miscellaneous trade Expenses						
							Depreciations written off in Company's Books						
							Interest on Loans						
III. Deficiency as per Statement of Affairs ..							III. Bad Debts (if any) as per List "1" (2)						
							IV. Directors' Fees from the (1) day of 18						
							V. Dividends paid (if any) since the (1) day of 18						
							VI. Losses on Investments realised since the (1) day of 18 , viz. :— (4)						
							VII. Depreciation on property not written off in Company's Books, viz. :— (4)						
							VIII. Other Losses and Expenses (if any) (3) since the (1) day of 18 , viz. :—						
							IX. Unpaid Calls, as per List "K"..						
							Less Amount taken credit for in front sheet as estimated to be realised therefrom ..						
							Balance estimated as irrecoverable						
Total amount to be accounted for .. .. .. (5)£							Total amount accounted for .. (5)£						

NOTES.—(1) Three years before date of Winding-up Order.
(2) This List must shew when debts were contracted. [no consideration received.
(3) Here add particulars of other losses or expenses (if any) and liabilities (if any) for which
(4) Where particulars are numerous they should be inserted in a separate schedule.
(5) These figures should agree.

Signature . Dated , 189 .

Form 34.

No. 34.

ORDER APPOINTING LIQUIDATOR.

(*Title.*)

Upon the application of , the Official Receiver of the Court, and upon reading the report of the result of the meeting of creditors and contributories held respectively on the day of , 189 , and on the day of , 189 , and upon hearing, &c., it is hereby ordered that of be appointed liquidator of the above-named Company.

[*If a committee of inspection is also appointed, add*

And it is further ordered that the following persons be appointed a committee of inspection to act with the liquidator.]

Dated the day of , 189 .

And it is ordered that the said liquidator do within days from the date of this Order give security to the satisfaction of the Board of Trade in the manner provided by the Companies (Winding-up) Rules, 1890.

Dated the day of , 189 .

No. 35.

CERTIFICATE THAT LIQUIDATOR OR SPECIAL MANAGER HAS GIVEN SECURITY.

(*Title.*)

This is to certify that *A. B.*, of , who was on the day of , 189 , appointed liquidator [*or* special manager] of the above-named Company, has duly given security to the satisfaction of the Board of Trade.

Dated this day of , 189 .

By the Board of Trade,
(Signed) *J. S.*

No. 36.

ADVERTISEMENT OF APPOINTMENT OF LIQUIDATOR.

In the matter, &c.

By order of the , dated the day of , 189 , Mr. of has been appointed liquidator of the above-named Company with [*or* without] a committee of inspection.

Dated this day of , 189.

No. 37.

ORDER DIRECTING A PUBLIC EXAMINATION.

(*Title.*)

Upon the application of the Official Receiver in the above matter, and upon reading the report of the Official Receiver made to the Court on the day of , 189 , and [*as the case may be*] and it appearing , it is ordered that [*state name of person*] attend before the (*a*) on a day to be named for the purpose and be publicly examined as to the promotion or formation of the Company and as to the conduct of the business of the Company, and as to his conduct and dealings as director [*or* officer] of the Company [*or as the case may be*].

(*a*) State the judge or officer before whom the examination is to be held.

Dated the day of , 189 .

No. 38.

ORDER APPOINTING A TIME FOR PUBLIC EXAMINATION.

(*Title.*)

Upon the application of the Official Receiver in the above matter, it is ordered that the public examination of , who by the order of was directed to attend before to be publicly examined , be held at (*a*) on the day of , 189 , at o'clock in the

(*a*) Insert the place for the examination.

And it is ordered that the above-named do attend at the place and time above mentioned.

Dated this day of , 189 .

NOTE.—Notice is hereby given that if you, the above-named fail, without reasonable excuse, to attend at the time and place aforesaid, you will be liable to be committed to prison without further notice.

No. 39. **Form 39.**

REPORT TO THE COURT WHERE PERSON EXAMINED REFUSES TO ANSWER TO SATISFACTION OF REGISTRAR OR OFFICER.

(*Title.*)

At the [public] examination of (*a*) held before me this day of , 189 , the following question was allowed by me to be put to the said [ ].

Q. (*b*)

The (*c*) refused to answer the said question.

(*or*) The (*c*) answered the said question as follows:—

A. (*d*)

I thereupon named the day of , 189 , at as the time and place for such [refusal to] answer to be reported to the Hon. Mr. Justice [*or* His Honour Judge].

Dated this day of , 189 .

Registrar.
[*or as the case may be*].

(*a*) *e.g.*, *A.B.*, a person ordered to attend for examination.

(*b*) Here state question.

(*c*) Witness.

(*d*) Here insert answers (if any).

No. 40.

ORDER OF COURT THAT EXAMINATION IS CONCLUDED.

(*Title.*)

Whereas the above-named *A. B.* has duly attended before the court, and has been publicly examined as to the promotion and formation of the company [*or as the case may be*].

And whereas is of opinion that the said *A. B.* has sufficiently answered the questions put to him, it is hereby ordered that the examination of the said *A. B.* is concluded.

Dated this day of , 189 .

No. 41.

WARRANT AGAINST PERSON WHO FAILS TO ATTEND EXAMINATION.

(*Title.*)

To *X. Y.*, the officer of this court [*or where warrant issues from a county court*, to the high bailiff and others the bailiffs of the said court] and all peace officers within the jurisdiction of the said court, and to the governor or keeper of the [*here insert the prison*].

Whereas by evidence taken upon oath, it hath been made to appear to the satisfaction of the court that by order of the court, dated the day of , 189 , and directed to (*a*) , he was directed to attend personally at the (*b*) , and be examined before (*c*) , which order was afterwards, as hath been duly proved on oath, duly served upon the said (*a*) [*or*, that there is probable reason to suspect and believe that the said (*a*) has absconded and gone abroad [*or* quitted his place of residence, *or*] is about to go abroad [*or* quit his place of residence] with a view of avoiding examination under the Companies (Winding-up) Act, 1890].

And whereas the said (*a*) did without good cause fail to attend on the said day of , 189 , for the purpose of being examined, according to the requirements of the said order of this court made on the day of , 189 , directing him so to attend.

These are therefore to require you the said [*or* high bailiff, bailiffs, and others], to take the said (*a*) and to deliver him to the governor or keeper of the above-named prison, and you the said governor or keeper to receive the said (*a*) , and him safely to keep in the said prison until such time as this court may order.

Dated this day of , 189 .

(*a*) Name of person required to attend.

(*b*) Place of examination.

(*c*) Name or title of officer before whom examination is directed to be held.

Form 42.

No. 42.

SUMMONS FOR PERSONS TO ATTEND AT CHAMBERS TO BE EXAMINED.

(*Title.*)

(*a*) State place of examination.

A. B. of &c., and *E. F.* of &c., are hereby severally summoned to attend at (*a*), in the county of , on the day of , 18 , at of the clock in the noon, to be examined on the part of the Official Receiver [*or* the liquidator] for the purpose of proceedings directed by the court to be taken in the above matter. [And the said *A. B.* is hereby required to bring with him and produce, at the time and place aforesaid, a certain indenture [*describe documents*], and all other books, papers, deeds, writings, and other documents in his custody or power in anywise relating to the above-named company].

Dated this day of , 189 .

This summons was taken out by *Messrs. C.* and *D.*, of , in the county of , solicitors for

---

No. 43.

APPLICATION TO BOARD OF TRADE TO AUTHORISE A SPECIAL BANK ACCOUNT.

(*Title.*)

(*a*) Here insert grounds of application.

We, the committee of inspection, being of opinion that Mr. , of , the liquidator in the above matter, should have a special bank account for the purpose of (*a*) , hereby apply to the Board of Trade to authorise him to make his payments into and out of the bank.

All cheques to be countersigned by , a member of the committee of inspection, and by for .

Dated this day of , 189 .

_____
_____
_____
} Committee of Inspection.

No. 44.

ORDER OF BOARD OF TRADE FOR SPECIAL BANK ACCOUNT.

(*Title.*)

You are hereby authorised to make your payments in the above matter into, and out of, the bank.

[*Here insert any special terms.*]

All cheques to be countersigned by , a member of the committee of inspection, and by .

Dated this day of , 189 .

By order of the Board of Trade.

To

Liquidator.

No. 45.

LIST OF CONTRIBUTORIES TO BE MADE OUT BY LIQUIDATOR.

(*Title.*)

The following is a list of the contributories of the said company, made out by me from the books and papers of the said company, together with their respective addresses and the number of shares [*or* extent of interest] to be attributed to each, so far as I have been able to make out or ascertain the same.

In the first part of the list, the persons who are contributories in their own right are distinguished.

In the second part of the said list, the persons who are contributories as being representatives of, or being liable to the debts of others, are distinguished.

FIRST PART.—CONTRIBUTORIES IN THEIR OWN RIGHT. **Form 46.**

Serial No.	Name.	Address.	Description.	In what Character included.	Number of Shares [*or* extent of Interest].

SECOND PART.—CONTRIBUTORIES AS BEING REPRESENTATIVES OF, OR LIABLE TO THE DEBTS OF OTHERS.

Serial No.	Name.	Address.	Description.	In what Character included.	Number of Shares [*or* extent of Interest].

No. 46.

NOTICE TO CONTRIBUTORIES OF APPOINTMENT TO SETTLE LIST OF CONTRIBUTORIES.

(*Title.*)

Take notice that I, , the liquidator of the above-named company, have appointed the day of , 189 , at of the clock in the noon, at (*a*) , in the county of , to settle the list of the contributories of the above-named company, made out by me, pursuant to the Companies Acts, 1862 to 1890, and the rules thereunder, and that you are included in such list in the character and for the number of shares [*or* extent of interest] stated below; and if no sufficient cause is shewn by you to the contrary at the time and place aforesaid, the list will be settled, including you therein.

(*a*) Insert place of appointment.

Dated this day of , 189 .

Liquidator.

To Mr. *A. B.* [and to Mr. *C. D.*, his solicitor.]

No. on List.	Name.	Address.	Description.	In what Character included.	Number of Shares [*or* extent of Interest].

Form 47.

No. 47.

CERTIFICATE OF LIQUIDATOR OF FINAL SETTLEMENT OF THE LIST OF CONTRIBUTORIES.

(*Title.*)

Pursuant to the Companies Acts, 1862 to 1890, and to the rules made thereunder, I, the undersigned, being the liquidator of the above-named company, hereby certify that the result of the settlement of the list of contributories of the above-named company, so far as the said list has been settled, up to the date of this certificate, is as follows:—

1. The several persons whose names are set forth in the second column of the First Schedule hereto have been included in the said list of contributories as contributories of the said company in respect of the number of shares [*or* extent of interest] set opposite the names of such contributories respectively in the said schedule.

I have, in the first part of the said schedule, distinguished such of the said several persons included in the said lists as are contributories in their own right.

I have, in the second part of the said schedule, distinguished such of the said several persons included in the said list as are contributories as being representatives of or being liable to the debts of others.

2. The several persons whose names are set forth in the second column of the Second Schedule hereto have been excluded from the said list of contributories.

3. I have, in the seventh column of the said First and Second Schedules, set forth opposite the name of each of the several persons respectively the date when such person was included in or excluded from the said list of contributories.

4. Before settling the said list, I was satisfied by the affidavit of W. S. , clerk to , duly filed with the proceedings herein, that notice was duly sent by post to each of the persons mentioned in the said list informing him that he was included in each list in the character and for the number of shares [*or* extent of interest] stated therein, and of the day appointed for finally settling the said list.

The FIRST SCHEDULE above referred to.

FIRST PART.—CONTRIBUTORIES IN THEIR OWN RIGHT.

Serial No. in List.	Name.	Address.	Description	In what Character included.	Number of Shares [*or* extent of Interest].	Date when included in the List.

SECOND PART.—CONTRIBUTORIES AS BEING REPRESENTATIVES OF OR LIABLE TO THE DEBTS OF OTHERS.

Serial No. in List.	Name.	Address.	Description.	In what Character included.	Number of Shares [*or* extent of Interest].	Date when included in the List.

The SECOND SCHEDULE above referred to. **Form 48.**

Serial No. in List.	Name.	Address.	Description.	In what Character proposed to be included.	Number of Shares [*or* extent of Interest].	Date when excluded from the List.

Dated this day of , 189 .

(Signed)

Liquidator.

No. 48.

NOTICE TO CONTRIBUTORY OF FINAL SETTLEMENT OF LIST OF CONTRIBUTORIES, AND THAT HIS NAME IS INCLUDED.

(*Title.*)

Take notice that I, , the liquidator of the above-named company, have, by certificate, dated the day of , 189 , under my hand, finally settled the list of contributories of the said company, and that you are included in such list in the character and for the number of shares [*or* extent of interest] stated below.

Any application by you to vary the said list of contributories, or that your name may be excluded therefrom, must be made by you to the court within 21 days from the service on you of this notice, or the same will not be entertained.

The said list may be expected by you at my office at (*a*) on any day between the hours of and .

(*a*) State address.

Dated this day of , 189 .

(Signed)

Liquidator.

To Mr.
[*or* to Mr. his solicitor].

No. in List.	Name.	Address.	Description.	In what Character included.	Number of Shares [*or* extent of Interest].

No. 49.

SUPPLEMENTAL LIST OF CONTRIBUTORIES.

(*Title.*)

1. The following is a list of persons who, since making out the list of contributories herein, dated the day of , 189 , I have ascertained are, or have been, holders of shares in [*or* members of] the above-named company, and to the best of my judgment are contributories of the said company.

2. The said supplemental list contains the names of such persons, together with

Form 50.

their respective addresses and the number of shares [*or* extent of interest] to be attributed to each.

3. In the first part of the said list such of the said persons as are contributories in their own right are distinguished.

4. In the second part of the said list such of the said persons as are contributories as being representatives of, or being liable to the debts of others, are distinguished.

[*The supplemental list is to be made out in the same form as the original list.*]

No. 50.

AFFIDAVIT OF SERVICE OF NOTICE TO CONTRIBUTORY.

(*Title.*)

I, *W. S.*, of &c., clerk to , make oath and say as follows :—

1. The first six columns of the schedule now produced and shewn to me, and marked with the letter A., contain a true copy of the list of contributories of the said company, made out by the liquidator of the company on the day of , 189 , and now on the file of proceedings of the said company, as I know from having on the day of , 189 , examined and compared the said schedule with the said list.

2. I did on the day of , 189 , in the manner hereinafter mentioned, serve a true copy of the notice now produced and shewn to me and marked B., upon each of the respective persons whose names, addresses, and descriptions appear in the second, third, and fourth columns of the said schedule marked A., except that in the tabular form at the foot of such copies respectively I inserted the number on list, name, address, description, in what character included, and number of shares [*or* extent of interest] of the person on whom such copy of the said notice was served, in the same words and figures as the same particulars are set forth in the said schedule marked A.

3. I served the said respective copies of the said notice, by putting such copies respectively, duly addressed to such persons respectively, according to their respective names and addresses appearing in the said schedule marked A., and with the proper postage stamps affixed thereto, as prepaid letters into the Post Office Receiving House, No. , in street, in the county of , between the hours of and of the clock, in the noon of the said day of , 189 .

Sworn, &c.

No. 51.

THE SCHEDULE REFERRED TO IN FORM NO. 50.

A.

This schedule marked A., was produced and shewn to *W. S.*, and is the same schedule as is referred to in his affidavit sworn before me this day of , 189 .

W. B., &c.

1. Number on List.	2. Name.	3. Address.	4. Description.	5. In what Character included.	6. Number of Shares [*or* extent of Interest].

No. 52. **Form 52.**

ORDER ON APPLICATION TO VARY LIST OF CONTRIBUTORIES.

(*Title.*)

Upon the application of *W. N.* to review or vary the list of contributories of the said company in respect of the inclusion of the said *W. N.* therein, and that his name may be excluded therefrom, [*or, as the case may be*], and upon hearing, &c., and upon reading, &c., It is Ordered, That the name of the said *W. N.* be excluded from the said list of contributories, *or* may be included in the said list of contributories for shares, [*or, as the case may be*] [*or* the court doth not think fit to make any order on the said application, except that the said *W. N.* do pay to the liquidator of the said company his costs of this application, to be taxed by in case the parties differ].

No. 53.

NOTICE BY LIQUIDATOR REQUIRING PAYMENT OF MONEY OR DELIVERY OF BOOKS, &C., TO LIQUIDATOR.

(*Title.*)

Take notice that I, the undersigned (*a*) , have been appointed liquidator of the above-named company, and that you, the undermentioned (*b*) , are required, within days after service hereof, to pay to me [*or* deliver, convey, surrender, or transfer to or into my hands] as liquidator of the said company at my office, situate at (*c*) , &c., the sum of £ , being the amount of debt appearing to be due from you on your account with the said company [*or* any sum or balance, books, papers, estate, or effects], [*or specifically describe the property*] now being in your hands, and to which the said company is entitled [*or otherwise as the case may be*].

Dated this day of , 189 .

(Signed)

Liquidator.

To (*b*)
(*Address*)

(*a*) Name of liquidator.

(*b*) Name of person to whom notice is addressed.

(*c*) Address of liquidator's office.

No. 54.

NOTICE TO EACH MEMBER OF COMMITTEE OF INSPECTION OF MEETING FOR SANCTION TO PROPOSED CALL.

(*Title.*)

Take notice that a meeting of the committee of inspection of the above company will be held at on the (*a*) day of , 189 , at o'clock in the noon, for the purpose of considering and obtaining the sanction of the committee to a call of £ per share proposed to be made by the liquidator on the contributories.

Annexed hereto is a statement shewing the necessity for the proposed call and the amount required.

Dated this day of , 189 .

(Signed)

Liquidator.

(*a*) To be a date not less than seven days from the date when the notice will in course of post reach the person to whom it is addressed.

STATEMENT.

1. The amount due in respect of proofs admitted against the company, and the estimated amount of the costs, charges, and expenses of the winding-up, form in the aggregate the sum of £ or thereabouts.

2. The assets of the company amount in value to the sum of £ . There are no other assets, except the amounts due from certain of the contributories to the company, and in my opinion it will not be possible to realise in respect of the said amounts more than £ .

3. The list of contributories has been duly settled, and persons have been settled on the list in respect of the total number of shares.

4. For the purpose of satisfying the several debts and liabilities of the company, and of paying the costs, charges, and expenses of the winding-up, I estimate that a sum of £ will be required in addition to the amount of the company's assets hereinbefore mentioned.

5. In order to provide the said sum of £ it is necessary to make a call on the contributories, and having regard to the probability that some of them will partly or wholly fail to pay the amount of the call, I estimate that for the purpose of realising the amount required it is necessary that a call of £ per share should be made.

(*Annex tabular statement shewing amounts of debts, costs, &c., and of assets.*)

Form 55.

No. 55.

ADVERTISEMENT OF MEETING OF COMMITTEE OF INSPECTION.

In the matter of, &c.

Notice is hereby given that the undersigned liquidator of the above-named company proposes that a call should be made on all the contributories of the said company [*or as the case may be*] of £ per share, and that he has summoned a meeting of the committee of inspection of the company to be held at , on the day of , 189 , at o'clock in the noon, to obtain their sanction to the proposed call.

Each contributory may attend the meeting and be heard, or make any communication to the liquidator or the members of the committee of inspection in reference to the intended call.

A statement shewing the necessity of the proposed call and the purpose for which it is intended may be obtained on application to the liquidator at his office at (*a*) .

(*a*) Insert address.

(Signed)

Liquidator.

Dated this day of , 189 .

No. 56.

RESOLUTION OF COMMITTEE OF INSPECTION SANCTIONING CALL.

Resolved, that a call of £ per share be made by the liquidator on all the contributories of the company [*or as the case may be*].

(Signed)

Members of the Committee of Inspection.

Dated this day of , 189 .

No. 57.

NOTICE OF CALL SANCTIONED BY COMMITTEE OF INSPECTION TO BE SENT TO CONTRIBUTORY.

In the matter, &c.

Take notice that the Committee of Inspection in the winding up of this company have sanctioned a call of £ per share on all the contributories of the company.

The amount due from you in respect of the call is the sum of £ . This sum should be paid by you direct to me at my office (*a*) on or before the day of , 189 .

Dated this day of , 189 .

Liquidator.

To Mr. .

(*a*) State address.

NOTE.—Should any provision be made for payment of calls direct to the company's liquidation account when a private liquidator is appointed.

No. 58.

SUMMONS FOR INTENDED CALL.

(*Title.*)

Let all parties concerned attend at my chambers in the on day, the day of , 189 , at of the clock in the noon on the hearing of an application on the part of the liquidator of the above-named company, that a call to the amount of £ per share on all the contributories [*or, if upon any particular class, specify the same*] of the said company may be sanctioned.

This summons was taken out by *A.* and *B.*, of , in the county of , solicitors for the liquidator.

To Mr. *A. B.*, of &c., a contributory of the said company proposed to be included in the said call.

Form 59.

No. 59.

AFFIDAVIT OF LIQUIDATOR IN SUPPORT OF PROPOSAL FOR CALL.

(*Title.*)

I, , of &c., the liquidator of the above-named company, make oath and say as follows:—

1. I have in the schedule now produced and shewn to me, and marked with the letter A., set forth a statement shewing the amount due in respect of the debts proved and admitted against the said company, and the estimated amount of the costs, charges, and expenses of and incidental to the winding up the affairs thereof, and which several amounts form in the aggregate the sum of £ or thereabouts.

2. I have also in the said schedule set forth a statement of the assets in hand belonging to the said company, amounting to the sum of £ and no more. There are no other assets belonging to the said company, except the amounts due from certain of the contributories of the said company, and, to the best of my information and belief, it will be impossible to realise in respect of the said amounts more than the sum of £ or thereabouts.

3. persons have been settled by me on the list of contributories of the said company in respect of the total number of shares.

4. For the purpose of satisfying the several debts and liabilities of the said company, and of paying the costs, charges, and expenses of and incidental to the winding up the affairs thereof, I believe the sum of £ will be required in addition to the amount of the assets of the said company mentioned in the said Schedule A. and the said sum of £ .

5. In order to provide the said sum of £ , it is necessary to make a call upon the several persons who have been settled on the list of contributories as before mentioned, and, having regard to the probability that some of such contributories will partly or wholly fail to pay the amount of such call, I believe that for the purpose of realising the amount required as before-mentioned, it is necessary that a call of £ per share should be made.

Sworn, &c.

No. 60.

ADVERTISEMENT OF INTENDED CALL.

In the matter of .

Notice is hereby given that the (*a*) Court has appointed the day of , 189 , at o'clock in the noon, at (*b*) , to sanction a call on all the contributories of the said company [*or as the case may be*] and that the liquidator of the said company proposes that such call shall be for £ per share. All persons interested are entitled to attend at such day, hour, and place, to offer objections to such call.

(*a*) Name of court.

(*b*) State place of appointment.

Dated this day of 189 .

G. H.,
Liquidator.

No. 61.

ORDER FOR A CALL.

The day of , 189 .

(*Title.*)

Upon the application of the liquidator of the above-named company, and upon reading the affidavit of the said liquidator, filed , 189 , and the exhibit marked A. therein referred to, and an affidavit of , filed , 189 , it is ordered that leave be given to the liquidator to make a call of £ per share on all the contributories of the said company [*or as the case may be*]. And it is ordered that each such contributory do, on or before the day of , 189 , pay to the liquidator of the company the amount which will be due from him or her in respect of such call.

Form 62.

No. 62.

NOTICE TO BE SERVED WITH THE ORDER FOR A CALL.

In the Matter, &c.

The amount due from you, *A. B.*, in respect of the call made pursuant to leave given by the above [*or* within] order is the sum of £ , which sum is to be paid by you to me as the liquidator of the said company at my office, No. Street, in the county of .

Dated this day of 189 .

To Mr. *A. B.*

G. H.,
Liquidator.

No. 63.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR ORDER FOR PAYMENT OF CALL DUE FROM CONTRIBUTORIES.

(*Title.*)

I, , of &c., the liquidator of the above-named company, make oath and say as follows:—

1. None of the contributories of the said company, whose names are set forth in the schedule hereunto annexed, marked A., have paid or caused to be paid the respective sums set opposite their respective names in the said schedule, which sums are the respective amounts now due from them respectively in respect of the call of £ per share, duly made under the Companies Acts, 1862 to 1890, dated the day of , 189 .

2. The amounts or sums set opposite the names of such contributories respectively in such schedule are the true amounts due and owing by such contributories respectively under the said call.

Sworn, &c.

A.

THE SCHEDULE ABOVE REFERRED TO.

No. on List.	Name.	Address.	Description.	In what Character included.	Amount due.
					£ *s.* *d.*

NOTE.—*In addition to the above affidavit, an affidavit of the service of the application for the call will be required.*

No. 64.

ORDER FOR PAYMENT OF CALL DUE FROM A CONTRIBUTORY.

The day of , 18 .

(*Title.*)

Upon the application of the liquidator of the above-named company, and upon reading an affidavit of , filed the day of , 189 , and an affidavit of the liquidator, filed the day of , 189 , it is ordered, that *C. D.*, of &c. [*or E. F.*, of &c., the legal personal representative of *L. M.*, late of &c., deceased], one of the contributories of the said company [*or, if against several contributories*, the several persons named in the second column of the schedule to this order, being respectively contributories of the said company], do, on or before the day , 189 , or within four days after service of this order, pay to the liquidator of the said company at his office, No. Street, in the county of , the sum of £ , [*if against a legal personal representative add,*

Form 65.

out of the assets of the said *L. M.*, deceased, in his hands as such legal personal representative as aforesaid, to be administered in a due course of administration, if the said *E. F.* has in his hands so much to be administered, or, *if against several contributories*, the several sums of money set opposite to the respective names in the sixth column of the said schedule hereto], such sum [*or* sums] being the amount [*or* amounts] due from the said *C. D.* [*or L. M.*], or the said several persons respectively], in respect of the call of £ per share duly made, dated the day of , 18 .

THE SCHEDULE REFERRED TO IN THE FOREGOING ORDER.

No. on List.	Name.	Address.	Description.	In what Character included.	Amount due.
					£ s. d.

NOTE.—The copy for service of the above order must be indorsed as follows:—
"If you, the undermentioned *A. B.*, neglect to obey this order by the time mentioned therein you will be liable to process of execution."

No. 65.

AFFIDAVIT OF SERVICE OF ORDER FOR PAYMENT OF CALL.

(*Title.*)

I, *J. B.*, of &c., make oath and say as follows:—

1. I did on the day of , 189 , personally serve *G. F.*, of , in the county of , &c., with an order made in this matter by this court, dated the day of , 189 , whereby it was ordered [*set out the order*] by delivering to and leaving with, the said *G. F.*, at , in the county of , a true copy of the said order, and at the same time producing and shewing unto him, the said *G. F.*, the said original order.

2. There was indorsed on the said copy when so served the following words, that is to say, "If you, the undermentioned *G. F.*, neglect to obey this order by the time mentioned therein, you will be liable to process of execution."

Sworn, &c.

No. 66.

PROOF OF DEBT. GENERAL FORM.

(*Title.*)

I, (*a*) of in the county of , make oath and say:

(*b*) That I am in the employ of the undermentioned creditor; and that I am duly authorised by to make this affidavit, and that it is within my own knowledge that the debt hereinafter deposed to was incurred and for the consideration stated, and that such debt, to the best of my knowledge and belief, still remains unpaid and unsatisfied.

(*c*) That I am duly authorised, under the seal of the company hereinafter named, to make the proof of debt on its behalf.

1. That the above-named company was, at the date of the commencement of the winding up of the affairs of the company, viz., the day of , 189 , and still is justly and truly indebted to (*d*) in the sum of pounds shillings and pence for (*e*) as shewn by the account indorsed hereon, or by the following account, viz.:—

You should attend carefully to these directions.

(*a*) Fill in full name, address, and occupation of deponent.

If proof made by creditor strike out clauses (*b*) and (*c*).

If made by clerk strike out (*c*).

If by agent of company strike out (*b*).

(*d*) Insert *me* and to C.D. and E.F., my copartners in trade, if any, or, if by clerk, insert name, address, and description of principal.

: :

Form 67.

for which sum or any part thereof I say that I have not nor hath (*f*) or any person by (*g*) order to my knowledge or belief for (*g*) use had or received any manner of satisfaction or security whatsoever, save and except the following (*h*)

Date.	Drawer.	Acceptor.	Amount.	Due date.

Admitted to vote for £ : : the day of 189 .
Official Receiver or Liquidator.

Admitted to rank for dividend for £ : .
this day of 189 .
Official Receiver or Liquidator.

Sworn at
in the county of
this day of , 189 .
Before me

(*f*) Depouent's signature.
(*f*)

The proof cannot he admitted for voting at the first meeting unless it is properly completed and lodged with the Official Receiver before the time named in the notice convening such meetiog.

NOTE THIA.

(*e*) *State consideration* [*as*—Goods sold and delivered by me [and my said partner] to the company between the dates of [*or*, moneya advanced by me in respect of the under-mentioned bill of exchange,] *or as the case may be*].

(*f*) My asid partnera or any of them or the above-named creditor (*as the case may be*).

(*g*) My or our or their or his (*as the case may be*).

(*h*) [Here state the particulara of all securities held, and where the securities are on the property of the company, assess the value of the same, and if any bills or other negotisble securities ba held specify them in the schedule.]

No. 67.

PROOF OF DEBT OF WORKMEN.

(*Title.*)

I, (*a*) of (*b*) make oath and say:

1. That the above-named company was on the day of , 189 , and still is justly and truly indebted to the several persons whose names, addresses, and descriptions appear in the schedule endorsed hereon in sums severally set against their names in the sixth column of such schedule for wages due to them respectively as workmen or others in the employ of the company in respect of services rendered by them respectively to the company during such periods as are set out against their respective names in the fifth column of such schedule, for which said sums, or any part thereof, I say that they have not, nor hath any of them had or received any manner of satisfaction or security whatsoever.

Sworn at , in the county of ,
this day of , one thousand eight hundred and .
Before me

Deponent's signature

(*a*) Fill in full name, address, and occupation of deponent.

(*b*) On behalf of the workmen and others employed by the above-named company.

SCHEDULE referred to on the other side.

1. No.	2. Full Name of Workman.	3. Address.	4. Description.	5. Period over which Wages due.	6. Amount due. £	s.	d.

Signature of Deponent.

Form 68.

No. 68.

NOTICE OF REJECTION OF PROOF OF DEBT.

(*Title.*)

Take notice that, as Official Receiver of the above-named company, I have this day rejected your claim against the company (*a*) [to the extent of £] on the following grounds:—

(*a*) If proof wholly rejected strike out words underlined.

And further take notice that subject to the power of the court to extend the time, no application to reverse or vary my decision in rejecting your proof will be entertained after the expiration of (*b*) days from this date.

(*b*) 21 days or 7 days as the case may be. See Rules 111 and 112.

Dated this day of 189 .

Signature
Address

To Official Receiver.

No. 69.

NOTICE TO CREDITORS OF INTENTION TO DECLARE DIVIDEND.

(*Title.*)

A (*a*) dividend is intended to be declared in the above matter. You are mentioned in the statement of affairs, but you have not yet proved your debt.

If you do not prove your debt by the day of , 189 , you will be excluded from this dividend.

(*a*) Insert here "first" *or* "second" *or* "final," *or as the case may be.*

Dated this day of , 189 .

G. H., Liquidator,
[Address.]

To *X. Y.*

No. 70.

NOTICE TO PERSONS CLAIMING TO BE CREDITORS OF INTENTION TO DECLARE FINAL DIVIDEND.

(*Title.*)

Take notice that a final dividend is intended to be declared in the above matter, and that if you do not establish your claim to the satisfaction of the court on or before the day of , 189 , or such later day as the court may fix, your claim will be expunged, and I shall proceed to make a final dividend without regard to such claim.

Dated this day of , 189 .

G. H., Liquidator,
[Address.]

To *X. Y.*

Form 71.

No. 71.

STATEMENT TO ACCOMPANY NOTICE OF APPLICATION FOR RELEASE.

(*Title.*)

Statement shewing position of company at date of application for release.

Dr. Cr.

	Estimated to produce per company's statement.	Receipts.				Payments.		
	£ s. d.	£	s.	d.		£	s.	d.
To total receipts from date of winding-up order, viz.:— (*State particulars under the several headings specified in the Statement of Affairs.*)					By Board of Trade and Court fees ..			
Receipts per trading account					Law costs of petition ..			
Other receipts					Other law costs			
Total					Liquidator's remuneration, viz.:—			
					per cent. on £ assets realised			
					per cent. on £ assets distributed in dividend			
Less:	£ s. d.				Special managers' charges			
Payments to redeem securities					Person appointed to assist in preparation of Statement of Affairs ..			
Costs of execution					Auctioneer's charges as taxed ..			
Payments per trading account					Other taxed costs			
	£				Costs of possession			
					Costs of notices in Gazette and local papers			
					Incidental outlay			
					Total cost of realisation ..	£		
Net realisations	£							
Amounts received from calls on contributories					*Creditors, viz.:*—			
					(*a*) Preferential			
					(*a*) Unsecured; dividend of s. d. in the £ on £ .			
					The estimate of amount expected to rank for dividend was £ .			
					Amount returned to contributories.			
					Balance			
	£					£		

(*a*) State number of creditors.

Assets not yet realised including calls estimated to produce £

(*Add here any special remarks the liquidator thinks desirable.*)

Creditors can obtain any further information by inquiry at the office of the liquidator.

Dated this day of , 189 .

(*Signature of Liquidator*)

(*Address*)

No. 72.

NOTICE OF DIVIDEND.

(*Title.*)

[Please bring this Dividend Notice with you.]

Dividend of in the £.

[Address.]

Date 189 .

Notice is hereby given that a dividend of in the pound has been declared in this matter, and that the same may be received at office, as

Form 73.

above on the of , 189 , or on any subsequent between the hours of .

Upon applying for payment this notice must be produced entire, together with any bills of exchange or other securities held by you; and if you do not attend personally you must fill up and sign the subjoined Forms of *Receipt and Authority*, when a cheque payable to your order will be delivered to the bearer.

To

(Signed) *G. H.* [Liquidator.]

RECEIPT.

189 .

Received of the sum of pounds shillings and pence, being the amount payable to in respect of the dividend of in the £ on claim against this estate.

Signature.

£ : :

AUTHORITY.

SIR,

PLEASE deliver to the

(Insert the name of the person who is to receive the cheque, or the words "me by post," if you wish the cheque sent to you in that way.)

cheque for the dividend payable to in this matter.

Creditor's signature.

To .

No. 73.

GENERAL PROXY.

(*Title.*)

I, (*a*) of , a creditor [*or* contributory] hereby appoint (*b*) to be (*c*) general proxy in the above matter [excepting as to the receipt of dividend (*d*)]

Dated this day of , 189 .

[Signed (*e*)]

Signature of Witness.
Address.

NOTES.

1. When the person desires that his general proxy should receive dividends he should strike out the words, "excepting as to the receipt of dividend," putting his initials thereto (*f*).

2. The authorised agent of a corporation may fill up blanks, and sign for the corporation, thus:—

"For the Company.
J. S. [duly authorised under the seal of the Company]."

3. A proxy may be filled up and signed by any person having a general authority in writing to sign. Such person shall sign,

J. S. [duly authorised by a general authority in writing to sign on behalf of (*name of creditor*)] (*g*).

Certificate to be signed by person other than Creditor or Contributory filling up the above Proxy.

I, of , being a (*here state whether clerk or manager in the regular employment of the creditor or contributory or a commissioner to administer oaths in the Supreme Court*), hereby certify that all insertions in the above proxy are in my own handwriting, and have been made by me at the request of the above-named and in his presence, before he attached his signature (*or* mark) thereto.

Dated this day of , 189 .

(Signature)

The proxy must be lodged with the Official Receiver or Liquidator not later than the day before the meeting at which it is to be used.

(*a*) If a firm write "we" instead of "I," and set out the full name of the firm.

(*b*) Here insert *either* "Mr. of , a clerk, manager, &c., in my regular employ," *or* "the Official Receiver in the above matter." The standing of the person appointed must be clearly set out.

(*c*) "My" or "our."

(*d*) *See* footnote 1.

(*e*) If a firm sign the firm's trading title, and add "by *A. B.*, a partner in the said firm."

As to signature by agent, *see* footnotes 2 and 3.

(*f*) It is not intended that the Official Receiver shall in any case receive dividends on behalf of a creditor.

(*g*) The Official Receiver or Liquidator may require the authority to sign to be produced for his inspection.

Form 74.

No. 74.

SPECIAL PROXY.

(*Title.*)

I, (*a*) of , a creditor [*or* contributory], hereby appoint (*b*) as (*c*) proxy at the meeting of creditors [*or* contributories] to be held on the day of , 189 , or at any adjournment thereof, to vote (*d*) .

Dated this day of , 189 .

[Signed] (*e*) .

Signature of Witness.

Address.

(*a*) If a firm, write "we" instead of "I," and set out the full name of the firm.

(*b*) Here insert *either* Mr. of , *or* "the Official Receiver in the above matter."

(*c*) "My" *or* "our."

(*d*) Here insert the word "for" or the word "against" as the case may require, and specify the particular resolution.

(*e*) If a firm, sign the firm's trading title, and add "by *A. B.*, partner in the said firm."

As to signature by agent, *see* footnotes 1 and 2.

(*f*) The Official Receiver or Liquidator may require the authority to sign to be produced for his inspection.

NOTES.

1. A creditor or contributory may give a special proxy to any person to vote at any specified meeting or adjournment thereof on all or any of the following matters:—

(*a.*) For or against the appointment or continuance in office of any specified person as liquidator or as member of the committee of inspection:

(*b.*) On all questions relating to any matter, other than those above referred to, arising at any specified meeting or adjournment thereof.

2. The authorised agent of a corporation may fill up blanks and sign for the corporation, thus:—

"For the Company.
J. S. [duly authorised under the seal of the Company]."

3. A proxy given by a creditor or contributory may be filled up and signed by any person having a general authority in writing to sign for such creditor or contributory. Such person shall sign,

J. S. [duly authorised by a general authority in writing to sign on behalf of (*name*)] (*f*).

Certificate to be signed by person other than Creditor or Contributory filling up the above Proxy.

I, , of , being a (*here state whether clerk or manager in the regular employment of the creditor or contributory or a commissioner to administer oaths in the Supreme Court*), hereby certify that all insertions in the above proxy are in my own handwriting, and have been made by me at the request of the above-named and in his presence, before he attached his signature (*or* mark) thereto.

Dated this day of , 189 .

(Signature) .

The proxy must be lodged with the Official Receiver or Liquidator not later than the day before the meeting at which it is to be used.

No. 75.

LIQUIDATOR'S STATEMENT OF ACCOUNT.

(*Title.*)

Nature of proceedings (whether wound up by the Court or under the supervision of the Court, or voluntarily) -

Date of commencement of winding-up

ACCOUNT of RECEIPTS and PAYMENTS pursuant to Section 15 of the Companies (Winding-up) Act, 1890.

Receipts.				Payments.			
Date.	Of whom received.	Nature of Receipt.	Amount.	Date.	To whom paid.	Nature of Payment.	Amount.

NOTE.—At the foot of the account the liquidator should state the general description and estimated value of outstanding assets (if any), the causes which delay the termination of the winding-up and the period within which it may probably be completed. He should also state the balance of assets as follows:—

		£	s.	d.
Balance	Invested -			
	In bank -			
	In hand			
	Total - -	£		

Form 76.

No. 76.

CERTIFICATE BY COMMITTEE OF INSPECTION AS TO AUDIT OF LIQUIDATOR'S ACCOUNTS.

(*Title.*)

We, the undersigned, members of the committee of inspection in the winding up of the above-named company, hereby certify that we have examined the foregoing account with the vouchers, and that to the best of our knowledge and belief the said account contains a full, true, and complete account of the liquidator's receipts and payments.

Dated this day of , 189 .

A. B.
C. D. } Committee of Inspection.
E. F.

No. 77.

AFFIDAVIT VERIFYING LIQUIDATOR'S ACCOUNT.

(*Title.*)

I, *G. H.*, of , the liquidator of the above-named company, make oath and say:

That **the account hereunto annexed marked B. contains a full and true account of my receipts and payments in the winding up of the above-named company* from the day of , 189 , to the day of , 189 , inclusive, **and that* I have not, nor has any other person by my order or for my use during such period, received any moneys on account of the said company * *other than and except the items mentioned and specified in the said account.*

Sworn at, &c.

* NOTE.—If no receipts or payments, strike out the words in italics.

No. 78.

NOTICE TO CREDITORS AND CONTRIBUTORIES OF INTENTION TO APPLY FOR RELEASE.

(*Title.*)

Take notice that I, the undersigned liquidator of the above-named company, intend to apply to the Board of Trade for my release, and further take notice that any objection you may have to the granting of my release must be notified to the Board of Trade within twenty-one days of the date hereof.

A summary of my receipts and payments as liquidator is hereto annexed.

Dated this day of , 189 .

G. H., Liquidator.

To *K. L.*

NOTE.—Section 22 (3) of the Companies (Winding-up) Act, 1890, enacts that "An order of the Board releasing the liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact."

No. 79.

APPLICATION BY LIQUIDATOR TO BOARD OF TRADE FOR RELEASE.

(*Title.*)

I, *G. H.*, the liquidator of the above-named company, do hereby report to the Board of Trade as follows:—

1. That the whole of the property of the company has been realised for the benefit of the creditors and contributories [and a dividend to the amount of shillings in the pound has been paid as shewn by the statement hereunto annexed, and a return of in the pound has been made to the contributories of the company];

[*or*, That so much of the property of the company as can, according to the joint opinion of myself and the committee of inspection, hereunto annexed in writing

Form 80.

(*a*) Add if necessary, "That the rights of the contributories between themselves have been adjusted."

under our hands, be realised without needlessly protracting the liquidation, has been realised, as shewn by the statement hereunto annexed, and a dividend to the amount of shillings has been paid]; (*a*)

2. I therefore request the Board of Trade to cause a report on my accounts to be prepared, and to grant me a certificate of release.

Dated this day of , 189 .

G. H., Liquidator.

No. 80.

LIQUIDATOR'S TRADING ACCOUNT.

(*Title.*)

G. H., the liquidator of the above-named company, in account with the estate.

Dr. RECEIPTS.					PAYMENTS. *Cr.*				
Date.					*Date.*				

Liquidator.

(Date)

We have examined this account with the vouchers and find the same correct, and we are of opinion the expenditure has been proper.

Dated this day of , 189 .

Committee of Inspection
[*or* member of the Committee of Inspection].

No. 81.

AFFIDAVIT VERIFYING LIQUIDATOR'S TRADING ACCOUNT.

(*Title.*)

I, , the liquidator of the above-named company, make oath and say that the account hereto annexed is a full, true, and complete account of all money received and paid by me or by any person on my behalf in respect of the carrying on of the trade or business of the company, and that the sums paid by me as set out in such account have, as I believe, been necessarily expended in carrying on such trade or business.

Sworn, &c.

Liquidator.

No. 82.

AFFIDAVIT VERIFYING ACCOUNT OF UNCLAIMED AND UNDISTRIBUTED FUNDS.

(*Title.*)

I, , of , make oath and say that the particulars entered in the statement hereunto annexed, marked A, are correct, and truly set forth all money in my hands or under my control, representing unclaimed or undistributed assets of the above company, and that the amount due by me to the Companies Liquidation Account in respect of unclaimed dividends and undistributed funds is £ .

Signature.

Sworn, &c.

Form 83.

No. 83.

REQUEST BY COMMITTEE OF INSPECTION TO BOARD OF TRADE TO SELL SECURITIES.

(*Title.*)

We, the Committee of Inspection in the above matter, hereby certify that a sum of £ , forming part of the assets of the above-named company, has been invested in Government Securities, and that the sum of £ is now required to answer demands in respect of the estate of the said company. And we request that so much of the said securities as may be necessary for the purpose of answering such demands may be realised by the Board of Trade, and that the amount realised may be placed to the credit of the said company.

Dated this day of , 189

_____
_____ } Committee of Inspection.
_____

No. 84.

CERTIFICATE AND REQUEST BY COMMITTEE OF INSPECTION AS TO INVESTMENT OF FUNDS.

(*Title.*)

We, the Committee of Inspection in the above matter, hereby certify that in our opinion the cash balance standing to the credit of the above-named company is in excess of the amount which is required for the time being to answer demands in respect of such company's estate, and request that the Board of Trade will invest the sum of £ in Government Securities, to be placed to the credit of the said account for the benefit of the said company.

Dated this day of , 189 .

_____
_____ } Committee of Inspection.
_____

No. 85.

AFFIDAVIT BY SPECIAL MANAGER VERIFYING ACCOUNT.

(*Title.*)

I, , of , make oath and say as follows:—

1. The account hereunto annexed marked with the letter A, produced and shewn to me at the time of swearing this my affidavit, and purporting to be my account as special manager of the estate or business of the above-named company, contains a true account of all and every sums and sum of money received by me or by any other person or persons by my order or to my knowledge or belief for my use on account or in respect of the said estate or business.

2. The several sums of money mentioned in the said account hereby verified to have been paid or allowed have been actually and truly so paid and allowed for the several purposes in the said account mentioned.

3. The said account is just and true in all and every the items and particulars therein contained, according to the best of my knowledge and belief.

Sworn, &c.

Form 86.

No. 86.

NOTICES FOR "LONDON GAZETTE."

(1.) *Winding-up Orders.*

Name of Company.	Address of Registered Office.	Description.	Court.	Number of Matter.	Date of Order.	Date of Petition.

(2.) *First Meetings.*

Name of Company.	Address of Registered Office.	Description.	Court.	Number.	Date of first Meeting.	Hour.	Place.

(3.) *Notice of Day appointed for proceeding with Public Examinations.*

Name of Company.	Address of Registered Office.	Description.	Court.	Number of Matter.	Date fixed for proceeding with Examination.	Hour.	Place.

Form 86.

(4.) *Notice of Intended Dividend.*

Name of Company.	Address of Registered Office.	Description.	Court.	Number.	Last Day for receiving Proofs.	Name of Liquidator.	Address.

(5.) *Notice of Dividend.*

Name of Company.	Address of Registered Office.	Description.	Court.	Number.	Amount per £	First or final or otherwise.	When payable.	Where payable.

(6.) *Appointments of Liquidators.*

Name of Company.	Court.	Number.	Liquidator's Name.	Address.	Date of Appointment.

Form 87.

(7.) *Notice of Releases of Trustees.*

Name of Company.	Court.	No. of Matter.	Liquidator's Name.	Liquidator's Address.	Date of Release.

No. 87.

MEMORANDUM OF ADVERTISEMENT OR GAZETTING.

(*Title.*)

Name of Paper.	Date of Issue.	Date of Filing.	Nature of Order, &c.

(Signed) *A. B.*

No. 88.

REGISTER OF WINDING-UP ORDERS TO BE KEPT IN THE COURTS.

Number of Winding-up Order.	Number of Petition.	Date of Petition.	Date of Winding-up Order.	Dates of Public Examinations (if any).	Liquidator.

No. 89.

REGISTER OF PETITIONS TO BE KEPT IN THE COURTS.

No. of Petition.	Name of Company.	Address of Registered Office.	Description of Company.	Date of Petitioner.	Petitioner.	Date of Winding-up Order.

THE following are Conventions relating to Joint Stock Companies which have been made between the Government of this country and the Governments of France, Belgium, Italy, and Germany respectively :—

CONVENTION BETWEEN HER MAJESTY AND THE EMPEROR OF THE FRENCH RELATIVE TO JOINT STOCK COMPANIES (*f*).

Signed at Paris, April 30, 1862.
Ratifications exchanged at Paris, May 15, 1862.

HER MAJESTY the Queen of the United Kingdom of Great Britain and Ireland and His Majesty the Emperor of the French having judged it expedient to come to an understanding in order to define, within their respective dominions and possessions, the position of commercial, industrial, and financial companies and associations constituted and authorized in conformity with the laws in force in either of the two countries, have resolved to conclude a Convention for that purpose, and have named as their plenipotentiaries, &c.

Who, after having communicated to each other their respective full powers found in good and due form, have agreed upon and concluded the following articles :—

Art. 1. The High Contracting Parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorized in conformity with the laws in force in either of the two countries, the power of exercising all their rights and of appearing before the tribunals, whether for the purpose of bringing an action or for defending the same throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions.

Art. 2. It is agreed that the stipulations of the preceding article shall apply as well to companies and associations constituted and authorized previously to the signature of the present Convention as to those which may subsequently be so constituted and authorized.

Art. 3. The present Convention is concluded without limit as to duration. Either of the High Powers shall, however, be at liberty to terminate it by giving to the other a year's previous notice. The two High Powers moreover, reserve to themselves the power to introduce into the Convention, by common consent, any modifications which experience may shew to be desirable.

Art. 4. The present Convocation shall be ratified, and the ratifications shall be exchanged at Paris in fifteen days or sooner if possible.

(*f*) Parl. Papers, 1862, vol. 63, p. 325.

CONVENTION BETWEEN HER MAJESTY AND THE KING OF THE BELGIANS RELATIVE TO JOINT STOCK COMPANIES (*g*).

Signed at London, November 13, 1862.
Ratifications exchanged at London, December 8, 1862.

[This convention is in precisely the same terms as the French Convention above set forth, *mutatis mutandis* in the preamble and in Art. 4.]

DECLARATION EXCHANGED BETWEEN THE BRITISH AND ITALIAN GOVERNMENTS RELATIVE TO JOINT STOCK COMPANIES (*h*).

Signed at Florence, November 26, 1867.

THE Government of Her Majesty the Queen of Great Britain and Ireland and the Government of His Majesty the King of Italy, with a view to the reciprocal regulation in the two countries of the position of joint stock companies and other commercial, industrial, and financial associations, have respectively authorized, &c. [certain persons] to agree:—

That joint stock companies and other associations, commercial, industrial, and financial, constituted and authorized in conformity with the laws in force in either of the two countries, may freely exercise in the dominions of the other all their rights, including that of appearing before tribunals, whether for the purpose of bringing an action or for defending the same, in conformity, however, with the laws and customs in force in the said countries.

That these dispositions shall be applicable as well to companies and associations constituted and authorized previously to the signature of this present declaration as to those which may subsequently be so constituted and authorized.

That the present declaration, made without limit as to duration, may be revoked by either party giving a year's previous notice, and that such modifications may, by common consent, be introduced into it which experience may shew to be desirable.

DECLARATION EXCHANGED BETWEEN THE BRITISH AND GERMAN GOVERNMENTS RELATIVE TO JOINT STOCK COMPANIES (*i*).

Signed at London, March 27, 1874.

THE Government of Her Majesty the Queen of Great Britain and Ireland and the Government of His Majesty the Emperor of Germany, King of Prussia, with a view to the reciprocal regulation in the two countries of the position of joint stock companies and other commercial, industrial, and financial associations, have respectively authorized, &c. [certain persons] to agree:—

That joint stock companies and other associations, commercial, industrial, and financial, constituted and authorized in conformity with the laws in force in either of the two countries, may freely exercise in the dominions of the other all their rights, including that of appearing before tribunals, whether for the purpose of bringing an action or for defending themselves, in conformity, however, with the laws and customs in force in the said countries.

That these dispositions shall be applicable as well to companies and

(*g*) Parl. Papers, 1863, vol. 73, p. 21. (*h*) Parl. Papers, 1867–8, vol. 73, p. 553.
(*i*) Parl. Papers, 1874.

associations constituted and authorized previously to the signature of this Convention, as to those which may subsequently be so constituted and authorized.

It is agreed that such companies or associations authorized in either of the two countries, shall only be admitted to the exercise of their business or trade in the dominions of the other country, if found to be in compliance with the conditions prescribed by the laws of that country.

That the said convention, made without limits as to duration, may be revoked by either party giving a year's previous notice, and that such modifications may, by common consent, be introduced into it which experience may shew to be desirable.

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